

1 PLACER COUNTY WATER AGENCY
Daniel Kelly (SBN 215051)
2 144 Ferguson Road
P.O. Box 6570
3 Auburn, CA 95604
Telephone: (530) 823-4850
4 dkelly@pcwa.net

5 SOMACH SIMMONS & DUNN
A Professional Corporation
6 Kelley M. Taber (SBN 184348)
500 Capitol Mall, Suite 1000
7 Sacramento, CA 95814
Telephone: (916) 446-7979
8 Facsimile: (916) 446-8199
ktaber@somachlaw.com

9 Attorneys for PLACER COUNTY WATER
10 AGENCY

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12
13 BEFORE THE
14 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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16 HEARING ON THE MATTER OF
17 CALIFORNIA DEPARTMENT OF WATER
RESOURCES AND UNITED STATES
18 BUREAU OF RECLAMATION REQUEST
FOR A CHANGE IN POINT OF DIVERSION
19 FOR CALIFORNIA WATER FIX.

PLACER COUNTY WATER AGENCY'S
RESPONSES TO THE DEPARTMENT
OF WATER RESOURCES' AND SAN
LUIS DELTA-MENDOTA WATER
AUTHORITY'S OBJECTIONS TO
PLACER COUNTY WATER AGENCY'S
PART 1B CASE IN CHIEF

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21 I. INTRODUCTION

22 Placer County Water Agency (PCWA) filed its case in chief on August 31, 2016.
23 It included the testimony of Einar Maisch, PCWA's General Manager. The Department
24 of Water Resources (DWR) objected to Mr. Maisch's testimony on the grounds that it
25 lacks foundation, constitutes surprise testimony, is not an expert opinion on which a
26 responsible person would rely, and materially misstates the Petitioners' testimony.
27 (Department of Water Resources' Objections to Testimony and Exhibits Submitted By
28 Placer County Water Authority and Motion to Strike (Sept. 21, 2016), p. 2 (DWR's

1 Objections).) DWR moves to strike Mr. Maisch’s entire testimony based on these
2 objections. (*Id.* at p. 3.)

3 San Luis Delta-Mendota Water Authority (SLDMWA) objected to Mr. Maisch’s
4 testimony “on the grounds that it lacks foundation, is inadmissible lay witness opinion, is
5 speculative, includes inadmissible legal conclusion, and incorporates hearsay.”
6 (San Luis & Delta-Mendota Water Authority’s Objections to Part 1B Parties’ Cases In
7 Chief (Sept. 21, 2016), p. 58 (SLDMWA’s Objections).) None of these objections have
8 merit because Mr. Maisch’s testimony is relevant and admissible under the
9 administrative rules for State Water Resources Control Board (State Water Board)
10 hearings.

11 II. LEGAL STANDARD

12 This hearing is governed by Chapter 4.5 of the Administrative Procedure Act,
13 (Gov. Code, § 11400 et seq.); regulations adopted by the State Water Board, (Cal. Code
14 of Regs., tit. 23, §§ 648-648.8); sections 801 to 805 of the Evidence Code; and
15 section 11513 of the Government Code. (Cal. Code of Regs., tit. 23, § 648(b).) The
16 State Water Board is not required to conduct adjudicative hearings according to the
17 technical rules of evidence applicable to a court. (Gov. Code, § 11513(c).) Instead,
18 “[a]ny relevant evidence shall be admitted if it is the sort of evidence on which
19 responsible persons are accustomed to rely in the conduct of serious affairs, regardless
20 of the existence of any common law or statutory rule which might make improper the
21 admission of evidence over objection in civil actions.” (*Ibid.*) The State Water Board
22 follows these relaxed standards because the Hearing Officers’ expertise in the subject
23 matter justifies the State Water Board’s ability to make both legal and factual
24 determinations.

25 The State Water Board’s Notice of Hearing includes further direction on the types
26 of evidence that must be included by protestants. Protests based on an injury to a legal
27 user of water “must describe specifically what injury would result if the proposed
28 changes requested in the Petition were approved.” (State Water Resources Control

1 Board's Notice of Petition and Notice of Public Hearing and Pre-Hearing Conference to
2 Consider the Above Petition (Oct. 30, 2015), p. 13 (Hearing Notice).) Additionally, "the
3 party claiming injury must provide specific information describing the basis of the claim of
4 right, the date the use began, the quantity of water used, the purpose of use and the
5 place of use." (*Ibid.*) PCWA is a legal user of water that claims potential injury due to
6 the California Water Fix (WaterFix) Project, and Mr. Maisch's testimony is relevant
7 foundational evidence for PCWA's protest in Part 1B of the hearing.

8 III. ARGUMENTS

9 A. Mr. Maisch Is Not Being Offered as an Expert; His Testimony Is Relevant 10 and Admissible Lay Witness Testimony

11 DWR objected to Mr. Maisch's testimony as inadmissible expert testimony that
12 lacks foundation. Mr. Maisch is not being offered as an expert, so DWR's objections are
13 irrelevant and should be overruled. (PCWA's Notice of Intent to Appear (Jan. 4, 2016),
14 p. 1.) SLDMWA objected on the grounds that Mr. Maisch's testimony lacks foundation
15 and that it is inadmissible lay witness opinion. This is also incorrect. A non-expert
16 witness may offer an opinion that is "[r]ationally based on the perception of the witness"
17 and "[h]elpful to a clear understanding of his testimony." (Evid. Code, § 800.)

18 Mr. Maisch's testimony is based on his years of experience managing PCWA, and his
19 knowledge of PCWA's water rights. Furthermore, Mr. Maisch reviewed the expert work
20 of and testimony by MBK Engineers submitted on behalf of the Sacramento Valley Water
21 Users, and developed the understanding that there would be injury to PCWA if the
22 WaterFix Project were constructed and operated as it is proposed. Therefore,
23 Mr. Maisch's opinion about the injury to PCWA is "[r]ationally based on [his] perception"
24 of the conditions that affect PCWA's operations, and "[h]elpful to a clear understanding
25 of [his] testimony" regarding the detrimental effects of the WaterFix Project on PCWA's
26 water supply. (*Ibid.*) Therefore, Mr. Maisch's testimony is relevant and admissible lay
27 witness testimony. DWR's and SLDMWA's objections that Mr. Maisch's testimony lacks
28 foundation, is inadmissible expert opinion, and inadmissible lay witness opinion should

1 be overruled.

2 **B. Mr. Maisch’s Testimony Is Not Surprise Testimony**

3 DWR also objected that Mr. Maisch's testimony constitutes surprise testimony.
4 (DWR’s Objections at p. 3.) This is incorrect. In order to prevent surprise testimony, the
5 State Water Board’s Hearing Notice required PCWA to provide Mr. Maisch’s written
6 testimony in compliance with California Code of Regulations, title 23, section 648.4. In
7 accordance with the Hearing Notice, Mr. Maisch’s testimony describes “specifically what
8 injury would result if the proposed changes requested in the Petition were approved.”
9 (Hearing Notice at p. 13.) Quoting portions of Mr. Maisch’s testimony that clearly identify
10 the evidence and analysis that form the basis for his opinion regarding WaterFix effects
11 on PCWA (DWR’s Objections at p. 2, lines 17-22), including the testimony of MBK
12 Engineers, testimony of the City of Roseville, and the American River Water Agencies
13 (ARWA), DWR argues that “it is impossible to determine exactly which parts of the
14 incorporated testimony the witness actually intends to use as direct testimony, and what
15 additional conclusions are made for purposes of this hearing.” (DWR’s Objections at
16 p. 3.)

17 First, Mr. Maisch’s written testimony speaks for itself and was submitted on
18 August 31, 2016, many weeks prior to the commencement of the Part 1B case in chief,
19 in compliance with California Code of Regulations, title 23, section 648.4 and the State
20 Water Board’s Hearing Notice, and his direct testimony will reflect the information and
21 opinions contained therein; thus by definition it is not surprise testimony. Second, the
22 objection as to whether the testimony contains unidentified additional conclusions is
23 speculative, irrelevant, and outside the scope of the surprise testimony objection. To the
24 extent DWR objects to Mr. Maisch’s reliance on testimony submitted by MBK Engineers,
25 the City of Roseville, and the ARWA on the grounds that DWR does not understand the
26 specific aspects of that evidence relied upon by Mr. Maisch in forming his understanding
27 as to WaterFix impacts on municipal intakes at Folsom Reservoir, DWR may seek to
28 obtain that information through cross-examination during Part 1B of the hearing.

1 Mr. Maisch's opinions and conclusions, and the evidence he relied on in forming those
2 opinions, have been sufficiently identified in his written testimony, and thus DWR's
3 objection regarding surprise testimony should be overruled.

4 **C. Mr. Maisch's Opinion Testimony Regarding the Ultimate Issues Are**
5 **Admissible**

6 DWR and SLDMWA object to Mr. Maisch's characterization of Petitioners'
7 testimony through his statement that "the overarching goal of the WaterFix Project to
8 attenuate the existing disparity between North of Delta and South of Delta [Central
9 Valley Project municipal and industrial] allocations, it is likely that a balancing of
10 allocations resulting from the WaterFix project would result in injury to the American
11 River Diversion [Central Valley Project municipal and industrial] contractors,
12 compounding the issues regarding low water levels at the municipal intakes of Folsom
13 Reservoir." (Testimony of Einar Maisch (Aug. 31, 2016), p. 23.) DWR objects to this
14 statement on the grounds that it misstates Petitioners' testimony, and SLDMWA objects
15 on the grounds that it is an inadmissible legal conclusion. Additionally, SLDMWA objects
16 to Mr. Maisch's statement that "[i]f current export restrictions due to potential
17 environmental impacts at the existing south Delta diversion site are eliminated by virtue
18 of adding a second point of diversion upstream as planned, Reclamation will no doubt
19 further increase water exports, at the further expense of upstream water supply reliability
20 in dry years" as speculative. (*Id.* at p. 22.)

21 In this proceeding, Mr. Maisch's opinion testimony may touch on the Petitioners'
22 obligation to show no injury to legal users of water. "Testimony in the form of an opinion
23 that is otherwise admissible is not objectionable because it embraces the ultimate issue
24 to be decided by the trier of fact." (Evid. Code, § 805.) In a recent proceeding, the State
25 Water Board explained that an opinion that embraces the ultimate issue "is not improper
26 if a foundation is laid by the witness as to the factors taken into account when forming
27 the opinion on the ultimate issue." (SWRCB Ruling on Motions Filed in the Matters of
28 Administrative Civil Liability Complaint Against Byron-Bethany Irrigation District and Draft

1 Cease and Desist Order Against the West Side Irrigation District (Mar. 18, 2016), p. 4
2 (Ruling on BBID Motions). First, Mr. Maisch’s testimony states his understanding of the
3 WaterFix Project, and it can hardly be said to misstate Petitioners’ Petition or testimony
4 by stating what DWR’s Petition and Part 1A confirm – that a project objective for both
5 DWR and Bureau of Reclamation (Reclamation) is to increase export capacity south of
6 the Delta. Second, his testimony clearly relies on the expert testimony of MBK
7 Engineers, which demonstrates that the WaterFix Project can, and most likely would, be
8 operated in a manner that would increase exports south of the Delta at the expense of
9 carryover storage in upstream reservoirs, including Folsom Reservoir. As evidenced by
10 his testimony, Mr. Maisch’s 30 years of experience with PCWA, his extensive knowledge
11 of PCWA’s water rights and operations, and his knowledge of the operation of Folsom
12 Dam, combined with his reliance on the expert testimony and reports specifically
13 identified in his testimony, provide a sufficient foundation for his opinions regarding the
14 ultimate issues of this proceeding. For these reasons, DWR’s and SLDMWA’s
15 Objections should be overruled.

16 **D. Mr. Maisch’s Testimony Does Not Include Inadmissible Hearsay**

17 SLDMWA objects to Mr. Maisch’s testimony that “[b]ased upon the work of and
18 testimony by MBK Engineers..., it is my understanding that, with the WaterFix project
19 constructed and operating, Reclamation will have more opportunities to divert water at
20 the new North Delta intakes, including natural flows and water that was previously stored
21 in Folsom Reservoir. It is also my understanding, based upon the testimony submitted
22 on behalf of the City of Roseville and the American River Water Agencies (ARWA), that
23 the capacity of the municipal intakes at Folsom Dam diminishes as water levels decline.”
24 (SLDMWA’s Objections at p. 59.) SLDMWA objects that this statement is “hearsay
25 because it relies on statements by someone other than the witness to establish the truth
26 regarding modeling runs analyzing impacts of the project and testimony regarding
27 municipal intakes at Folsom Dam.” (*Ibid.*)

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1 Mr. Maisch, however, is simply summarizing the relevant testimony of experts that
2 have submitted evidence on PCWA's behalf in this proceeding and that addresses
3 issues directly relevant to the injury PCWA will experience if the WaterFix Project were
4 approved as proposed. Relevant hearsay is admissible in adjudicative proceedings
5 before the State Water Board. The State Water Board has previously stated it will
6 "decline to exclude or strike any evidence on the grounds that it is hearsay, but will
7 consider relevant hearsay evidence subject to the limitations imposed by Government
8 Code section 11513, subdivision (d)." (Ruling on BBID Motions at p. 4.) MBK
9 Engineers' expert work is relevant because it concerns the potential impacts of WaterFix
10 Project operations on legal users of water. (See Exhs. SVWU-107, SVWU-109.)
11 Further, MBK Engineers' expert work and the expert reports submitted on behalf of the
12 ARWA are reliable because they were prepared by qualified experts with extensive
13 experience in the area of hydrologic modeling and knowledge of Central Valley Project
14 and Reclamation facility operations. Thus, this is relevant evidence upon which
15 Mr. Maisch can reasonably rely to form his opinion, and explain the potential impacts of
16 the WaterFix Project operations on PCWA's water rights and supplies. (See Gov. Code,
17 § 11513(d).)

18 **E. Conclusion**

19 For the reasons stated herein, PCWA respectfully requests that the State Water
20 Board overrule DWR's and SLDMWA's Objections to Mr. Maisch's testimony.

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24 Dated: October 21, 2016

SOMACH SIMMONS & DUNN
A Professional Corporation

By: 
Kelley M. Taber
Attorney for Placer County Water Agency

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STATEMENT OF SERVICE

**CALIFORNIA WATERFIX PETITION HEARING
Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)**

I hereby certify that I have this day submitted to the State Water Resources Control Board and caused a true and correct copy of the following document(s):

PLACER COUNTY WATER AGENCY'S RESPONSES TO THE DEPARTMENT OF WATER RESOURCES' AND SAN LUIS DELTA-MENDOTA WATER AUTHORITY'S OBJECTIONS TO PLACER COUNTY WATER AGENCY'S PART 1B CASE IN CHIEF

to be served by **Electronic Mail** (email) upon the parties listed in Table 1 of the Current Service List for the California WaterFix Petition hearing, dated October 6, 2016, posted by the State Water Resources Control Board at http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml:

I certify that the foregoing is true and correct and that this document was executed on October 21, 2016.

Signature: 
Name: Michelle Bracha
Title: Legal Secretary
Party/Affiliation: Placer County Water Agency
Address: 500 Capitol Mall, Suite 1000
Sacramento, CA 95814