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6 PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS
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9 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

10 HEARING REGARDING PETITION FILED BY) PACIFIC COAST FEDERATION OF
THE DEPARTMENT OF WATER) FISHERMEN'S ASSOCIATIONS' AND
11 RESOURCES AND U.S. BUREAU OF) INSTITUTE FOR FISHERIES
RECLAMATION REQUESTING CHANGES IN) RESOURCES' SECOND SUPPLEMENTAL
12 WATER RIGHTS FOR THE CALIFORNIA) RESPONSE TO OBJECTIONS
WATERFIX PROJECT)
13 _____)

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15 Protestants Pacific Coast Federation of Fishermen's Associations and Institute for Fisheries
16 Resources (collectively, "PCFFA") hereby respond to the California Department of Water Resources'
17 ("DWR's") Objections to Exhibits Submitted in Support of Protestants' Cases-in-Chief ("DWR
18 Objections"), and San Luis & Delta-Mendota Water Authority's ("SLDMWA's") Objections to Exhibits
19 Submitted for Admission by Groups 18, 19, 21, 24, 27, 31, 32, 37, 38, 39 into Evidence at the Close of
20 Part 1B Cases in Chief ("SLDMWA Objections").

21 **I. DWR'S OBJECTIONS TO EXHIBITS**

22 DWR raises four objections to certain exhibits submitted by PCFFA, all of which lack merit.
23 DWR Objections at 20-22. First, DWR argues that some exhibits should be excluded because they were
24 "never actually utilized" by either PCFFA or other parties. DWR Objections at 20:20-21:11. But other
25 parties used these exhibits and, moreover, PCFFA properly submitted these to preserve its ability to make
26 reference to these exhibits during its rebuttal testimony. Second, DWR states that PCFFA-83 should be
27 "excluded from the record" based its misinterpretation of a ruling by the Hearing Officers. DWR
28 Objections at 21:13-15. Third, DWR claims three exhibits are irrelevant, which is incorrect as explained

1 below. DWR Objections at 21:17-22:14. Finally, DWR improperly asks for the exclusion of the
2 testimony of Stephan C. Volker. DWR Objections at 22:16-22:23.

3 **A. PCFFA's Exhibits Are Proper**

4 DWR objects that several of PCFFA's exhibits should be excluded because neither PCFFA nor
5 any other party made use of them during its case-in-chief or cross-examination. This objection ignores
6 the facts. Further, there is no requirement that parties make an express reference to each and every one of
7 their exhibits – as DWR's failure to provide any support for its objection demonstrates. Additionally,
8 PCFFA may make use of these exhibits during its rebuttal presentation, so they should not be excluded
9 for that reason as well. DWR's objection must be overruled.

10 During her cross-examination on behalf of LAND on December 13, 2016, Ms. Osha Meserve
11 asked PCFFA witness Ms. Patricia Schifferle about many of these documents. Ms. Meserve first asked
12 Ms. Schifferle about exhibit PCFFA-57 and its relevance to these proceedings. Transcript Volume 34 at
13 100:6-102:17 ("Tr. 34:100:6-34:102:17). As Ms. Schifferle explained, this document is relevant because
14 it demonstrates that members of the California Legislature concluded that certain decisions made in the
15 course of planning for the Waterfix – acquiring particular parcels of land – was premature and constituted
16 an unlawful pre-approval of the project in violation of state and federal environmental laws. Tr.
17 34:101:23-34:102:17. Ms. Meserve further noted that exhibit PCFFA-57 references one of LAND's
18 exhibits, exhibit LAND-69, which is the acquisition plan that prompted the legislators' letter.

19 In response to further questioning from Ms. Meserve, Ms. Schifferle explained the relevance of
20 documents PCFFA-23 to PCFFA-61, noting that they raised objections from federal agencies about the
21 WaterFix that fall within four different areas: (1) whether inadequate modeling led to inadequate
22 consideration of environmental impacts; (2) whether impacts on upstream diversions and impacts on
23 upstream critical habitat were appropriately considered; (3) whether impacts to biological resources were
24 considered; and (4) whether adverse environmental impacts would result from construction of the
25 WaterFix, including from transportation, the placement of power lines, and the use of barges. Ms.
26 Schifferle further testified that revisions made to the definition of the WaterFix project would likely
27 exacerbate the concerns raised by these agencies by removing the few mitigation measures designed to
28 address them. Tr. 34:106:16-34:107:25.

1 Additionally, as DWR’s wholesale failure to provide any support for its objection demonstrates,
2 there is no requirement that parties expressly reference each and every one of their exhibits. PCFFA
3 demonstrated the general relevancy of its exhibits – which include background information about the
4 project prompting the change petition presented to this Board – and out of respect for the Board’s
5 schedule elected not to provide further detailed testimony about each particular document. PCFFA also
6 may make use of these exhibits during its rebuttal presentation. The Hearing Officers’ ruling dated
7 December 19, 2016, states on page 2 that rebuttal evidence includes “evidence that is responsive to
8 evidence presented in connection with another party’s case-in-chief,” and the background information
9 included in PCFFA’s exhibits may assist the Board in understanding the other parties’ testimony.
10 Accordingly, they should not be excluded.

11 **B. Document PCFFA-83 Is a Policy Statement, Not an Opening Statement**

12 DWR objects that document PCFFA-83 should be excluded because it is an opening statement
13 and “opening statements are not evidence and should not be marked as exhibits.” DWR Objections at
14 21:13-15. However, Hearing Officer Doduc ruled on December 13 that exhibit PCFFA-83 was a policy
15 statement, not an opening statement. Tr. 34:50:16-18 (Mr. Volker’s “statement was . . . not quite an
16 opening statement. I regard it as more of a policy statement.”). As PCFFA explained in its response to
17 DWR’s prior objections, Mr. Volker’s policy statement was properly submitted in compliance with the
18 Board’s ruling on October 20, 2016, that parties could submit policy statements either orally *or* in writing
19 prior to the beginning of their case-in-chief. Moreover, Title 23 of the California Code of Regulations,
20 section 648.1(d) provides that even *non*-parties may submit policy statements to the Board “either orally
21 or in writing.” Accordingly, DWR’s objection must be overruled.

22 **C. PCFFA’s Exhibits Are Relevant**

23 DWR objects that exhibits PCFFA-12, PCFFA-18, and PCFFA-21, which were used during
24 PCFFA’s cross-examination of DWR’s witnesses, were not demonstrated to be relevant. DWR
25 Objections at 21:17-22:14. But the bar for relevancy is extremely low; all that is required is that the
26 evidence has “any tendency in reason to prove or disprove any disputed fact that is of consequence.”
27 Evid. Code § 210. Mr. Eichenberg’s questions during cross-examination easily surmounted this low
28 hurdle. DWR’s objection must thus be overruled.

1 DWR first objects to exhibit PCFFA-12, a list of the Temporary Urgency Change Petitions
2 (“TUCPs”) submitted to the Board between the years of 2003 and 2016. DWR Objections at 21:17-28.
3 DWR argues that because the witnesses “could not answer” the cross-examination questions posed to
4 them “with any specificity,” the document is irrelevant. But a witnesses’ familiarity with a document has
5 nothing to do with whether the document itself is relevant. All that is required is that the document have
6 some “tendency in reason to prove or disprove” a “disputed fact . . . of consequence,” which PCFFA-12
7 plainly does. Evid. Code § 210.

8 Exhibit PCFFA-12 is relevant because it casts doubt on DWR’s main argument in support of its
9 change petition: that granting the change petition will not adversely affect any legal users of water
10 because petitioners will comply with the terms of their permits. During Mr. Eichenberg’s cross-
11 examination, DWR’s witnesses testified that even though a TUCP waives the requirements ordinarily
12 applicable to CVP/SWP operations, they consider the CVP/SWP to be operating according to permit
13 requirements when a TUCP is requested and granted. Tr. 12:63:12-12:64:8. In other words, DWR
14 considers itself to be complying with the terms of its permits even *when those permit terms are waived*.
15 Mr. Eichenberg’s questions, and his use of exhibit PCFFA-12, were designed to cast doubt on DWR’s
16 argument, since DWR is requesting waivers of those permit terms on *nearly an annual basis*. When Mr.
17 Eichenberg asked DWR’s witnesses about TUCPs, they admitted that TUCPs were submitted for the
18 CVP/SWP during 2014 and 2015. Tr. 12:64:22-12:65:12. Exhibit PCFFA-12 demonstrates that TUCPs
19 were requested by the Bureau and DWR in many other years as well. Such evidence has a “tendency in
20 reason to prove or disprove any disputed fact . . . of consequence” to the change petition and therefore
21 cannot be excluded. Evid. Code § 210. If DWR or the Bureau wished to try to show that TUCPs
22 requested in other years were for other purposes, they had ample opportunity to do so – but they did not.
23 That failure is the fault of DWR, not PCFFA.

24 Next, DWR objects to PCFFA-18, a copy of a decision from the Ninth Circuit Court of Appeals
25 holding that the Bureau violated federal law when it failed to consider the alternative of reducing contract
26 quantities when managing the CVP. DWR claims that in its cross-examination PCFFA “was unable to
27 demonstrate how the decision had any bearing on . . . the submitted testimony or the broader WaterFix
28 proceeding” (DWR Objections at 22:3-6), but that is plainly false. As Mr. Eichenberg explained, that

1 case is relevant because it demonstrates that the Bureau has the ability under federal law to reduce the
2 amount of water it delivers to its water contractors, but it not only chooses not to – the Bureau even
3 *illegally* refuses to *study* the consequences of making that choice. The main argument DWR and the
4 Bureau advance in support of the change petition is that they rigorously comply with the law and thus will
5 not injure anyone in their management of the CVP/SWP if the petition is granted. Exhibit PCFFA-18
6 makes plain that the Bureau has a myopic focus on maximizing water deliveries no matter the cost or
7 legality of doing so, and thus exhibit PCFFA-18 has a “tendency in reason to prove or disprove any
8 disputed fact . . . of consequence” to the change petition and cannot be excluded. Evid. Code § 210.

9 Finally, DWR objects to PCFFA-21, a spreadsheet found on DWR’s website. DWR Objections at
10 22:8-14. As PCFFA explained previously, Mr. Eichenberg stated during cross-examination that he
11 obtained this document from DWR’s website (Tr. 16:110:3-7), and DWR’s witness stated repeatedly that
12 he “recognize[d] this type of spreadsheet” and that “this . . . type of spreadsheet . . . has been used in the
13 past.” Tr. 16:110:8-16:112:1. Mr. Eichenberg’s purpose in introducing this straightforward document
14 was to discredit DWR’s untenable excuse for failing to provide the Board with modeling data: that
15 DWR’s underlying modeling evidence was so impenetrable as to be useless to the Board. There has been
16 ample testimony about the relevancy and authenticity of exhibit PCFFA-21 and it is therefore admissible.

17 **D. Exhibit PCFFA-84 Is Proper**

18 DWR objects to exhibit PCFFA-84, the authenticating declaration of Stephan C. Volker, on the
19 basis that Mr. Volker was not presented for cross-examination. Incorrect; Mr. Volker was present during
20 PCFFA’s presentation of its case-in-chief on December 13, 2016, and could have been cross-examined at
21 that time. DWR declined to do so and its objection must therefore be rejected.

22 **II. SLDMWA’S OBJECTIONS TO EXHIBITS**

23 SLDMWA objects on hearsay grounds to PCFFA’s exhibits. This objection lacks merit for two
24 reasons, as explained in PCFFA’s response to SLDMWA’s *identical* prior hearsay objection.

25 First, SLDMWA *admits* in its objection that hearsay is “technically . . . admissible in Water Board
26 proceedings.” SLDMWA Objections at 3:26-27. That is the end of the inquiry. SLDMWA makes this
27 concession because Government Code section 11513(d) allows the use of hearsay evidence in this
28 proceeding “for the purpose of supplementing or explaining other evidence.” Govt. Code § 11513(d); 23

1 C.C.R. § 648.5.1; Evid. Code § 801(b). Here, the exhibits PCFFA submitted with its case-in-chief
2 supplement and explain the testimony of its witnesses. Under Government Code section 11513(d), such
3 “quotes or descriptions of opinions of experts” are admissible. Govt. Code § 11513(d); Evid. Code §
4 801(b); Witkin, California Evidence, 4th ed., vol. 1, §§ 30, 35 pp. 560-561, 566-567. The “quotes or
5 descriptions of opinions of experts” contained in the testimony of Ms. Deirdre Des Jardins form the basis
6 for her opinion as an expert, and Ms. Des Jardins is permitted to explain to the fact-finder how she
7 reached the basis of her opinion. *Id.*; see also *People v. Sanchez* (2016) 63 Cal.4th 665, 685-686.
8 SLDMWA’s hearsay objection must be overruled.

9 SLDMWA’s objection must also be denied because SLDMWA’s boilerplate objection fails to
10 specifically identify the statements it finds objectionable. SLDMWA’s failure to provide specificity in, or
11 legal support for, its objections is itself sufficient grounds to overrule them. *Rodriguez v. McDonnell*
12 *Douglas Corp.* (1978) 87 Cal.App.3d 626, 659-660; *People v. Castaneda* (1975) 52 Cal.App.3d 334,
13 339.

14 **III. CONCLUSION**

15 For the foregoing reasons, the objections of DWR and SLDMWA are meritless and must be
16 rejected.

17 Dated: January 6, 2016

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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):

**PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS' AND
INSTITUTE FOR FISHERIES RESOURCES' SECOND SUPPLEMENTAL RESPONSE
TO OBJECTIONS**

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 November 15, 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 January 6, 2017.

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