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7 **BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

9 **IN RE CALIFORNIA WATERFIX**
10 **CALIFORNIA DEPARTMENT OF**
11 **WATER RESOURCES AND U.S.**
12 **BUREAU OF RECLAMATION**
13 **PETITION FOR CHANGES IN**
14 **WATER RIGHTS, POINTS OF**
15 **DIVERSION/RE-DIVERSION**

PROTESTANT SAVE THE CALIFORNIA
DELTA RESPONSE TO DWR'S DECEMBER
30, 2016, OBJECTIONS TO EXHIBITS
SUBMITTED IN SUPPORT OF
PROTESTANTS' CASES-IN-CHIEF.

16 **I. Overview.**

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18 On December 30, 2016, DWR submitted an additional seventy pages of objections to
19 Protestants' Part 1B Case-In-Chief exhibits. This is in addition to the hundreds of pages of
20 objections filed by DWR on September 21, 2016.

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22 For the most part, DWR's objections to Save the California Delta Alliance's ("SCDA")
23 exhibits are duplicative of objections already made in DWR's September 21 filing. (*Compare, e.g.,*
24 *Table: Objections to SCDA et al. Exhibits and Testimony, attached to DWR September 21, 2016*
25 *Objections with DWR's December 30, 2016, Objections at pp. 14–15 [duplicative objections to*
26 *SCDA-3, 5, 19, 20, 40, and 41].*)
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1 DWR also misstates the record when it classifies SCDA-63 and SCDA-64 as “Improper
2 Submission of Exhibits After Close of Case-in-Chief,” (DWR December 30 Objections, p. 12: 28),
3 and “Late-Filed Exhibit” (DWR December 30 Objections p.15.) DWR is aware that the Hearing
4 Officer’s December 19, 2016, Ruling states that “the deadline for all Part 1 parties who wish to
5 enter exhibits into the record that they used for cross-examination of other parties’ witnesses is
6 **Noon, December 21, 2016.**” SCDA-63 and SCDA-64 were submitted on December 7, 2016, and
7 clearly identified as being added pursuant to use on cross-examination. (*See* SCDA’s December 7,
8 2016, Submission of Evidence, p.2: 15–22 [exhibits 63 and 64 have “been added to the exhibit list”
9 because used on cross-examination].)

11 DWR also mischaracterizes SCDA’s submission of errata as “Failure to Revise Testimony
12 in Accordance with Rulings.” (DWR’s December 30 Objections, p. 13: 15.) In its November 16,
13 2016, emailed ruling on SCDA’s re-submitted revised testimony pursuant to previous Board
14 rulings, the Hearing Officers ruled that numerous footnotes added to the testimony of Michael
15 Brodsky during revision were untimely and “therefore the new footnotes are stricken.” The Board
16 *did not* direct SCDA to re-submit the testimony with the footnotes shown in *strikeout* type.
17 Moreover, when SCDA prepared to correct the mislabeling of Mr. Brodsky’s testimony, SCDA
18 sought guidance from Board staff and suggested that it could “re-submit 60, 61 and 62 without any
19 changes except correcting the bates stamp to accurately reflect the exhibit number” (e-mail
20 from Michael Brodsky to CWF Hearing Team, December 6, 2016 [Exhibit A to Brodsky
21 Declaration filed herewith].) SCDA does not object to re-submitting the exhibit with the footnotes
22 shown in *strikeout* type if the Board feels this would provide a clearer record and so directs.
23 However, SCDA does object to DWR’s characterization of SCDA as failing to follow Board
24 directives.
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1 Finally, DWR is acting within its prerogative to choose a shotgun approach to trial
2 objections. DWR has objected to virtually every witness and every exhibit of every party. Such an
3 approach is common among trial lawyers, even though “[t]he attorney who makes too many
4 objections may be seen as an obstructionist who is trying to conceal information.” (Robert C. Park,
5 Trial Objections Handbook 2d § 1:19 General Tactical Considerations (Thompson West 2015).)
6 DWR has a right to be, and is, a zealous advocate. However, it can hardly cloak itself in the role of
7 friend-of-the-court presenting only “non-duplicative, non-cumulative objections to assist the
8 hearing team with reviewing the testimony and exhibits in relation to the relevant issues before it.”
9 (DWR’s December 30 Objections, p.30: 19–20.)
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11 **II. Response to DWR’s Specific Objections.**

12 **SCDA-3 and SCDA-5.**

13 DWR objects to demonstrative exhibits SCDA-3 and SCDA-5, which are handmade graphs
14 used to illustrate questions posed on cross-examination of witness John Leahigh. SCDA-3
15 graphically depicts actual Sacramento River flows at Freeport on August 8, 2016, and depicts the
16 reduction in flow that would occur downstream of the proposed NDD if the proposed NDD were
17 operated to divert all but 10,747 cfs remaining in the river. SCDA-5 performs a similar function for
18 August 9, 2014.
19

20 SCDA-3 and SCDA-5 are “demonstrative aids.” “It is today increasingly common to
21 encounter the use of demonstrative aids throughout trial. These aids are offered to illustrate or
22 explain the testimony of witnesses including experts, or to present a summary or chronology of
23 complex or voluminous documents.” (2 McCormick On Evid. § 214 (7th ed.)) “Demonstrative aids
24 take many forms”, including “hand drawn maps, charts, drawings, and computer-generated
25 pedagogic aids.” (*Id.*) “Demonstrative evidence is physical evidence that is not itself at issue in the
26 case but which illustrates or demonstrates a party’s testimony or theory of the case.” (California
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1 Practice Guide Civil Trials and Evidence § 8:470 (Rutter 2016.) A court may “exclude such
2 evidence where its probative value is ‘substantially outweighed’ by risks of undue consumption of
3 time, undue prejudice or confusing the issues or misleading the jury.” (*Id.* at § 8:472.) Concerns
4 over confusing or misleading a jury are not present here and SCDA-3 and SCDA-5 serve to focus
5 and clarify issues in a way that is beneficial to the Board and ultimately a reviewing court.
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7 DWR objects that SCDA-3 and SCDA-5 are “Exhibits That Lack Foundation.” (DWR
8 December 30, 2016 Objections, p. 14: 3.) First, although DWR throughout these proceedings uses
9 “lacks foundation” without elaboration to proffer objections, “lacks foundation” by itself fails to
10 adequately state an objection because it is non-specific. “All that ‘no foundation’ means is that the
11 opposing attorney has failed to do something that must be done as a prerequisite for introducing
12 evidence. The objection could refer to failure to lay the foundation for a hearsay exception, failure
13 to authenticate a writing, failure to show that the witness has personal knowledge, etc.” (Trial
14 Objections Handbook 2d § 619.) An “objecting attorney must state ‘specific ground’ for objection
15 unless ground apparent from context.” (*Id.* citing Fed. R. Evid. 103(a)(1).) “Unless the ground for
16 the objection is apparent from the context or unless the objection is explained in greater detail,
17 simply stating ‘no foundation’ may fail to preserve the objection on appeal.” (*Id.*)
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19 Here, the foundation for SCDA-3 and SCDA-5 as demonstrative exhibits was established.
20 “When a demonstrative aid is presented, its foundation differs considerably from the requirements
21 for authenticating real evidence.” The test is whether “the item is a fair and accurate representation
22 of relevant testimony or documentary evidence otherwise admitted in the case.” (McCormick On
23 Evid. § 214.)
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25 SCDA-3 and SCDA-5 are graphic depictions of Sacramento River flow on handmade graphs
26 drawn by counsel for SCDA. Prior to introduction of SCDA-3 and SCDA-5, Delta Alliance
27 introduced SCDA-2 and SCDA-4 in order to lay foundation for the graphic depictions. SCDA-2 and
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1 SCDA-4 are computer printouts from official government sources USBR and USGS reporting
2 Sacramento River flow at Freeport. The “Actual Sac River Flow” depicted on the handmade graphs
3 matches the data from the official government sources. SCDA-3 and SCDA-5 are “fair and accurate
4 representations” of actual Sacramento River flow on the dates in question.

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6 SCDA-2 was presented to witness Leahigh at Vol.11, pp. 140: 22–141: 9. SCDA-2 is an
7 unmodified computer printout downloaded from USBR’s official website with the original title
8 “U.S. Bureau of Reclamation-Central Valley Operations Office Delta Outflow Computation (values
9 in c.f.s.) August 2016.” (SCDA-2.) The authenticity of SCDA-2 is beyond reasonable dispute and
10 DWR has not challenged its authenticity. It is self-authenticating under the rules of evidence in
11 numerous ways. USBR is a party to these proceedings. “When a party places material (or authorizes
12 it to be placed) in its Web site, it makes an ‘admission’ of whatever the material says. The fact that
13 it is on the party’s Web site makes it self-authenticating (as an admission), at least prima facie.”
14 (California Practice Guide Civil Trials and Evidence (The Rutter Group 2016) §8:359.6.) The
15 printout is also an official government record subject to judicial (and official) notice and therefore
16 by definition is self-authenticating. “Judicial notice may be taken of official reports and publications
17 of government agencies.” (Civil Trials and Evidence § 8:862.) It is also a verifiable fact “capable of
18 immediate and accurate determination by resort to sources of reasonably indisputable accuracy.”
19 (*Id.* at § 8:900 [citing Ev. C. § 452(h) and using government rainfall reports as example].) SCDA-2
20 is found at <https://www.usbr.gov/mp/cvo/vungvari/doutdly.pdf> and can be instantaneously verified
21 with the click of a mouse. Finally, “[p]rinted representations of computer information are presumed
22 to be accurate depictions of the computer information they purport to represent.” (Civil Trials and
23 Evidence § 8:368, citing Ev. C. §1552(a).)

24 SCDA-2 indicates that Sacramento River flow at Freeport on August 8, 2016, was 19,747
25 cfs. Witness Leahigh verified “that’s what the report says.” (Vol. 11, p. 141: 8–9.) SCDA-3 depicts
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1 actual Sacramento River flow on August 8, 2016, as 19,747 cfs. SCDA-3 accurately and fairly
2 represents the USBR’s report of Sacramento River flow for August 8, 2016.

3 SCDA-4 was presented to witness Leahigh at Vol. 11, p.146: 7–23. SCDA-4 is a computer
4 printout entitled “Sacramento River At Freeport” and bears the insignia of “Operator US Geological
5 Survey.” (SCDA-4.) SCDA-4 indicates that on August 9, 2014, the flow of the Sacramento River at
6 Freeport was 10,138 cfs. (SCDA-4.) Witness Leahigh confirmed that SCDA-5 depicts Sacramento
7 River flow at Freeport in graphic form on August 9, 2014, as 10,138 cfs. (Vol. 11, p.147: 10–21.)
8 SCDA-5 fairly and accurately represents USBR’s report of Sacramento River flow for August 9,
9 2014. SCDA-4 is self-authenticating in the same ways as SCDA-2, and is available at[].

11 After establishing the actual Sacramento River flows on the dates in question, SCDA-3 and
12 SCDA-5 then apply the bypass flow criteria proposed by CWF proponents that would be in effect in
13 the summer months. Application of the bypass flow criteria reduces the flow of the Sacramento
14 River downstream of the proposed NDD to 10,747 cfs (a 45% flow reduction) and 5,000 cfs (a
15 50% flow reduction) for August 8, 2016 (SCDA-3) and August 9, 2014 (SCDA-5) respectively.

17 In response to questions inviting him to do so, witness Leahigh was unable to point to
18 anything in the CWF operating rules that would prevent the flow scenario demonstrated by SCDA-3
19 and SCDA-5. Mr. Leahigh initially pointed to DWR-5 errata, p.25 as establishing CWF operating
20 rules that would prevent the flow scenario shown on SCDA-3 and SCDA-5. (Vol. 11, p.142: 1–21.)
21 However, it was pointed out to Mr. Leahigh that the flow rules contained in DWR-5 errata, p.25 do
22 not apply in the summer months. (Vol. 11, p.144: 11–14; *see also* DWR 5 errata, p.25 [“Sacramento
23 River Proposed *Dec-Apr* NDD Bypass Flow Rules,” emphasis added].) Mr. Leahigh then
24 acknowledged that he could not point to anything in CWF criteria that would prevent the reductions
25 in Sacramento River flow depicted in SCDA-3:
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1 MR. BRODSKY: Wait. You're in charge of Operations, and I'm
2 representing to you that there's no CWF criteria that would prohibit—Could
we go back to the handmade chart that's SCDA-3, I guess, we're calling it.

3 (Document displayed on screen.)

4 MR. BRODSKY: There's nothing in the CWF—I'm representing to
5 you that there's nothing in the CWF operating criteria that would prohibit this
scenario.

6 Can you point to anything to show I'm wrong about this?

7 WITNESS LEAHIGH: Yeah. Offhand, I cannot. I think the—a lot of
8 the Modeling Panel were involved in developing that criteria. They may have
a – They have a better understanding as to exactly what the requirements
9 would be for the summer –summer period.

10 (Vol. 11, p.145: 5–20.)

11 During further questioning about whether meeting the *water quality* objectives of D-1641
12 would constrain diversions at the NDD where proposed operating *flow* criteria for CWF might not,
13 Mr. Leahigh acknowledged that he did not know if meeting D-1641 would prevent diverting 9,000
14 cfs at the NDD, leaving 10,747 cfs downstream of the NDD as shown on SCDA-3:

15 MR. BRODSKY: How do you know you couldn't meet the Emmaton
16 standard with 10,747 flowing in the river as you sit there?

17 WITNESS LEAHIGH: I didn't say I could. I said we'd have to do some
analysis as to whether that would be possible.

18 MR. BRODSKY: Right

19 WITNESS LEAHIGH: But just based on experience, if we were diverting
20 that large a flow and allowed the river to get that low, it's – it's very possible we
wouldn't – On a sustainable basis, it's very possible we would not be able to meet
21 the Emmaton objective.

22 MR. BRODSKY: But you don't know that as you sit here.

23 WITNESS LEAHIGH: I don't know that—

24 MR. BRODSKY: Okay.

25 WITNESS LEAHIGH: -- for sure.

26 (Vol. 11, p.155: 4–20.)

1 DWR now argues that “As shown by the cross-examination transcript, such figures [SCDA-
2 3] assume facts not in evidence regarding the factors that weigh into project operations and D-1641
3 compliance, lack foundation, and are not the sort of evidence on which a responsible person would
4 rely on in the conduct of serious affairs.” (DWR December 30 Objections, p.14: 5–8.) All of the
5 transcript pages of Mr. Leahigh’s cross-examination on this subject are attached for the Hearing
6 Officer’s convenience and will show that the above excerpts are a fair representation of Mr.
7 Leahigh’s cross-examination on this subject. Far from assuming facts not in evidence or lacking
8 foundation, SCDA-3 graphically illustrates the potential for reduction in Sacramento River flow *in*
9 *the summer months* when Fall X2, Spring Outflow, and other factors that limit diversions do not
10 apply. The burden of proof is on petitioners. “I don’t know” is not evidence that SCDA-3 is
11 inaccurate. Contrary to DWR’s assertion, the role of D-1641 and other “factors that weigh into
12 project operations” were fully discussed in relation to SCDA-3.

13 SCDA-3 and SCDA-5 are necessary to illustrate Mr. Leahigh’s testimony and make a
14 comprehensible record. “Numerous appellate courts have commented upon the difficulties created
15 on appeal when crucial testimony has been given in the form of indecipherable reference to an
16 object not available to the reviewing court. The clearly preferable practice is for the proponent to
17 offer a demonstrative aid into evidence as an exhibit” allowing for a complete record. (2
18 McCormick on Evidence § 214.) While there is some controversy over the use of demonstrative
19 exhibits in trial courts, such controversy always centers around how a jury should be instructed to
20 weigh a demonstrative exhibit. (*Id.*) Here, the Board is quite capable of understanding the difference
21 between a demonstrative exhibit and other types of evidence and DWR is quite capable of putting
22 on a rebuttal case if it wishes to present *evidence* that it cannot divert as much water as shown by
23 SCDA-3 and SCDA-5.

24 **SCDA-40 and SCDA-41.**

25 SCDA-40 is Delta Alliance’s comments on the 2015 BDCP Draft EIR/S. SCDA-41 is Delta
26 Alliance’s comments on the 2013 BDCP Draft EIR/S.

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1 DWR argues that Delta Alliance has not testified “that the entirety of the exhibit has
2 foundation.” (DWR December 30, 2016, Objections, p.14: 25.) Again, DWR’s non-specific “no
3 foundation” objection lacks specificity and should be overruled on that ground alone. “Judges are
4 not like pigs, hunting for truffles buried in briefs.” (*Entm’t Research Group, Inc. v. Genesis
5 Creative Group, Inc.* (9th Cir. 1997) 122 F.2d 1211, 1217.)

6 Both SCDA-40 and SCDA-41 have full foundation. First, SCDA-40 and SCDA-41 were
7 authenticated on the stand under oath by witness Michael Brodsky¹. Mr. Brodsky is the author of
8 the documents in question and both documents bear his signature. “A writing may be authenticated
9 by anyone who saw the writing made or executed, including a subscribing witness.” (Civil Trials
10 and Evidence § 8:336, citing Ev. C. § 1413.)

11 Next, DWR itself has offered SCDA-40 into evidence. DWR’s June, 21, 2016, revised
12 exhibit list offers SWRCB-3 into evidence. SWRCB-3 is the “2015 Public Draft Bay Delta
13 Conservation Plan/California WaterFix Partially Recirculated Draft Environmental Impact
14 Report/Supplemental Draft Environmental Impact Statement (RDEIR/SDEIS) *and Comments*.
15 (DWR Revised Exhibit List, emphasis added.) Delta Alliance’s comments (SCDA-40) are included
16 in this exhibit as “Recirc 2655” under the comments tab. (*See*
17 [http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/e
18 xhibits/exhibit3/rdeir_sdeis_comments/RECIRC_2655.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/exhibit3/rdeir_sdeis_comments/RECIRC_2655.pdf).) Each page of SCDA-40 bears the stamp
19 “Recirc 2655.” It is unclear what DWR has in mind when it asks that SCDA-40 “be excluded from
20 the record,” (DWR December 30 Objections), when DWR itself has offered the contents of SCDA-
21 40 into the record. (*See also*
22 [http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/e
23 xhibits/exhibit3/index.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/exhibit3/index.shtml) [“The [comment] letters were also copied for inclusion in the
24 administrative record for the SWRCB’s California WaterFix evidentiary hearing proceedings. In

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27 ¹ All of SCDA’s exhibits were authenticate by Mr. Brodsky on the stand as well as being authenticated in his written
28 testimony, separate and apart from the footnotes to which DWR objects. On September 2, 2016, Delta Alliance
submitted a notice of errata correcting the accidental last-minute deletion of footnotes authenticating exhibits cited in
Mr. Brodsky’s testimony.

1 addition to the BDCP web site, the comment letters are posted here and are also considered part of
2 Exhibit SWRCB-3”].)

3 DWR has relied repeatedly on the 2015 Draft EIR/S as evidence in Part 1 of these
4 proceedings. (*See, e.g.* DWR-51, p.8: 7–11; pp. 10: 17–12: 9; p.13: 18–22; p.14: 22–23.) DWR’s
5 description of the proposed changes in its change petition, including “water diversion and use,”
6 relies in large measure on references to the 2015 Draft EIR/S. (*See, e.g.*, SWRCB-2, p.6 [“Specific
7 discussions of the components of Alternative 4A most relevant to the attached water rights change
8 petition can be found within the Partially Recirculated Draft EIR / Supplemental Draft EIS ... ”].)

9 DWR cannot pick and choose which portions of the EIR/S will be considered. By relying on
10 parts of the EIR/S they have waived any objection to other parties’ relying on other relevant parts of
11 EIR/S:

12 Where part of an act, declaration, conversation, or writing is given in evidence by
13 one party, the whole on the same subject may be inquired into by an adverse party;
14 when a letter is read, the answer may be given; and when a detached act, declaration,
15 conversation, or writing is given in evidence, any other act, declaration,
16 conversation, or writing which is necessary to make it understood may also be given
17 in evidence.

18 (Cal. Evid. Code § 356; *see also* Civil Trials and Evidence § 10:39 [“By asking a witness to testify
19 as to part of an ‘act, declaration, conversation, or writing,’ the direct examiner *waives* any objection
20 to other relevant parts thereof, so as to present the ‘complete’ picture.”].) “Public comments are
21 therefore an integral part of the ... EIR approval process” (*Environmental Protection
22 Information Center. V. Cal. Dept. of Forestry and Fire Protection* (2008) 44 Cal. 4th 459, 486.)

23 DWR’s objection that “Mr. Brodsky does not provide testimony establishing that the
24 inclusion of extensive comments from the CEQA/NEPA process are relevant to Part 1,” lacks merit.
25 First, the Hearing Officers have already ruled that testimony encompassing SCDA-40 and SCDA-
26 41 is within the scope of Part 1. The testimony of Michael Brodsky was subject to objections by
27 DWR and given close independent scrutiny by the Hearing Officers for scope. On November 16,
28 2016, the Hearing officers issued a ruling finding that, with limited exceptions not relevant here, the
testimony as revised in compliance with the Hearing Officer’s October 7 1 2016, Ruling, was within

1 the scope of Part 1. (November 16 Ruling, p. 2.) The following testimony was examined and found
2 to be within the scope of part 1:

3 The Board has ample legal grounds to deny the Petition. If the Board considers
4 granting the Petition with conditions, those conditions should not be constrained by
5 the limits of existing infrastructure. There is ample authority for the Board to impose
6 conditions that would force either a reduction in exports south of Delta or would
7 force DWR and Contractors to undertake a portfolio approach as a part of the CWF
8 project description, including additional surface storage, additional groundwater
9 recharge, integrated water management, and conservation, including increasing
10 regional self-reliance. These measures are all cost effective, feasible, and necessary.
11 (SWRCB-~~23-46~~; SCDA-40–SCDA-47; SCDA-50–SCDA-~~5556~~.)

12 CWF fails to provide a more reliable water supply for the state because it is a single-
13 focus project without any of the portfolio elements that a consensus of the relevant
14 scientific community agrees are indispensable for improving the reliability of
15 California’s water supply. (See SCDA-40, pp. 14–17 and attachments thereto;
16 SCDA41–SCDA-46.) The failure to include portfolio elements, the upstream
17 location of the NDD, and the increasing likelihood of longer and more severe
18 droughts due to climate change means that Temporary Urgency Change Petitions
19 (“TUCPs”) will be used to allow diversions to continue at the upstream NDD while
20 the interior Delta is allowed to become salty and degraded. This structural change in
21 the system constitutes injury to legal users of water within the Delta, regardless of
22 the Board’s authority to suspend D-1641 standards through TUCPs.

23 (SCDA-60 Errata, pp. 3:20–4:2; 5:22–6:5 [footnotes omitted].)

24 SCDA-40 is cited twice in the above excerpts and specific page numbers of SCDA-40 (14–
25 17) and its attachments are referenced in the testimony (SCDA-40 and SCDA-41 are cited a total of
26 4 times in Mr. Brodsky’s testimony and were referred to in his oral testimony as well). Pages 14–17
27 and the attachments referenced in those pages directly support the testimony that imposing
28 conditions on CWF that would necessitate additional use of groundwater storage and other portfolio
elements are “cost effective, feasible and necessary” if CWF is to avoid injury to legal users of
water. (SCDA-60 Errata, p.4: 1–2.) SCDA-40 and its attachments are integral to Mr. Brodsky’s
testimony, extensive foundation was laid, and the exhibit is within the scope of Part 1.

The comments to the 2013 Draft EIR/S (SCDA-41) apparently have not been included on
the Board’s website. However, they remain an integral part of the 2013 Draft EIR/S and all the rules
cited above with regard to the comments on the 2015 Draft EIR/S (SCDA-40) are equally
applicable to the admissibility of SCDA-41.

SCDA-63 and SCDA-64

1 SCDA-63 is a May 16, 2016, letter from USBR and DWR to the CWF Hearing Officers.
2 SCDA-63 was used by Delta Alliance on cross-examination of DWR witness Jennifer Pierre on
3 July 29, 2016. DWR objects to admission of SCDA-63 on grounds that it is already “a document in
4 the proceeding being a part of the official docket” and is therefore “cumulative and unnecessary to
5 mark the letter as a separate exhibit in the hearing.” (DWR December 30 Objections, p.13: 4–7.)
6 The letter does appear on the CWF general docket, however Delta Alliance is aware of no Ruling
7 by the Hearing Officers or other regulation that would establish all documents on the CWF docket
8 as admitted into evidence in these proceedings.

9 The Hearing Officers have established procedures for parties wishing to introduce
10 documents into evidence. Delta Alliance has followed those procedures for SCDA-63. The Hearing
11 Officers’ December 19, 2016, Ruling established Noon, December 21, 2016, as the deadline for
12 parties to submit exhibits used on cross-examination that had otherwise not yet been offered into
13 evidence. Delta Alliance timely submitted SCDA-63 on December 7, 2016, in accordance with
14 CWF established procedures for offering documents into evidence. DWR’s reference to SCDA-63
15 and SCDA-64 as “late-added” exhibits is inaccurate. SCDA-63 and SCDA-64 were timely
16 submitted.

17 DWR also apparently argues that because SCDA-63 was not given an exhibit number at the
18 time it was presented to Ms. Pierre, it cannot now be offered into evidence. Delta Alliance noted in
19 its December 7, 2016, submission of SCDA-63 and SCDA-64 that the Board had not yet established
20 procedures for marking and using exhibits at the time Ms. Pierre was cross-examined. (Delta
21 Alliance December 7, 2016, Submission of Evidence, p.2 n.1.) The Board shortly thereafter
22 established the procedure for submitting an exhibit index and flash drive before cross-examining
23 each witness and Delta Alliance has subsequently followed that procedure.

24 DWR offers no other reason that SCDA-63, which was quoted and addressed to the witness
25 on cross-examination, should not be admitted into evidence.

26 SCDA-64 is a July 18, 2016, Declaration of Michael A. Brodsky with Exhibits A, B, and C
27 attached. DWR refers to the Declaration as being “a 330 page declaration.” However the
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1 Declaration itself is only one page of text and does nothing more than authenticate and describe
2 exhibits used by Delta Alliance on cross-examination. Exhibit A is chapter 3 of the January 2016
3 Draft Biological Assessment for CWF. This document contains the operating criteria and modeling
4 assumptions for CWF. It was used extensively on cross-examination of Ms. Pierre on July 29, 2016,
5 and has been used for the cross-examination of other witnesses as well. It also contains the evidence
6 that DWR is proposing to change the way the D-1641 export to inflow ratio is calculated and
7 change the point at which flow is measured on the Sacramento River for purposes of the D-1641
8 export to inflow ratio. (SCDA-64, p. 3-80.) DWR objects that during cross-examination of Ms.
9 Pierre only two pages (3-75 and 3-80) were used. However, as the Hearing Officers may recall,
10 cross-examination of Ms. Pierre on this document and the change in the E/I ratio was extensive,
11 thorough, and brought out important information.

12 As far as the relevance of the point about changing the E/I ratio and centrality of this
13 document in reaching the truth, the following exchange took place on cross-examination of Ms.
14 Pierre, all referencing SCDA-64, Exhibit A.

15 MR. BRODSKY: Where DWR represents repeatedly to this Board that our
16 modeling shows that under all these operating scenarios between Boundary 1 and
17 Boundary 2 we continue to meet D-1641 you mean you meet it as you've redefined
18 the export to inflow ratio, isn't that correct?

18 MR. MIZELL: Objection misstates the testimony. He's talking about a draft
19 BA which is not part of the modeling analysis presented in front of the Board.

19 MR. BRODSKY: That's not what the witness said. She said that the
20 modeling that was presented to the Board assumed the redefined export to inflow
21 ratio as its written here [SCDA-64, p. 3-80].

21 HEARING OFFICER DODUC: And that's-that's what I heard so Ms. Pierre
22 correct that its not true, answer the question.

22 (Video recording of July 29, 2016 CWF Hearing at time stamp 6:32:30–6:33:20.) Ms. Pierre then
23 explained that in her opinion “the change has been largely inconsequential,” and that “there is not a
24 change in the actual E and I.” (6:33:30–6:33:40.) Upon conclusion of the point Hearing Officer
25 Doduc commented: “Thank you Ms. Pierre. Mr. Brodsky, you've made your point and you've made
26 it very well, so let's move on.” (6:34:35.)
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1 SCDA-64, Exhibit A is central to these proceedings, has been properly offered into evidence
2 and DWR has presented no valid reason why it should be excluded. Submission of the 221 page
3 chapter 3 (rather than the entire Draft BA) gives appropriate context to the pages quoted and it
4 would not be good practice to submit only scattered pages from the document.

5 SCDA-64, Exhibit B is DWR's March 11, 2016, response to the Hearing Officer's March 4
6 directive to DWR to explain what modeling was used where. Exhibit B establishes that modeling
7 data and assumptions discussed above in reference to Exhibit A are, in fact, those used for the
8 change petition. (SCDA-64, Exhibit B, p.3 [Change Petition "Same as Biological Assessment
9 (BA)"].)

10 SCDA-64, Exhibit C is the Independent Review Panel for the 2016 California WaterFix
11 Aquatic Science Peer Review. This document has been referred to several times on cross-
12 examination. This document was presented to witness Leahigh, on August 18, 2016, in conjunction
13 with SCDA-2-5, discussed above. (*See* Vol. 11, pp. 132-135.) The Review Panel states that CWF
14 "will effect major changes in hydrodynamics" throughout the Delta. (Vol. 11, p.133: 2-8.) Witness
15 Leahigh states that he does not believe CWF will "have major effects on the rate and timing of flow
16 downstream of the intakes in the - Sacramento River." (Vol. 11, p.135: 5-8.) SCDA-64, Exhibit C
17 was presented to witness Jennifer Pierre on July 29, 2016 as well. (*See* Video Recording CWF
18 Hearing, July 29, 2016, at timestamp 6:54:30 and following.)

19 Although Exhibits A, B, and C are self-authenticating, the Declaration adds further detail for
20 convenience and was referred to during cross-examination. (*See* Video Recording CWF Hearing,
21 July 29, 2016, at timestamp 6:27:04 [Declaration displayed].)

22 **DWR's Objections to "Exhibits Submitted but not Utilized."**

23 DWR objects that "SCDA's final exhibit list contains three exhibits, SCDA-20, SCDA-63,
24 SCDA-64, that appear to have not been utilized in direct testimony or on cross examination." (DWR
25 December 30 Objections, p.13: 27-28.) However, as shown immediately above, SCDA-64 was
26 extensively used on cross-examination. SCDA-63 was also used on cross-examination. SCDA-63 is
27 the May 16, 2016, letter from USBR and DWR to the Hearing Officers. SCDA-63 was presented,
28

1 utilized, and quoted during cross-examination of Jennifer Pierre on July 29, 2016. (*See Video*
2 *Recording of July 29 CWF Hearing at timestamp 7:17:40 and following.*)

3 **Hearsay.**

4 Although it does not offer objections to Delta Alliance’s exhibits, San Louis and Delta
5 Mendota Water Authority offers multiple objections to parties’ documents on the basis that these
6 documents are hearsay. Other objections to various parties’ documents on hearsay grounds have
7 also also been scattered throughout the proceedings.

8 A number of exceptions to the hearsay rule apply to documents offered by Delta Alliance.
9 First, many of the documents are official records. “Entries in official records, made in the
10 performance of an official duty, are prima facie evidence of the facts stated therein.” (Civil Trials
11 and Evidence § 8:1686.) The EPA letters (SCDA-26 and SCDA-34) are official records of a federal
12 agency. SCDA-10 is an official record of the SWRCB. All of the DWR and USBR printouts, graphs
13 and materials are also official records of those agencies. The Delta Stewardship Council materials,
14 including the ISB review of the EIR/S are official records of that state agency. Other documents,
15 including the EIR/S and documents related to the EIR/S are admissions by adverse parties. The
16 EIR/S was prepared and proffered by Petitioners DWR and USBR. “An admission for purposes of
17 the hearsay exceptions is any out-of-court statement or assertive conduct by (or on behalf of or
18 imputable to) a party to the action that is inconsistent with a position the party is taking at the
19 current proceedings. The statement need not necessarily have been made against the party’s interest
20 when made; even a statement self-serving when made may be admissible as a party admission if
21 contrary to the party’s present position.” (Civil Trials and Evidence §d 8:1137.) All portions of the
22 EIR/S and the aquatic science peer review (SCDA-1) were written at Petitioners’ behest. SCDA-7
23 was also commissioned by USBR and DWR. The learned scientific publications (SCDA-6, SCDA-
24 52, SCDA-55, SCDA-44, SCDA-45, SCDA-46) are publications of general notoriety and interest.
25 “Historical works, books of science or art, and published maps or charts, made by persons
26 ‘indifferent between the parties’ are admissible to prove facts of ‘general notoriety and interest.’”
27 (Civil Trials and Evidence § 8:1749.) The many publications that explain the need and feasibility of

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1 groundwater banking are non-controversial and even include DWR's own California Water Plan
2 (SCDA-42 and SCDA-43.) Many of these items are also of the nature subject to judicial and official
3 notice and thereby admissible to prove the facts asserted therein. A chart of SCDA's exhibits and
4 the applicable hearsay exception is attached.

5 **Delta Alliance's Opening Statement.**

6 DWR moves to exclude Delta Alliance's opening statement because it was marked with an
7 exhibit number and included in the exhibit index. Delta Alliance understands that the opening
8 statement is not made under oath or affirmation and is not evidence. Delta Alliance never intended
9 to offer it as evidence. The opening statement, rather, is a summary of what Delta Alliance hoped to
10 show with its case in chief evidence: "Our case in chief will show ... Our case in chief will discuss
11 ...Our case in chief will also discuss." (Delta Alliance Opening Statement, p.1.) Through an
12 oversight, Delta Alliance's opening statement was given an exhibit number and included on its
13 exhibit index. Petitioners themselves made the same mistake. "The U.S. Department of Interior
14 listed its opening statement as an exhibit." (June 10, 2016, Hearing Officer Ruling on various
15 matters, p.5.)

16 Delta Alliance apologizes for any inconvenience caused by the mislabeling of its opening
17 statement and respectfully requests that it be afforded the same treatment as Petitioners when they
18 made the same mistake: that the opening statement be remain a part of the record along with other
19 non-evidentiary materials with the understanding that it is not evidence and was never intended to
20 be evidence in these proceedings.

21
22 Respectfully Submitted

23 

24 Michael A. Brodsky

25 Attorney for Protestant Save the California Delta Alliance

26 Dated: January 6, 2017

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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):

PROTESTANT SAVE THE CALIFORNIA DELTA RESPONSE TO DWR'S DECEMBER 30, 2016, OBJECTIONS TO EXHIBITS SUBMITTED IN SUPPORT OF PROTESTANTS' CASES-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 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, at Santa Cruz, California.

Signature: 

Name: Michael A. Brodsky

Title: Attorney

Party/Affiliation:

Save the California Delta Alliance

Address:

Law Offices of Michael A. Brodsky

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