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14 On behalf of Central Delta Water Agency,
15 South Delta Water Agency, Lafayette Ranch,
16 Heritage Lands, Mark Bachetti Farms
17 and Rudy Mussi Investments L.P.

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

19 **IN THE MATTER OF**

20 Hearing in the Matter of California
21 Department of Water Resources and
22 United States Department of the Interior,
23 Bureau of Reclamation Request for a
24 Change in Point of Diversion for California
25 Water Fix

26 **SOUTH DELTA WATER AGENCY,
27 CENTRAL DELTA WATER AGENCY,
28 LAFAYETTE RANCH, HERITAGE
LANDS, MARK BACHETTI FARMS
AND RUDY MUSSI INVESTMENTS L.P.
RESPONSE TO OBJECTIONS**

29 The South Delta Water Agency, Central Delta Water Agency, Lafayette Ranch,
30 Heritage Lands, Mark Bachetti Farms and Rudy Mussi Investments L.P. ("SDWA
31 Parties") herein respond to the objections of San Luis & Delta-Mendota Water
32 Authority's Objections to Exhibits Submitted for Admission by SDWA Parties' into
33 Evidence at the Close of Part 1B Cases in Chief ("SLDMWA Objection"), Department
34 of Water Resources' Objections to Exhibits Submitted in Support of Protestants' Cases-
35 In-Chief ("DWR Objection") and Westlands Water District's joinder to the San Luis and
36 Delta-Mendota Water Authority's Objections to Testimony and Exhibits Offered into

1 Evidence for Part 1 (“Westlands Joinder”). The SDWA Parties are not aware of any
2 other objections.

3 These objections contained within the above-referenced documents are without
4 merit. The testimony and related exhibits submitted by the SDWA Parties are relevant,
5 reliable, and plainly admissible. The SDWA Parties respectfully requests that the State
6 Water Resources Control Board (“SWRCB”) overrule the objections in their entirety and
7 deny SLDMWA, DWR and Westlands requests to exclude, or otherwise discount, this
8 evidence.

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10 **I. BACKGROUND**

11 On August 26, 2015 Department of Water Resources (“DWR”) and the United States
12 Bureau of Reclamation (“BOR”) petitioned for change of diversion to allow for the
13 implementation of the California WaterFix project (“Change Petition”). On October 30,
14 2015, the Board issued a notice of petition and notice of public hearing and prehearing
15 conference to consider the Change Petition. On May 11, 2016, a second revised notice of
16 rescheduled public hearing was issued.

17 The Change Petition hearing was separated into two parts: (1) injury to legal users of
18 water and other human uses of water; and (2) potential effects on fish and wildlife and
19 recreational uses and associated human uses.

20 The May 11th Notice referenced hereinabove established September 1, 2016 (later
21 revised to September 2, 2016) as the due date for Protestants to submit their Part1B Cases-in-
22 Chief. The revised notice also established a deadline of September 15, 2016 for the
23 submission of objections to Part 1B cases-in-chief. This deadline was later extended to
24 September 21, 2016. Protestants had until September 30, 2016 to respond to any objections
25 dealing with testimony and or exhibits alleged to be outside the scope of part One of the
26 proceeding. The responses to the remaining objections were due prior to the individual
27 protestants beginning their respective cases in chief. As such, Petitioners have had multiple
28 opportunities to object to protestants proffered evidence, including while the cases in chief

1 were being presented. Instead, Petitioner's objections during the hearing to SDWA Parties'
2 exhibits were minimal. Petitioners now lodge voluminous objections, including foundational
3 objections, nearly two months after SDWA Parties' witnesses testified. Petitioners
4 objections, had they been made during the hearing, would have been no more meritorious
5 than they are now.

6 7 **II. SLDMWA OBJECTIONS**

8 SLDMWA objects to multiple parties' exhibits solely on the basis that they contain
9 hearsay.

10 Evidence in a hearing on a petition for change is admitted in accordance with
11 Government Code § 11513. (Cal. Code Regs. Tit. 23, § 648.5.1.) Under Government Code
12 §11513(c), relevant evidence must be admitted if "it is the sort of evidence on which
13 responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the
14 existence of any common law or statutory rule which might make improper the admission of
15 the evidence over objection in civil actions." (Gov. Code § 11513(c).) The evidence objected
16 to is both relevant and reliable, and is admissible in this hearing. Further, Gov. Code §
17 11513(d) provides "hearsay evidence may be used for the purpose of supplementing or
18 explaining other evidence but over timely objection shall not be sufficient in itself to support
19 a finding..."

20 The hearsay objections asserted by SLDMWA lack any specificity. SLDMWA has
21 objected to no less than 44 documents, which includes over 100 pages of evidence. SDWA
22 Parties assert that SLDMWA's objections should be overruled on this basis alone.

23 Included therein are SDWA Parties' Exhibits 221 through 243. These exhibits were
24 submitted in conjunction with Mr. Ringleberg's anticipated testimony in support of the
25 SDWA Parties. However, because Mr. Ringleberg was ultimately testified on behalf of other
26 protestants, his exhibits withdrawn by SDWA Parties. SDWA Parties, therefore, will not
27 address these exhibits further herein.

1 A. Thomas Burke's PowerPoint, Technical Report and Related Exhibits

2 SLDMWA objects to SDWA 77 through SDWA 83 as hearsay. These exhibits were
3 each submitted to clarify, corroborate or otherwise support the testimony provided by witness
4 Thomas Burke. Mr. Burke was proffered as an expert witness, whose testimony mainly
5 focused on his opinion that the Change Petition would cause increased salinity and residence
6 time of water in the South and Central Delta, as well as causing a decrease in water levels.

7 The California Evidence Code explicitly authorizes expert witnesses to rely upon
8 (otherwise inadmissible) hearsay evidence. (*California Evidence Code §802*) According to the
9 California Evidence Code, '[h]earsay evidence' is evidence of a statement that was made other
10 than by a witness while testifying at the hearing and that is offered to prove the truth of the
11 matter stated. (*California Evidence Code §1200(a)*) As a general rule, hearsay evidence is
12 considered inadmissible in court, but there are various exceptions, especially with respect to
13 expert witnesses. The rationale for allowing experts to rely on certain types of hearsay
14 evidence is that experts, who are utilized in order to provide opinions and conclusions (as
15 opposed to fact witnesses, who tend to be lay persons), typically base their opinions on data
16 they've collected in their field of expertise.

17 SDWA 77 Errata is Mr. Burke's PowerPoint used to facilitate the presentation of his
18 direct testimony within the time allotted. The PowerPoint is based directly on Mr. Burke's
19 detailed technical report (SDWA 78 Errata). As such SDWA 77 Errata should not be
20 considered hearsay under California Evidence Code § 801.

21 SDWA 78 Errata is a technical report providing a detailed, in depth analysis of Mr.
22 Burke's analysis, opinions and conclusions. The format of the California WaterFix hearings
23 required witnesses to give their opinions and conclusions in a limited amount of time,
24 necessitating each witness to supplement their oral testimony with foundational evidence
25 thereof. Mr. Burke's technical report sought to provide a detailed explanation of his analysis of
26 Petitioner's evidence as it pertained to injury to legal users of water within the south and
27 central Delta Simply put, the technical report represents a further, more detailed analysis upon
28 which Mr. Burke's opinions are based and are, thus, not hearsay.

1 SLDMWA further objects to Mr. Burke's exhibits SDWA 79 through SDWA 83. As
2 Mr. Burke testified, these exhibits are merely graphical depictions of the data and modeling
3 provided by Petitioners in this matter. Presumably, Petitioners are not claiming their own data
4 to be hearsay. As such, providing a graphical analysis to assist the hearing officers in their
5 determination cannot shift such information into the realm of hearsay.

6
7 B. SDWA 116 – Electrical Conductivity in MilliS

8 SDWA 116 is a graph, provided by DWR regarding electrical conductivity in MilliS for
9 Doughty Cut above Grant Line Canal. The document itself identifies it as information
10 provided by DWR, taken from the California Data Exchange Center.

11 *California Evidence Code §1220* provides, “[e]vidence of a statement is not made
12 inadmissible by the hearsay rule when offered against the declarant in an action to which he
13 is a party in either his individual or representative capacity...”

14 SDWA 116 is a document provided by DWR, being offered by Protestants against
15 DWR. As such, §1220 Admission of Party exception applies.

16
17 C. Jeffery Michael, Ph.D. PowerPoint and related exhibits

18 SDWA 135R is the PowerPoint presentation used in conjunction with Dr. Michael's
19 live testimony. SLDMWA's asserts that the PowerPoint presentation is hearsay. Hearsay is
20 “evidence of a statement that was *made other than by a witness while testifying at the*
21 *hearing* and that is offered to prove the truth of the matter stated.” The PowerPoint is part
22 and parcel with the testimony provided by Dr. Michael. It is testimony made in court by the
23 witness. It is therefore not hearsay, and the objection should be overruled.

24 SDWA 137 and SDWA 141 are Economic Sustainability Plans for the Sacramento-
25 San Joaquin River Delta. These reports were generated by the Delta Protection Commission,
26 a governmental agency. *Ca. Evid. Code §1280* provides that evidence of a writing made by a
27 public official is not made inadmissible by the hearsay rule if the writing occurred at or near
28 the time of the act, condition or event and the sources of information and method of

1 preparation indicate the document is trustworthy. SDWA 137 and SDWA 141 meet these
2 requirements, and as such the hearsay objections thereto should be overruled. SDWA 142 is
3 contained in an appendix of this report, and as such, would fall under the same exception.

4 Similarly, SDWA 138, the Independent Panel Review of the Economic
5 Sustainability Plan for the Sacramento-San Joaquin Delta December 2, 2011 was generated
6 by the Delta Science Program, a group which is part of the Delta Stewardship Counsel, a
7 state agency. This document too fits within the requirements of *Ca. Evid. Code §1280*, and
8 as such the hearsay objection thereto should be overruled.

9 SDWA 139, an executive summary for the Economic Sustainability Plan for the
10 Sacramento-San Joaquin Delta, and SDWA 140, Leaching Fractions Achieved in South
11 Delta Soils under Alfalfa Culture Project Report Update were compiled by Dr. Michelle
12 Leinfelder-Miles in connection with her work at the U.C. Davis Cooperative Extension
13 Program. The report specifically was compiled as part of a study in the South Delta,
14 commissioned in part by SWRCB. SDWA witness Terry Pritchard assisted in the conduction
15 of this study. As such, *Ca. Evid. Code §1280* provides a valid exception to any hearsay
16 objections.

17
18 D. Dante Nomellini, Sr.'s Written Testimony, PowerPoint and related exhibits

19 SLDMWA has objected to Dante Nomellini's written testimony and PowerPoint as
20 hearsay. Once again, the objection fails to articulate what portion of these lengthy documents
21 are hearsay. Aside therefrom, SLDMWA has again asserted baseless objections. Hearsay is
22 defined as "evidence of a statement that was *made other than by a witness while testifying at*
23 *the hearing* and that is offered to prove the truth of the matter stated." The written testimony
24 and PowerPoint are part of the record, submitted as part of Mr. Nomellini's testimony. It is
25 therefore testimony made in court by the witness and any objection as hearsay thereto must
26 be overruled.

27 Mr. Nomellini relied on multiple reports in rendering his expert opinion in this matter.
28 The SDWA Parties' exhibits 170, 183, 184, 185, 192, 197, and 199 each are references to

1 important historical data and have been relied upon by multiple state and public agencies.
2 For these reasons, and on the basis of *Ca. Evid. Code §1280*, objections to these documents
3 should be overruled.
4

5 **III. DWR OBJECTIONS**

6 DWR also submitted an objection to SDWA Parties' Exhibits. Within their December
7 30, 2016 objection, DWR asserts that a portion of DWR's prior objections to the Protestants
8 cases-in-chief remain pending. To that extent, within its objection, DWR specifically reserved
9 those prior objections. Insofar as DWR is reserving and reasserting their prior objections,
10 SDWA Parties incorporate herewith its prior responses thereto.

11 In addition, the DWR Objection requests further action from SDWA Parties with regard
12 to clarification of the record pertaining to SDWA Parties' exhibits. To the extent that the
13 DWR Objection requests such action, such is not a proper objection. Moreover, SDWA Parties
14 have already worked with the hearing team, and will continue to do so as necessary, to clarify
15 any possible minor issues concerning the identification of exhibits.

16 Lastly, DWR objects to SDWA Parties' exhibits 1, 17, 19, 20, 26, 30, 32, 34, 187, 198
17 and 199. Specifically, DWR asserts that these exhibits were never utilized in Part 1 of the
18 hearing, and as such, the exhibits lack foundation and relevance. SDWA 187, 198 and 199
19 were each discussed in SDWA witness Dante Nomellini's PowerPoint presentation, SDWA-
20 152. As such, this objection is without merit. To the extent that the remaining exhibits were
21 not specifically used in cross-examination, they remain relevant to the issues in this proceeding
22 and should be included as part of the record.
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24 **IV. CONCLUSION**

25 For the reasons outlined herein the objections filed by SLDMWA and DWR regarding
26 the SDWA Parties' exhibits should be overruled in their entirety.
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Respectfully submitted,

Date: January 6, 2017

HARRIS, PERISHO & RUIZ

By: Dean Ruiz
S. DEAN RUIZ, Esq.

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):

SOUTH DELTA WATER AGENCY, CENTRAL DELTA WATER AGENCY, LAFAYETTE RANCH, HERITAGE LANDS, MARK BACHETTI FARMS AND RUDY MUSSI INVESTMENTS L.P. RESPONSE TO OBJECTIONS

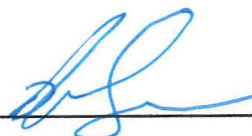
to be served **by Electronic Mail** (email) upon the parties listed in Table 1 of the **Current Service List** for the California WaterFix Petition Hearing, dated 11/15/2016, posted by the State Water Resources Control Board at

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml:

Note: In the event that any emails to any parties on the Current Service List are undeliverable, you must attempt to effectuate service using another method of service, if necessary, and submit another statement of service that describes any changes to the date and method of service for those parties.

I certify that the foregoing is true and correct and that this document was executed on 1/6/2017.
Date

Signature: _____



Name: Bee Speer

Title: Legal Assistant

Party/Affiliation: Harris, Perisho & Ruiz

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