

SOMACH SIMMONS & DUNN
A Professional Corporation
Aaron A. Ferguson (SBN 271427)
Kristian C. Corby (SBN 296446)
500 Capitol Mall, Suite 1000
Sacramento, California 95814-2403
Telephone: (916) 446-7979
Facsimile: (916) 446-8199
aferguson@somachlaw.com
kcoby@somachlaw.com

Attorneys for Protestant
Carmichael Water District

BEFORE THE
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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

**RESPONSES TO OBJECTIONS TO
CARMICHAEL WATER DISTRICT'S
CASE IN CHIEF TESTIMONY**

I. INTRODUCTION

On September 28, 2016, the State Water Resources Control Board (SWRCB) offered that "[b]efore any party's presentation of a Part 1B case in chief, any responses that the party may have to objections to the party's testimony or exhibits, other than any objections pertaining to scope, are due." Carmichael Water District (CWD) submits this response to San Luis & Delta-Mendota Water Authority's (SLDMWA) Objections to Part 1B Parties' Cases in Chief, Exhibits of CWD – Carmichael Water District (SLDMWA Objections), and the DWR Objections to Carmichael Water District Written Testimony and Exhibits Submitted by Protestants in Support of Part 1B Case in Chief and Related Joinders (DWR Objections). The SLDMWA Objections and DWR Objections are without merit. Because CWD testimony is relevant, reliable, and admissible, the CWD respectfully requests that the SWRCB overrule the objections in their entirety and deny SLDMWA's and DWR's requests to exclude certain portions of CWD's evidence.

II. BACKGROUND

Water Code section 1702 requires that, when a petition for change is filed, the petitioner must establish that the change will not operate to the injury of any legal user of the water involved. (Wat. Code, § 1702.) The burden of proof is on the petitioner. (SWRCB Order No. 95-6 at p. 7.) Part 1 of this hearing therefore addresses whether DWR'S and the Bureau of Reclamation's (Reclamation) proposed changes would injure any municipal, industrial or agricultural uses of water, including associated legal users of water. (Notice of Petition and Notice of Public Hearing and Pre-Hearing Conference to Consider the Above Petition (Oct. 30, 2015), p. 11)

On September 1, 2016, the CWD submitted the testimony and exhibits of Mr. Steve Nugent. SLDMWA and DWR object to certain portions of Mr. Nugent's testimony on the grounds that this testimony lacks foundation, is hearsay, is improper lay person opinion, and improper legal conclusion. For the reasons stated below, the SWRCB should overrule SLDMWA's and DWR's objections.

III. LEGAL STANDARDS

Administrative hearings are governed by the Water Code (Wat. Code, § 1075) and SWRCB regulations (Cal. Code Regs., tit., 23, §§ 648 et seq.), which incorporate portions of the Administrative Procedure Act (Gov. Code, § 11400 et seq.) and Evidence Code sections 801-805. Evidence in a hearing on a petition for change is admitted in accordance with Government Code section 11513. (Cal. Code Regs. tit. 23, § 648.5.1.) Government Code section 11513 states that an administrative hearing is not conducted according to technical rules relating to evidence and witnesses, but relevant evidence must be admitted if "it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions." (Gov. Code, § 11513(c).)

A. Foundation

An adjudicative body "may, and upon objection shall, exclude testimony in the

1 form of an opinion that is based in whole or in significant part on matter that is not a
2 proper basis for such an opinion.” (Evid. Code, § 803.) Opinion testimony must be
3 based on the proper foundation and “provide a reasonable basis for the particular
4 opinion offered.” (*Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 564.)

5 **B. Lay Person Opinion**

6 A non-expert witness may offer an opinion that is “[r]ationally based on the
7 perception of the witness” and “[h]elpful to a clear understanding of his testimony.”
8 (Evid. Code, § 800.) Where an opinion is based on a witness’s perception or experience
9 and otherwise helps explain his testimony, it is permissible lay person opinion. (See
10 *Castillo v. Toll Bros.* (2011) 197 Cal.App.4th 1172, 1199.)

11 **C. Hearsay**

12 Relevant hearsay is admissible in adjudicative proceedings before the SWRCB.
13 The SWRCB has previously stated it will “decline to exclude or strike any evidence on
14 the grounds that it is hearsay,” but will consider relevant hearsay evidence “subject to
15 the limitations imposed by Government Code section 11513, subdivision (d).” (Ruling on
16 Motions filed in the Matters of the Administrative Civil Liability Complaint against Byron-
17 Bethany Irrigation District and Draft Cease and Desist Order Against West Side Irrigation
18 District, March 18, p. 4 (BBID Ruling.) Hearsay evidence may be used for the purpose
19 of supplementing or explaining other evidence but over timely objection shall not be
20 sufficient in itself to support a finding unless it would be admissible over objection in civil
21 actions. (Gov. Code, § 11513(d).)

22 **D. Testimony Regarding Legal Injury**

23 In this proceeding, opinion testimony may touch on the Petitioners’ obligation to
24 show no injury to legal users of water. “Testimony in the form of an opinion that is
25 otherwise admissible is not objectionable because it embraces the ultimate issue to be
26 decided by the trier of fact.” (Evid. Code, § 805.) In a recent proceeding, the SWRCB
27 explained that an opinion that embraces the ultimate issue “is not improper if a
28 foundation is laid by the witness as to the factors taken into account when forming the

1 opinion on the ultimate issue.” (BBID Ruling at p. 4).

2 **IV. ARGUMENT**

3 **A. The SLDMWA Objections to Mr. Nugent’s testimony are unfounded.**

4 1. SLDMWA objects to Mr. Nugent’s statement that “[g]iven the documented
5 groundwater contamination underlying CWD, surface supplies from the American River
6 remain critical to the CWD’s longevity to (1) make up for supplies limited by the
7 contamination; and (2) reduce the hydrogeological gradients that affect contaminant
8 movement that an over-reliance on groundwater pumping might create.” (SLDMWA
9 Objections at p. 30:21-25.) SLDMWA argues that this is inadmissible lay person
10 testimony because there is no foundation showing Mr. Nugent has personal knowledge
11 regarding groundwater contamination or showing groundwater contamination underlies
12 CWD. (SLDMWA Objections at p. 30:25-28.)

13 Mr. Nugent has more than 20 years of experience at CWD, including service as
14 the General Manager for the past 12 years dealing with all aspects of CWD’s water
15 supplies. Mr. Nugent has been directly involved in assessing and addressing impacts to
16 CWD’s groundwater supplies caused by contamination from the plume that has migrated
17 into CWD’s service area. Based on this experience, he has personal knowledge of the
18 extent of the Aerojet contaminant plume, as shown in Exhibit CWD-9. This is adequate
19 foundation for him to offer an opinion about the importance of the District’s American
20 River surface water supplies given the impacts to groundwater supplies from
21 contamination.

22 2. SLDMWA objects to Mr. Nugent’s statement that “[b]ased on the expert
23 work of and testimony by MBK Engineers ..., it is my understanding that the modeling
24 conducted by Petitioners to determine whether the Water Fix Project would cause injury
25 to CWD and other legal users of water, is inadequate to ultimately answer this question.”
26 (SLDMWA Objections at p. 31:1-5.) SLDMWA argues this is hearsay, and inadmissible
27 lay person opinion because there is no foundation showing Mr. Nugent has personal
28 knowledge of modeling project operations. (SLDMWA Objections at p. 31:5-9.)

1 Mr. Nugent, however, is simply summarizing the relevant testimony of an expert
2 that has submitted evidence on the District's behalf in this proceeding. MBK's expert
3 work is relevant because it concerns the potential impacts of Water Fix project
4 operations on legal users of water. (See Exhs. SVWU-107, SVWU-109.) Further,
5 MBK's expert work is reliable because it was drafted by Mr. Walter Bourez, an expert in
6 hydrologic modeling. (See Exh. SVWU-101.) This testimony, even if it is hearsay,
7 provides the basis for Mr. Nugent to explain the potential impacts of California WaterFix
8 Project operations on CWD water rights and supplies because the evidence would
9 otherwise be admissible. (See Evid. Code, § 11513(d).) To the extent the testimony is
10 hearsay, Evidence Code section 1250 states that "state of mind" is not made
11 inadmissible by the hearing rule when the evidence is offered to prove state of mind, or
12 to prove or explain acts on conduct of the declarant. Here, Mr. Nugent offers testimony
13 reflecting his observation based upon knowledge, experience and training on water
14 supply issues, in order that he may discuss potential impacts to CWD's water supplies.
15 Further, this observation is based on his experience and is otherwise helpful to an
16 understanding of his testimony. In this respect, it is also not inadmissible lay person
17 opinion.

18 3. SLDMWA objects to Mr. Nugent's testimony that Petitioners have not met
19 their burden of showing that the Water Fix Project will not cause injury to CWD and other
20 legal users of water. (SLDMWA Objections at p. 31:10-12.) SLDMWA argues that this
21 is inadmissible legal conclusion. With the proper foundation, however, Mr. Nugent may
22 offer an opinion that embraces the ultimate issue of legal injury. (See Evid. Code, § 805;
23 see also BBID Ruling at p. 4.) Mr. Nugent laid the foundation for such a statement by
24 offering that "[b]ased on the expert work of and testimony by MBK Engineers ..., it is my
25 understanding that the modeling conducted by Petitioners to determine whether the
26 Water Fix Project would cause injury to CWD and other legal users of water, is
27 inadequate to ultimately answer this question." MBK's expert work clearly states that
28 Petitioners' CalSim II modeling does not address effects on non-Project water rights

holders, and effects on these water users must be determined by evaluating the model outputs. Upon this evidence, and with the knowledge that CWD only holds appropriative water rights (i.e., non-Project water rights), Mr. Nugent concluded that Petitioners had not evaluated potential impacts of the Project on CWD's water rights. In this respect, Mr. Nugent identified the factors taken into account when forming his opinion that the Petitioners have not met their burden of showing the Water Fix project will not cause injury to CWD. With this explanation, he was entitled to offer an opinion regarding the failure of the Petitioners to meet their burden on the ultimate issue – i.e., showing no injury to a legal user of water such as CWD.

B. DWR's Objections to Mr. Nugent's Testimony are without merit.


DWR objects to Mr. Nugent's testimony that Petitioners have failed to meet their burden to show that the Project would not injure CWD as unsupported by foundational evidence. (DWR Objections at p. 2:5-8.) The foundational evidence for Mr. Nugent's conclusion is explained in Response #3 to the SLDMWA Objections. With this explanation, Mr. Nugent was entitled to offer an opinion regarding failure of the Petitioners to meet their burden on the ultimate issue – i.e., showing no injury to a legal user of water such as CWD.

V. CONCLUSION

For the foregoing reasons, the CWD respectfully requests that the DWR Objections and SLDMWA Objections be overruled in their entirety.

Dated: October 20, 2016

SOMACH SIMMONS & DUNN
A Professional Corporation

By: 
Aaron A. Ferguson
Attorneys for Protestant
Carmichael Water District

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):


**RESPONSES TO OBJECTIONS TO CARMICHAEL
WATER DISTRICT'S CASE IN CHIEF TESTIMONY**

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 caused a true and correct **hard copy** of the document(s) to be served by the following method of service to Suzanne Womack & Sheldon Moore, Clifton Court, L.P., 3619 Land Park Drive, Sacramento, CA 95818:

Method of Service: U.S. Mail

I certify that the foregoing is true and correct and that this document was executed on October 20, 2016.

Signature: 
Name: Yolanda De La Cruz
Title: Legal Secretary
Party/Affiliation: Carmichael Water District
Address: 500 Capitol Mall, Suite 1000
Sacramento, CA 95814