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Agency

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
SACRAMENTO COUNTY WATER
AGENCY'S CASE IN CHIEF
TESTIMONY**

I. INTRODUCTION

On September 28, 2016, the State Water Resources Control Board (SWRCB) ruled 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." Sacramento County Water Agency (SCWA) submits this response to San Luis & Delta-Mendota Water Authority's (SLDMWA) Objections to Part 1B Parties' Cases in Chief, Exhibits of Sacramento County Water Agency (SLDMWA Objections). The SLDMWA Objections are without merit. Because SCWA's testimony is relevant, reliable, and admissible, the SCWA respectfully requests that the SWRCB overrule the objections in their entirety and deny SLDMWA's request to exclude certain portions of SCWA'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 the Department of Water Resources' (DWR) 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 SCWA submitted the testimony and exhibits of Mr. Michael Peterson and Mr. Forrest Williams. SLDMWA objects to certain portions of Mr. Peterson's and Mr. Williams's testimony on the grounds that this testimony lacks foundation, and is hearsay, speculative or inadmissible lay person opinion. For the reasons stated below, the SWRCB should overrule SLDMWA'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).)

1 **A. Foundation**

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

7 **B. Lay Person Opinion**

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

13 **C. Expert Testimony**

14 A witness testifying as an expert may offer an opinion that is “[r]elated to a subject
15 that is sufficiently beyond common experience that the opinion of an expert would assist
16 the trier of fact,” and “based on matter (including his special knowledge, skill, and
17 experience, training, and education) perceived by or personally known to the witness or
18 made known to him before the hearing . . .” (Evid. Code, § 801.) An expert witness is
19 entitled to rely upon his own reports, and the reports prepared by other experts, in
20 formulating his testimony. (See *Continental Airlines, Inc. v. McDonnell Douglas Corp.*
21 (1989) 216 Cal.App.3d 388, 416.) The material relied upon need not be admissible.
22 (See, e.g., *People v. Valdez* (1997) 58 Cal.App.4th 494, 509.)

23 **D. Hearsay**

24 Relevant hearsay is admissible in adjudicative proceedings before the SWRCB.
25 The SWRCB has previously stated it will “decline to exclude or strike any evidence on
26 the grounds that it is hearsay,” but will consider relevant hearsay evidence “subject to
27 the limitations imposed by Government Code section 11513, subdivision (d).” (Ruling on
28 Motions filed in the Matter of the Administrative Civil Liability Complaint Against Byron-

Bethany Irrigation District and Draft Cease and Desist Order against West Side Irrigation District, (March 18, 2016), p. 4 (BBID Ruling).) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. (Gov. Code, § 11513(d).)

IV. ARGUMENT

A. The objections to the testimony of SCWA's expert, Forrest Williams, are unfounded.

1. The SLDMWA argues testimony that "summarizes analysis performed by the East Bay Municipal Utility District (EBMUD) regarding the potential for reverse flow event impacts to the Freeport Regional Water Project (FRWP) intake" is hearsay. (SLDMWA Objections at pp. 74:28-75:4.) Mr. Williams, as an expert, properly summarizes evidence contained in an expert report prepared by Dr. Benjamin Bray and submitted by the East Bay Municipal Utility District in this proceeding. (See Evid. Code, § 801(b); see, e.g., *People v. Valdez*, *supra*, 58 Cal.App.4th at p. 509.) Mr. Williams's consideration of Dr. Bray's report is therefore appropriate in order to provide foundation to explain his testimony concerning the impact of reverse flow events on SCWA's operation of the FRWP and associated facilities.

2. SLDMWA argues there is no foundation for testimony that reverse flow events causing shutdowns will occur. (SLDMWA Objections at p. 75:9-10.) Mr. Williams's significant experience with the operations of the FRWP (See Exhs. SCWA-3, p. 2:19-21; SCWA-32) provide adequate foundation for him to consider expert work concerning project impacts to the FRWP facilities. (See Evid. Code, § 801(b).) Also, as an expert, Mr. Williams is entitled to rely on analyses by other experts. (*Ibid.*) Mr. Williams's assumption that reverse flow events causing shutdowns to Freeport will occur is based on his review of the expert report of Dr. Benjamin Bray. (See Exh. EBMUD-152.) Dr. Bray's expert report is relevant because it concerns the potential impacts of the California WaterFix (WaterFix) Project on legal users of water that rely on the FRWP

1 for their diversions. Further, Dr. Bray's report is reliable because he is an expert in the
2 application of advanced numerical methods to water resources in surface and ground
3 water supply, hydrodynamics, and water quality. (See Exh. EBMUD-127.) Thus,
4 adequate foundation has been provided for Mr. Williams to assume, according to
5 modeling conducted by Dr. Bray, that project related reverse flow events causing
6 shutdowns will occur.

7 3. SLDMWA further argues that it is speculative for Mr. Williams to testify that
8 any shutdown of the FRWP will require SCWA to shift to using groundwater. Mr.
9 Williams has laid the foundation for this opinion by presenting and describing SCWA's
10 appropriative and contract rights available for diversion at Freeport at Exh. SCWA-3 at
11 pp. 6-9. Mr. Williams, as an expert, also properly relies on the testimony of Michael
12 Peterson, Agency Engineer, who describes SCWA's groundwater resources and
13 conjunctive use program in more detail at Exh. SCWA-19. (See Evid. Code, § 801(b).)
14 Further Mr. Williams has offered and discussed SCWA's Division of Drinking Water
15 permit requiring shutdown of the FRWP when the threshold distance that the
16 Sacramento Regional County Sanitation District discharge has travelled upstream is
17 exceeded. (See Exh. SCWA-3 at pp. 9-10; Exh. SCWA-36.) Mr. Williams's testimony
18 concerning SCWA's supplies, and his special knowledge of SCWA's Division of Drinking
19 Water Permit, as well as his experience with the operations of the FRWP (See Exhs.
20 SCWA-3 at p. 2:19-21; SCWA-32) provide adequate foundation for him to offer the
21 opinion that a shutdown of the FRWP during a reverse flow event may cause SCWA to
22 shift to using groundwater supplies.

23 4. SLDMWA argues there is no foundation for Mr. Williams's opinions that
24 increased FRWP shutdowns result in a loss of Aerojet remediated groundwater
25 (SLDMWA Objections at p. 75:13-17) and SCWA's Central Valley Project (CVP) supplies
26 that would otherwise be available for diversion (SLDMWA Objections at p. 75: 18-22).
27 SLDMWA further objects that it is speculative to testify that the Water Fix Project could
28 cause SCWA to lose its CVP supply. (SLDMWA Objections at p. 75:18-22.)

1 Mr. Williams has offered a true and correct copy of the SCWA-Aerojet agreement,
2 which sets forth SCWA's contractual entitlement to 8,900 acre-feet per year. (Exh.
3 SCWA-28 at p. 5.) Based on Mr. Williams's unique experience, as Program Manager for
4 the Freeport Regional Water Authority (See Exhs. SCWA-3 at pp. 1-2; SCWA-32), Mr.
5 Williams has explained that "SCWA's historical daily Aerojet diversions have been
6 limited to a daily averaged amount of its full annual contract right" (Exh. SCWA – 3 at p.
7 11:8-9). In this regard, Mr. Williams has properly laid the foundation for his opinion that
8 Aerojet water that SCWA is unable to divert during reverse flow events causing
9 shutdown of the FRWP cannot be made up after reverse flow shutdowns are over. (*Id.*
10 at p. 11:9-12.)

11 Based on Mr. Williams's unique experience administering SCWA's CVP contracts
12 (Exh. SCWA-3 at p. 2:1-7), which have been offered as SCWA exhibits, and his
13 experience with FRWP operations (See Exhs. SCWA-3 at pp. 1-2; SCWA-32), adequate
14 foundation exists for him to offer his opinion that, at build-out, SCWA could lose an
15 opportunity to divert a portion of its CVP supply that would otherwise be available for
16 diversion during a reverse flow event causing a shutdown of the FRWP facilities. With
17 this foundation, Mr. Williams's testimony about potential loss of CVP supplies is not
18 speculative.

19 5. SLDMWA objects that there is no foundation for testimony stating that the
20 Project will cause shutdown of the Freeport intake (SLDMWA Objections at p. 75:26-28),
21 or that FRWP intake shutdowns cause "consequential effects" to SCWA facilities
22 (SLDMWA Objections at p. 75:26-27), and it is speculative that any shutdown would
23 result in increased labor and planning requirements. (SLDMWA Objections at p. 75:27-
24 28.)

25 As stated previously, Exhibit EBMUD 152, a report prepared by Dr. Benjamin
26 Bray in this proceeding, has been submitted, and Dr. Bray's results will be presented
27 during the hearing to show the project will cause an increase in shutdown events. As
28 explained above, Dr. Bray's expert report is relevant and reliable because it concerns the

1 potential impacts of the Water Fix project on legal users of water that rely on the FRWP
2 for their diversions and it has been prepared by an expert in hydrodynamic modeling.
3 Mr. Williams can reasonably rely on its conclusions to form his opinion about the impacts
4 of reverse flow events that cause shutdowns. (See Evid. Code, § 801(b).)

5 Mr. Williams has laid the foundation for his opinion about the effects of a
6 shutdown on SCWA's facilities. Mr. Williams's opinions regarding the consequential
7 effects of FRWP shutdowns are related to matter beyond common experience and
8 based on his special knowledge and experience associated with the operations of the
9 FRWP. Based on this special knowledge, Mr. Williams thoroughly describes the key
10 SCWA facilities that are part of the FRWP. (See Exh. SCWA-4 at pp. 4:14-6:4.)
11 Further, given his experience with these facilities, (Exhs. SCWA-3 at p. 2:19-21; SCWA-
12 32), Mr. Williams understands the operational protocols SCWA must adhere to when
13 SCWA must stop diverting water at the FRWP. Because Mr. Williams's special
14 knowledge of Freeport facilities and operations are adequate foundation for him to offer
15 an opinion on the effects of shutting down the facilities, Mr. Williams's opinions regarding
16 the consequential effects of such shutdowns caused by the project are not speculative.

17 Moreover, Mr. Williams has experienced shutdowns of the FRWP facilities in the
18 past, and reasonably relies on his experience to offer an opinion about the facility
19 impacts associated with reverse flow events. (See Evid. Code, § 800.)

20 **B. The objections to the testimony of Michael Peterson are without merit.**

21 1. SLDMWA objects to Michael Peterson's testimony as hearsay where he
22 states that the MBK Report concludes that the modeling performed by DWR and the
23 Bureau is flawed. (SLDMWA Objections at p. 76:7-11.) This objection lacks merit
24 because the evidence is not hearsay. Mr. Peterson does not make this statement for the
25 proof of the matter asserted. Here, Mr. Peterson simply offers this statement in order to
26 explain why MBK performed independent modeling that Mr. Peterson relies on in his
27 testimony to explain the potential impacts of the Project on the SCWA. In this respect, it
28 is admissible. Even if it is hearsay, it is subject to an exception. Evidence Code section

1 1250 states that "state of mind" is not made inadmissible by the hearsay rule when
2 evidence is offered to prove state of mind or to explain acts or conduct of the declarant.
3 Again, Mr. Peterson simply offers this statement as explanation for his reliance on MBK's
4 independent work. (See Gov. Code, § 11513(d).) Thus it is admissible.

5 This testimony should otherwise be admitted because it concerns evidence that is
6 relevant and reliable. (See Gov. Code, § 11513(c).) The MBK Report is relevant
7 because it concerns the impacts of Water Fix project operations. Further, the MBK
8 Report is reliable because it was drafted by Mr. Walter Bourez, an expert in hydrologic
9 modeling. (See Exh. SVWU-101.)

10 2. Further, SLDMWA objects to Michael Peterson's summaries of reports and
11 testimony from MBK Engineers as hearsay and inadmissible lay person opinion.
12 (SLDMWA Objections at pp. 76: 12-17, 18-22.) The reports have been offered as
13 exhibits in this proceeding on behalf of SCWA (See Exh. SVWU-07, SVWU-108). MBK
14 experts will testify regarding these reports during the hearing, and they are used by Mr.
15 Peterson to explain the potential supply impacts to SCWA. To the extent his testimony
16 on these reports is hearsay it is otherwise admissible as state of mind for his discussion
17 of impacts to SCWA. (See Gov. Code, § 11513(d), Evid. Code, § 1250.)

18 Also, Mr. Peterson, as an expert on the topic of SCWA's water supplies and
19 operations, can rely on reports by others. Any person who has special knowledge skill,
20 or experience in any occupation or trade may be qualified as an expert in his or her field.
21 (*Miller v. Los Angeles County Flood Control Dist.* (1973) 8 Cal.3d 689, 701; see also
22 Evid. Code, § 720(a) (a witness is qualified to testify as an expert if he or she has special
23 knowledge, skill, experience, training or education sufficient to qualify him or her as an
24 expert on the subject to which the testimony relates). Mr. Peterson has specialized
25 knowledge and experience with SCWA's water supplies and operations, and the
26 conditions that affect those supplies. Given this experience, he is qualified as an expert
27 on these issues. Here, Mr. Peterson appropriately summarizes key conclusions in the
28 reports as foundation for his opinion about impacts on SCWA. Based on this expertise,

he may rely on materials prepared by others in forming his opinions about impacts to SCWA's supplies. (Evid. Code, § 801(b).) The materials need not be admissible. (See, e.g., *People v. Valdez*, *supra*, 58 Cal.App.4th at p. 509.) Mr. Peterson, therefore, properly relies on the expert work of MBK to explain the potential impacts of WaterFix or SCWA's supplies and operations. In any event, Mr. Peterson's testimony summarizes a report that is relevant and reliable and should otherwise be admitted. (Gov. Code, § 11513(c).)

Further, Mr. Peterson's opinions regarding supply impacts associated with CVP reductions in allocations or implementation of Term 91 are otherwise proper lay opinions. Where an opinion is based on a witness's perception or experience and otherwise helps explain his testimony, it is permissible lay person opinion. (See *Castillo v. Toll Bros.*, *supra*, 197 Cal.App.4th at p. 119.) These opinions are directly related to Mr. Peterson's experience in administering SCWA's water contracts and appropriative water rights, including during times of reductions in allocations, supply availability, and implementation of Term 91 conditions. Thus, they are proper lay opinions.

3. SLDMWA further objects that Mr. Peterson's summaries of reports and testimony of third parties, as well as his conclusions based on the same, constitute hearsay and inadmissible lay person opinion because there is no foundation showing Mr. Peterson, has personal knowledge regarding modeling or operations or impacts to SVWU water supplies. (SLDMWA Objections at p. 76: 17-22.) The report and testimony Mr. Peterson has summarized have been offered as exhibits in this proceeding (See Exh. EBMUD-152 and SCWA-50). Experts will testify to their contents during the hearing, and they are used by Mr. Peterson to explain the potential supply impacts to SCWA, as well as impacts to SCWA's conjunctive use program. To the extent Mr. Peterson's testimony on these reports is hearsay, it is otherwise admissible as "state of mind" for his discussion of water supply impacts to SCWA. (See Gov. Code, § 11513(d).) Also, as an expert on SCWA's water supplies and operations, Mr. Peterson may rely on these reports, regardless of their admissibility. (See Evid. Code, § 801(b);

1 see, e.g. *People v. Valdez*, *supra*, 58 Cal.App.4th at p. 509.) In any event, Mr.
2 Peterson's testimony summarizes evidence that is relevant and reliable and should
3 otherwise be admitted. (Gov. Code, § 11513(c).)

4 Further, Mr. Peterson's opinions regarding supply impacts at the FRWP
5 associated with reverse flow events in the Sacramento River and impacts to
6 groundwater resources in the South American Subbasin are proper lay opinions. Where
7 an opinion is based on a witness's perception or experience and otherwise helps explain
8 his testimony, it is permissible lay person opinion. (See *Castillo v. Toll Bros.*, *supra*, 197
9 Cal.App.4th at p. 119.) Mr. Peterson's opinions regarding supply impacts are directly
10 related to his experience on the Executive Committee of the Freeport Regional Water
11 Authority (See Exh. SCWA-1:22-23) and with SCWA's water supply supplies (See Exh.
12 SCWA-1:27-28, 2:1-2), as well as his familiarity with SCWA's water utility, including both
13 surface and groundwater supplies. (See Exh. SCWA-1:25-26). Thus, they are proper
14 lay opinions.

15 V. CONCLUSION

16 For the foregoing reasons, SCWA respectfully requests that SLDMWA's
17 Objections be overruled in their entirety.

18
19 SOMACH SIMMONS & DUNN
A Professional Corporation

20
21 Dated: October 20, 2016

22 By: 
23 Aaron A. Ferguson
24 Attorney for Sacramento County Water
25 Agency
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27
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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):

**RESPONSES TO OBJECTIONS TO SACRAMENTO COUNTY
WATER AGENCY'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: 
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