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16  
17 BEFORE THE  
18 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

19  
20 HEARING IN THE MATTER OF  
21 CALIFORNIA DEPARTMENT OF WATER  
RESOURCES AND UNITED STATES  
22 BUREAU OF RECLAMATION REQUEST  
FOR A CHANGE IN POINT OF DIVERSION  
23 FOR CALIFORNIA WATER FIX

EAST BAY MUNICIPAL UTILITY  
DISTRICT'S RESPONSE TO SAN LUIS  
& DELTA-MENDOTA WATER  
AUTHORITY AND WESTLANDS  
WATER DISTRICT'S OBJECTIONS TO  
EXHIBITS SUBMITTED FOR  
ADMISSION INTO EVIDENCE BY  
GROUP 15 AT THE CLOSE OF ITS  
PART 1B CASE-IN-CHIEF

1 East Bay Municipal Utility District (“EBMUD”) respectfully responds to the objection of  
2 San Luis & Delta-Mendota Water Authority (“SLDMWA”) and Westlands Water District  
3 (“Westlands”) to the admission into evidence of four exhibits submitted by EBMUD as follows:

4 **I. INTRODUCTION**

5 SLDMWA and Westlands’ cursory objection to the admission of EBMUD’s expert  
6 witness summary presentations (identified as EBMUD-100 through EBMUD-102) and  
7 EBMUD’s comments on the Bay Delta Conservation Plan Environmental Impact  
8 Report/Environmental Impact Statement (“BDCP EIR/EIS”) (identified as EBMUD-176) is  
9 without merit and should be overruled because SLDMWA and Westlands fail to identify the  
10 statements upon which their objection is based. The documents at issue are also relevant and  
11 properly admissible.

12 SLDMWA and Westlands object to the four exhibits submitted by EBMUD on the  
13 grounds that the documents include some unidentified statements “that were made other than by  
14 witnesses while testifying during the California WaterFix change petition hearing.” The  
15 objection is limited to the extent these unidentified statements are being offered to prove the  
16 truth of the matter asserted and to the extent that the State Water Resources Control Board  
17 (“SWRCB”) may rely upon these unidentified statements to support its findings, in some fashion  
18 other than to corroborate non-hearsay evidence. The objection is without merit and improper,  
19 because it is entirely unclear as to which statements in these four documents SLDMWA and  
20 Westlands object. For this reason alone, the objection should be overruled.

21 The objection should also be overruled on the grounds that each of the documents is  
22 relevant and, to the extent the documents contain any hearsay statements, those statements are  
23 subject to an exception to the hearsay rule. EBMUD’s three expert witnesses testified that they  
24 each prepared the summaries of their written testimony – which the SWRCB directed them to  
25 submit – and they each provided oral testimony accompanying those summaries. EBMUD’s  
26 comments on the BDCP EIR/EIS were relied upon and identified in the written submissions and  
27 oral testimony of two of EBMUD’s expert witnesses, Dr. Benjamin S. Bray and Xavier Irias.  
28 The information cited by Dr. Bray and Mr. Irias is relevant and they laid a proper foundation for

1 the admission of the document. Accordingly, EBMUD respectfully requests that the SWRCB  
2 overrule SLDMWA and Westlands’ objections and admit the four documents.

3 **II. DISCUSSION**

4 **A. Standard of Review**

5 Adjudicative proceedings conducted by the SWRCB must be in accordance with chapter  
6 4.5 of the Administrative Procedure Act, sections 801-805 of the Evidence Code, and section  
7 11513 of the Government Code. (Cal. Code Regs., tit. 23, §§ 648; 648.5.1.) Such proceedings  
8 “need not be conducted according to technical rules relating to evidence and witnesses.” (Gov.  
9 Code, § 11513, subd. (c).)

10 All relevant evidence is admissible unless otherwise provided by law. (Evid. Code,  
11 § 350.) In administrative proceedings, “[a]ny relevant evidence shall be admitted if it is the sort  
12 of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs  
13 ... .” (Gov. Code, § 11513, subd. (c).) Additionally, “[h]earsay evidence may be used for the  
14 purpose of supplementing or explaining other evidence but over timely objection shall not be  
15 sufficient in itself to support a finding unless it would be admissible over objection in civil  
16 actions.” (Gov. Code, § 11513, subd. (d); *see also* Cal. Code Regs., tit. 23, § 648.5.1 [“Hearsay  
17 evidence is admissible subject to the provisions of Government Code section 11513.”].)  
18 Moreover, as in a civil action, expert witnesses may rely on hearsay evidence or evidence that is  
19 not admissible in establishing their expert opinions.

20 **B. The Expert Testimony Summaries Should Be Admitted**

21 SLDMWA and Westlands’ objections to the summary presentations prepared by  
22 EBMUD’s three expert witnesses, identified as Exhibits EBMUD-100 through EBMUD-102, are  
23 vague and unfounded and should be overruled. EBMUD’s three expert witnesses – Eileen M.  
24 White, Dr. Benjamin S. Bray, and Xavier Irias – each prepared a summary of their written direct  
25 testimony as required by the SWRCB in its January 15, 2016 letter and February 11, 2016 Pre-  
26 Hearing Conference Ruling. SLDMWA and Westlands now object to these three documents on  
27 the grounds they include some unidentified “statements that were made other than by witnesses  
28 while testifying during the California WaterFix change petition hearing, and to the extent that

1 they are being offered to prove the truth of the matters asserted herein.” (Objections to Exhibits  
2 at p. 2:25-27.) Although EBMUD does not dispute SLDMWA and Westlands’ recitation of the  
3 hearsay rule, generally, SLDMWA and Westlands completely disregard exceptions to the  
4 hearsay rule and, most importantly, fail to identify which particular statements in the subject  
5 documents they allege constitute hearsay. For this reason alone, the SWRCB should overrule the  
6 objection.

7 In any event, as expert witnesses, Ms. White, Dr. Bray, and Mr. Irias may properly rely  
8 on hearsay in forming their expert opinions. (Cal. Code Regs., tit. 23, §§ 648; 648.5.1; Evid.  
9 Code, § 801, subd. (b); Gov. Code, § 11513, subd. (d).) Accordingly, any hearsay statements  
10 identified in the summaries as information upon which the experts relied in forming their  
11 opinions is not barred by the hearsay rule. Moreover, each of the experts testified that they  
12 prepared the summary presentations of their written testimony and provided detailed testimony  
13 while presenting these three exhibits to the Hearing Officers. The summary presentations  
14 SLDMWA and Westlands challenge merely summarize and repeat key points in the full written  
15 testimony of the three experts. SLDMWA and Westlands do not object to the full written  
16 testimony of the three expert witnesses, which include the same information, though in more  
17 detail. Accordingly, because any statements included in the summary presentations are not  
18 barred by the hearsay rule and each of the three expert witnesses laid a proper foundation for the  
19 information contained in their summary presentations, the objection should be overruled and the  
20 documents should be admitted.

21 **C. EBMUD’s EIR/EIS Comments Should Be Admitted**

22 SLDMWA and Westlands’ objection to the admission of EBMUD’s comments to the  
23 BDCP EIR/EIS, identified as exhibit EBMUD-176, should also be overruled as vague and  
24 without merit. First, as noted above, SLDMWA and Westlands fail to identify any statements in  
25 the document to which they object. (See Objections to Exhibits at p. 2:25-27.) Because  
26 SLDMWA and Westlands fail to point to any specific statement that they allege to be hearsay,  
27 the objection should be overruled. Second, the objection should also be overruled on the  
28 grounds that the document is relevant and properly identified as a document relied upon by two


1 expert witnesses in forming their expert opinions. In support of his expert opinion, Dr. Bray  
2 referenced EBMUD-176 in discussing EBMUD's analysis of the Department of Water  
3 Resources' DSM2 modeling of the BDCP and EBMUD's DSM2 modeling of BDCP CalSim-II  
4 modeling. (See EBMUD-152 at pp. 19-21.) Mr. Irias cited to EBMUD-176 in support of his  
5 expert opinion in discussing EBMUD's repeated presentations of its concerns over impacts from  
6 the Petitioners' proposed Twin Tunnels on the existing Mokelumne Aqueducts and EBMUD's  
7 planned Delta Tunnel. (See EBMUD-153 at pp. 11-12.) This document is also properly  
8 admitted as a business and public record, previously prepared and submitted by EBMUD to  
9 several state and federal agencies. (See Evid. Code, §§ 1270-71, 1280.) Accordingly,  
10 SLDMWA and Westlands' objection to the admission of EBMUD-176 should be overruled.

11 **III. CONCLUSION**

12 For the reasons outlined above, EBMUD respectfully requests that the SWRCB overrule  
13 SLDMWA and Westlands' objection to the admission of EBMUD-100 through EBMUD-102  
14 and EBMUD-176 and admit these documents into evidence.

15  
16 DATED: November 30, 2016

ELLISON, SCHNEIDER & HARRIS, L.L.P.

17  
18 By:   
19 Robert E. Donlan  
Shawnda M. Grady

20 Attorneys for  
21 EAST BAY MUNICIPAL UTILITIES DISTRICT  
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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):

**EAST BAY MUNICIPAL UTILITY DISTRICT'S RESPONSE TO SAN LUIS & DELTA-MENDOTA WATER AUTHORITY AND WESTLANDS WATER DISTRICT'S OBJECTIONS TO EXHIBITS SUBMITTED FOR ADMISSION INTO EVIDENCE BY GROUP 15 AT THE CLOSE OF ITS PART 1B CASE-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](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml):

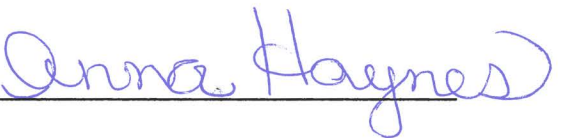
*Note: In the event that any emails to any parties on the Current Service List are undeliverable, you must attempt to effectuate service using another method of service, if necessary, and submit another statement of service that describes any changes to the date and method of service for those parties.*

**For Petitioners Only:**

	I caused a true and correct <b>hard copy</b> 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:  <b>Method of Service:</b> _____
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I certify that the foregoing is true and correct and that this document was executed on **November 30, 2016**.

Date

Signature: 

Name: Anna Haynes

Title: Litigation Secretary

Party/Affiliation: **East Bay Municipal Utility District**

Address: 375 11th St., Oakland, CA 94607