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 9 RECLAMATION DISTRICT 108, et al.

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 11 page*

12 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

13  
 14 In the matter of Hearing re California  
 15 WaterFix Petition for Change

**OBJECTIONS TO ORAL TESTIMONY  
 AND MOTION TO STRIKE**

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1 During the course of cross-examination on February 28, 2017, counsel for the Natural  
2 Resources Defense Council (“NRDC”) presented testifying expert witnesses with documents not  
3 yet accepted into evidence. These experts, who neither authored the documents nor offered  
4 testimony on their contents, were asked to recite selections from the documents, to describe the  
5 findings or positions contained within, or to contemporaneously confirm the contents of those  
6 documents. Protestants orally objected to this line of testimony as inadmissible hearsay and  
7 expert opinions lacking in foundation. Consistent with the Hearing Officer’s direction, the  
8 undersigned Protestants now file this written objection and motion to strike to formally request  
9 that the subject testimony be deemed inadmissible and struck from the record.

### 10 LEGAL STANDARD

11 Evidence in a hearing on a petition for change is admitted in accordance with Government  
12 Code § 11513. (Cal. Code Regs. tit. 23, § 648.5.1.) Pursuant to that standard, technical rules of  
13 evidence do not apply; instead, relevant evidence may be admitted if “it is the sort of evidence on  
14 which responsible persons are accustomed to rely in the conduct of serious affairs.” (Gov. Code  
15 § 11513(c).) Notwithstanding the flexibility of that rule, “[c]ertain basic requirements must be  
16 met to constitute substantial evidence upon which the State Water Board can rely.” (Feb. 21, 2017  
17 Ruling Letter, p. 16.) Hearsay, if both relevant and reliable, may be admitted to supplement or  
18 explain other evidence, but over timely objection is not sufficient in itself to support a finding  
19 unless it would be admissible over objection in civil actions. (Gov. Code § 11513(d).) Expert  
20 opinion testimony, likewise, must be based on the proper foundation and “provide a reasonable  
21 basis for the particular opinion offered.” (*Lockheed Litigation Cases* (2004) 115 Cal.App.4th  
22 558, 564.) To that end, an adjudicative body “may, and upon objection shall, exclude testimony  
23 in the form of an opinion that is based in whole or in significant part on matter that is not a proper  
24 basis for such an opinion.” (Evid. Code, § 803.) Finally, the hearing officer has “discretion to  
25 exclude evidence if its probative value is substantially outweighed by the probability that its  
26 admission would necessitate undue consumption of time.” (Gov. Code, § 11513(f).)

### 27 ARGUMENT

28 During the course of cross-examination, counsel for NRDC presented witnesses with a

1 number of technical documents, none of which have been admitted into evidence in this  
2 proceeding, and asked that those experts confirm what those out-of-court statements meant.  
3 Often, this request amounted to reading the contents of the document directly back to the Hearing  
4 Officers. So, for example:

5 MR. OBEGI: [Referring to NRDC-103] And in 2006, it was a very wet year.  
6 What was the fall midwater trawl abundance index?

7 WITNESS GREENWOOD: I'm not sure which of the—I can't see the header. Are  
8 you asking me to read it off the screen or –

9 MR. OBEGI: Yeah, it's the right-hand column, sorry.

10 WITNESS GREENWOOD: 1,949.

11 (February 28, 2018 Hearing Transcript (“HT”), p. 107:25-108:8.) Hearsay statements such as  
12 these are admissible, if at all, only to explain or supplement other evidence. (*See* Gov. Code §  
13 11513(c); *Buchanan v. Nye* (1964) 128 Cal.App.2d 582, 585 (“[T]he many possible deficiencies,  
14 suppressions, sources of error and untrustworthiness, which lie underneath the bare untested  
15 assertion of a witness, may be best brought to light and exposed by the test of cross-  
16 examination.”).)

17 However, these attorney-prompted recitations of the documents’ contents have no utility  
18 in supplementing or explaining other evidence, and as hearsay statements are unavailable to prove  
19 the truth of the matters asserted in those underlying documents. Cross-examination is not an  
20 opportunity to bolster or explain evidence not currently before the Hearing Officers. This  
21 testimony should be struck from the record because its introduction runs counter to the principles  
22 upon which cross-examination is based. (*See, e.g.*, Law Revision Commission Comment to  
23 Evidence Code §721 (permitting cross-examination on technical treatises not considered by the  
24 expert “would permit the cross-examiner to utilize this opportunity not for its ostensible purpose  
25 – to test the expert's opinion – but to bring before the trier of fact the opinions of absentee authors  
26 without the safeguard of cross-examination.”).) The documents, to the extent that they may be  
27 admitted into evidence at all, speak for themselves. (*See* Notice of Petition, p. 36.)

28 Moreover, while relevant hearsay evidence may be used for the purpose of supplementing  
or explaining other evidence, those statements must still be “relevant and reliable” to be

1 admissible. (Gov. Code § 11513(d); see *Aengst v. Bd. of Medical Quality Assurance* (1980) 110  
 2 Cal.App.3d 275, 283.) Here, the underlying documents were not authored by the witnesses in  
 3 question, nor were the authors of those documents presented for cross-examination. Of particular  
 4 note, the witnesses were not asked to interpret or opine upon the technical analysis contained in  
 5 those documents: rather, they were directed to read directly from particular excerpts, and confirm  
 6 the statements within those documents for the record.

7 WITNESS WILDER: Can you scroll up to the headers again? Okay. Thank you.  
 8 Can you please repeat the question?

9 MR. OBEGI: Does this table in the Biological Opinion conclude that the proposed  
 10 action results in a large amount of mortality of fall-run Chinook salmon from redd  
 dewatering?

11 WITNESS WILDER: I believe the header indicates that it's the proposed action,  
 12 the baseline, and existing conditions. Can you scroll one more time? ...so, yeah,  
 13 that's what it says. It says there's a high magnitude overall effect of the proposed  
 project, baseline, and cumulative effects.

14 (HT 194:4-13; 197:13-16.) The act of reading a document aloud in the course of the Hearing,  
 15 however, does not convert the statements contained in that document into admissible expert  
 16 opinions, nor does it render those statements the kind of relevant and reliable evidence upon  
 17 which the Hearing Officers are entitled to rely.

18 Based on the foregoing, Protestants object to the following testimony as hearsay evidence  
 19 and as inappropriate expert testimony that is lacking in foundation:

Transcript Selection	Grounds
HT 134:10-15; 136:17-24; 143:19-144:4; 144:21-24; 145:14-22; 146:15-19; 156:22-157:4; 157:14-158:5; 158:12-19; 161:12-18; 172:11-173:23; 174:7-16; 183:8-183:13; 193:17-194:13, 194:23-195:10; 195:24-196:5; 197:13-16;	Hearsay, lack of foundation.  This testimony consists entirely of exchanges between Mr. Obegi and the witnesses, confirming the contents of the National Marine Fisheries Service's June 16, 2017 <i>Biological Opinion for the California WaterFix Project</i> (SWRCB-106), a document neither authored by the witness nor admitted into evidence in this action. The language of the document speaks for itself, and these statements are not valid expert opinion testimony.

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	<p><i>See, e.g.,</i> 143:24-144:4</p> <p>MR. OBEGI: ...Does this report conclude that the bypass rules increase the frequency and duration of reverse flows downstream of Georgiana Slough?</p> <p>WITNESS GREENWOOD: I think---I don't recall the specifics, but---actually, I see that conclusion there. So, yes, it makes that conclusion.</p>
<p>HT 105:21-106:4; 107:18-109:2; 113:23-24</p>	<p>Hearsay, lack of foundation.</p> <p>This testimony is the witness's contemporaneous recitation, after prompting by NRDC's counsel, of selections and statistics from the California Department of Fish and Wildlife's <i>Monthly Abundance Indices, Fall Midwater Trawl</i> (NRDC-103). That document was neither authored by the witness nor admitted into evidence in this action. These statements are not available to prove the truth of the matter asserted, and do not supplement or explain other evidence.</p> <p><i>See, e.g.,</i> 106:2-4:</p> <p>WITNESS GREENWOOD: That's my understanding based on the survey indices that are shown on the screen, yes.</p>
<p>HT 109:3-111:8; 211:10-212:5</p>	<p>Hearsay, lack of foundation.</p> <p>This testimony consists entirely of the witness's contemporaneous description of exhibit NRDC-104 (U.S. Fish and Wildlife Service's June 30, 2016 Doubling Goal Graphs) as that document was displayed for the witness in the Hearing. Statements describing this out-of-court document, which the witness neither authored nor prepared, are not available to prove the truth of the matters asserted in that document.</p> <p><i>See, e.g.,</i> 110:19-111:1</p> <p>MR. OBEGI: This is a graph of the winter-run AFRP targets and abundance</p>

	<p>indices. How is the population abundance of winter-run during the 1992 to 2015 period compared to the baseline period?</p> <p>WITNESS GREENWOOD: It's lower.</p> <p>MR. OBEGI: Substantially lower?</p> <p>WITNESS GREENWOOD: Less than half.</p>
<p>HT 107:25-108:8; 108:13-15; 108:20-109:4; 113:22-23</p>	<p>Hearsay, lack of foundation.</p> <p>These selections consist entirely of the witnesses' readings and descriptions of the California Department of Fish and Wildlife's <i>Monthly Abundance Indices, Fall Midwater Trawl</i> (NRDC-103), a document neither authored by the witness nor admitted into evidence in this action.</p>
<p>HT 188:1-189:7; 218:3-13</p>	<p>Hearsay.</p> <p>These selections are questions and answers between counsel and the expert witnesses confirming the contents of NRDC-20 (admitted into evidence as DWR-1095), an out-of-court statement not authored by the witnesses. The document speaks for itself.</p>
<p>HT 189:8-22</p>	<p>Hearsay, lack of foundation.</p> <p>This exchange is cross-examination and witness descriptions of the National Marine Fisheries Service, January 19, 2017 <i>Proposed Amendment to the Reasonable and Prudent Alternative of the 2009 Opinion</i> (NRDC-29), a document neither authored by the witness nor admitted into evidence in this action.</p>
<p>200:20-201:14; 203:18-24</p>	<p>Hearsay, lack of foundation.</p> <p>These selections are exchanges between Mr. Obegi and the witnesses, seeking characterizations of NRDC-40, a 2015 technical paper. The contents of that document speak for itself.</p>
<p>HT 222:19-25; 223:9-16</p>	<p>Hearsay, lack of foundation.</p>



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	This testimony consists entirely of exchanges between Mr. Obegi and the witnesses, confirming the contents of the National Fish & Wildlife Service’s <i>Biological Opinion for the California WaterFix Project</i> (SWRCB-105), a document neither authored by the witness nor admitted into evidence in this action. The language of the document speaks for itself, and these statements are not valid expert opinion testimony.
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**CONCLUSION**

Through cross-examination, NRDC has elicited hearsay testimony from expert witnesses. That testimony is lacking in foundation, and not the sort of evidence upon which “responsible persons are accustomed to rely in the conduct of serious affairs” under Government Code section 11512. On that basis, Protestants respectfully request that the Hearing Officers strike NRDC's objectionable cross-examination questions and the witnesses' responses to them, identified in the selections above.

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DATED: March 23, 2018

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By: For 

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DATED: March 23, 2018

SOMACH, SIMMONS & DUNN, PC

By: /s/Andrew M. Hitchings  
Andrew M. Hitchings  
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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:

**OBJECTIONS TO ORAL TESTIMONY AND MOTION TO STRIKE**

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 March 21, 2018, posted by the State of 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 March 23, 2018.

Signature: 

Name: Catharine Irvine

Title: Legal Secretary

Party/Affiliation: Downey Brand, LLP

Address: 621 Capitol Mall, Sacramento, CA 95814