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7 Attorneys for Protestants
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9 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

11 In the matter of Hearing re California
 12 WaterFix Petition for Change

**SACRAMENTO VALLEY GROUP'S
 RESPONSE TO SLDMWA'S AND
 WESTLANDS' NOVEMBER 16, 2016
 OBJECTIONS TO EXHIBITS
 SUBMITTED FOR ADMISSION INTO
 EVIDENCE BY GROUPS 7 AND 9 AT THE
 CLOSE OF THEIR CASE IN CHIEF**

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 16 San Luis & Delta-Mendota Water Authority ("SLDMWA") and Westlands Water
 17 District's ("Westlands") assert that certain evidence submitted by the Sacramento Valley Group¹
 18 ("SVG") is hearsay, and that therefore the State Water Resources Control Board ("SWRCB")
 19 may not admit or rely upon that evidence in this Hearing. As a preliminary matter, SLDMWA
 20 and Westlands' Objections to Exhibits Submitted for Admission Into Evidence By Groups 7 and
 21 9 at the Close of Their Case In Chief (the "Objection") is lacking in both timeliness and
 22 specificity, and should be overruled on those grounds alone. The Objection is likewise meritless
 23 because the contested exhibit simply is not hearsay. These materials are not out-of-court-
 24 statements, but rather direct testimony incorporated into Mr. Marc Van Camp's written and oral
 25 summaries of testimony, submitted consistent with the Hearing Officer's procedural requirements

26
 27 ¹ The Sacramento Valley Group consists of certain protestants represented by Downey Brand that are identified in the
 28 signature block on the last page of these objections. The Sacramento Valley Group protestants comprise a portion
 and not all of the protestants in the larger Sacramento Valley Water Users ("SVWU").

1 for the presentation of testimony in this Hearing, and then subject to cross examination during the
2 Mr. Van Camp's oral summary of testimony.

3 Even if the contested exhibit could be considered hearsay (which it is not), the relaxed
4 rule for use of hearsay under Government Code section 11513 does not limit the admission or use
5 of the exhibits offered by SVG. Rather, these relevant and reliable materials supplement other
6 direct testimony, and would be admissible over objection in a civil action. Accordingly, SVG
7 respectfully requests that the Hearing Officers overrule the Objection in its entirety.

8 **I. BACKGROUND**

9 The Hearing Notice issued in this proceeding directed that any party "proposing to present
10 testimony on factual or other evidentiary matters" submit that testimony in writing, including
11 sufficient information in support of technical evidence to "clearly identify and explain the logic,
12 assumptions, development, and operation of the studies or models." Notice, Enclosure D, at 33.
13 On the question of injury to legal users of water, the Board directed protestants to include
14 "information describing the basis of the claim of right, the date the use began, the quantity of
15 water used, the purpose of use and the place of use." Notice, at 13. In keeping with the
16 SWRCB's policy of discouraging surprise testimony, parties were directed to provide PowerPoint
17 presentations or other visual aids that witnesses intended to use while summarizing their
18 testimony with their other exhibits, together with a written summary of each witness's direct
19 testimony. January 15, 2016 Ruling Letter Re: Service List of Participants, List of Interested
20 Parties, and Pre-Hearing Conference Agenda, pp. 5-6. The Notice barred parties from reading
21 written testimony directly into the record, instead directing them to use their time on direct
22 examination "to summarize or emphasize their written testimony." Notice, Enclosure D, at 35.
23 The Notice confirmed that "written testimony affirmed by the witness is direct testimony."
24 Notice, Enclosure D, at 35.

25 On September 1, 2016, SVG submitted evidence in support of its case in chief, including
26 the written summary of testimony of Mr. Marc Van Camp of MBK Engineers (SVG-01-001).
27 Consistent with the Board's direction, Mr. Van Camp's written summary of testimony identifies
28 and provides a brief description of the water rights held, claimed, and reflected in documents on

1 file with the SWRCB, by each of the SVG protestants. Exhibit SVG-01-001, 3:23-26. The
2 exhibits submitted with Mr. Van Camp's written summary of testimony further substantiate and
3 quantify those claimed rights and their history of use, and included various water delivery
4 contracts held by SVG water users (SVG-02-28; SVG-03-01; SVG-04-56; SVG-05-13; SVG-06-
5 59; SVG-07-52; SVG-08-17; SVG-09-19; SVG-10-97; SVG-11-31; SVG-12-39; SVG-13-79;
6 SVG-14-23; SVG-15-36; SVG-16-104; SVG-17-15; SVG-18-08; SVG-20-72); monthly water
7 delivery reports prepared by the Bureau of Reclamation (SVG-19-01 through SVG-19-06);
8 Statements of Diversion and Use and Progress Reports by Licensee for the SVG water users; and
9 a 2015 Joint Water Districts Hydrology Report (SVG-20-73, hereinafter the "Joint Districts
10 Report") documenting Sutter Extension Water District's use of its claimed rights.

11 The deadline for the written procedural or evidentiary objections to exclude such
12 testimony was September 21, 2016. Co-Hearing Officer's Ruling on Department of Water
13 Resources' Request for Time, Sept. 9, 2016 ("September 9th Ruling"); *see also* Ruling on
14 Submittal Deadlines, Rebuttal Process, and Scheduling, December 19th, 2016 ("December 19th
15 Ruling") (confirming that further objections seeking exclusion would be rejected "unless they are
16 based on new information that was presented during cross-examination."). Neither Westlands nor
17 SLDMWA objected to any SVG evidence prior to that deadline.

18 At the Hearing on October 20, 2016, Mr. Walter Bourez offered testimony that included a
19 discussion of several technical exhibits previously submitted by the Sacramento Valley Water
20 Users ("SVWU"). Oct. 20, 2016 Hearing Video at 00:42:32 through 2:32:44.² The Department
21 of Water Resources ("DWR") objected, on the grounds that the exhibits were not part of Mr.
22 Bourez's "direct testimony." Oct. 20, 2016 Hearing Video at 00:57:37 through 00:58:59. Counsel
23 for SVWU explained that Mr. Bourez's testimony was not just the written summary of testimony
24 provided as SVWU-100, but also the exhibits prepared by Mr. Bourez and offered by SVWU.
25 Oct. 20, 2016 Hearing Video at 00:58:59 through 00:59:57. Recognizing the interrelated nature
26 of the exhibits and oral testimony in this hearing, Hearing Officer Doduc ruled:

27 _____
28 ² Citations to the hearing video are to the SWRCB's archived videos, available on the Hearing website, and are in the
form [hour]:[minute]:[second]. A written transcript was not available at the time this response was submitted.

1 HEARING OFFICER DODUC: Thank you Mr. Lilly. Mr. Berliner, your
 2 objection is overruled. I actually was going to compliment Mr. Bourez on the fact
 3 that I appreciated his outline testimony a lot. It was clear, it was succinct, and it
 4 did refer back to these other documents that provide the substantive technical
 issues to which he is testifying. So, I recognize Mr. Lilly's argument, and overrule
 Mr. Berliner's objection.

5 Oct. 20, 2016 Hearing video, 00:59:57 through 1:00:24. Neither SLDMWA nor Westlands
 6 objected to the oral testimony offered by Mr. Bourez at the Hearing, and each declined to conduct
 7 any cross-examination regarding those exhibits. Oct. 21, 2016 Hearing video at 00:59:20 through
 8 00:59:37.³

9 In accordance with the Hearing Notice, on October 21, Mr. Van Camp provided an oral
 10 summary of his testimony on behalf of SVG, and was subject to cross-examination. SLDMWA
 11 and Westlands declined to cross-examine Mr. Van Camp. Oct. 21, 2016 Hearing Video at
 12 4:21:38 through 4:22:19. On October 21, 2016, following that oral testimony, SVG offered all of
 13 its exhibits into evidence. On November 16, 2016, SLDMWA and Westlands objected to the
 14 admission of the Joint Districts Report on the grounds that it constituted hearsay evidence, and
 15 that therefore the SWRCB may not admit or rely upon that exhibit in making its findings.

16 **II. ARGUMENT**

17 Each of the Exhibits was submitted by SVG first on September 1 as part of the written
 18 testimony in this hearing, and then, at the direction of the Hearing Officers, summarized and
 19 affirmed during Mr. Van Camp's oral summary of testimony at the Hearing. The Objection,
 20 submitted nearly two months after the deadline to object to the admission of such testimony, is
 21 fatally flawed in that it was not timely and lacks specificity. Substantively, the arguments raised
 22 in the Objection also fail: the Joint Districts Report is not hearsay, and none of the rules
 23 governing the conduct of this Hearing limit the SWRCB's consideration or use of these materials.

24 **A. The Objection Does Not Comply with the Board's Rules and So Should be Rejected.**

25 Objections to the admission of hearsay evidence must be timely and specific. September
 26

27 ³ Certain of the SVWU exhibits are also objected to as hearsay in the Objection and the SVG parties have previously
 28 joined in the response of the SVWU parties.

1 9th Ruling; Gov. Code § 11513(d); *Rodriguez v. McDonnell Douglas Corp.* (1978) 87
2 Cal.App.3d 626, 659–660; *People v. Castaneda* (1975) 52 Cal.App.3d 334, 339. This Objection,
3 filed long after the September 21, 2016 deadline for objections to exclude testimony, and lacking
4 any meaningful discussion of the basis for the objection, does not meet this standard.

5 An objection “must be made in such a way as to alert the trial court to the nature of the
6 anticipated evidence and the basis on which exclusion is sought, and to afford the People an
7 opportunity to establish its admissibility.” *People v. Rivera* (2011) 201 Cal.App.4th 353, 361.
8 SLDMWA and Westlands object to the admission of a long list of exhibits “to the extent
9 each...are offered to prove the truth of the matter stated,” but the Objection does not explain what
10 matters those exhibits are offered as the truth of, beyond listing the title of each document. Obj.
11 2:15. A general evidentiary objection like this one is not sufficient to exclude evidence “without
12 specific identification of the evidence to which the party objects and the reason for that
13 objection.” SWRCB Order WR 2012-0012, p. 11, fn. 28.

14 SLDMWA and Westlands characterize the Objection as a challenge to “non-testimony”
15 evidence that is therefore not subject to the September 21 deadline for motions to “disqualify
16 witnesses or to exclude a witness’s testimony, in whole or in part.” Obj., 1:7-12; *see* September
17 9th Ruling. This is a distinction without a difference. The Objection repackages the same
18 argument against the inclusion of exhibits in testimony that the Hearing Officer rejected on
19 October 20, 2016. As the Hearing Officers recognized then, exhibits submitted in advance of the
20 oral testimony are part of the testimony offered by a party’s witnesses, and are properly included
21 in the witnesses’ oral summary of testimony. The deadline for seeking to exclude this testimony
22 has passed, and SLDMWA and Westlands have not identified any new information that would
23 justify this late Objection. *See* December 19th Ruling.

24 SLDMWA and Westlands, having had ample opportunity to test the admissibility,
25 validity, and credibility of these exhibits, cannot now rely on semantics to evade the deadline set
26 by the Hearing Officers and obtain a second bite at the apple. The Objection, insofar as it seeks
27 to exclude evidence, should be overruled because it is untimely and not specific.

28

1 **B. The Subject Exhibits Are Direct Testimony, Not Hearsay**

2 The Hearing Officers have already considered and rejected a claim that exhibits submitted
3 by parties are not properly considered part of those parties' testimony. See, Oct. 20, 2016
4 Hearing, at 00:57:37 through 1:00:24. It is true that in traditional civil proceedings, "[d]ocuments
5 like letters, reports, and memoranda are often hearsay because they are prepared by a person
6 outside the courtroom and are usually offered to prove the truth of the information they contain."
7 *People v. Sanchez* (2016) 63 Cal.4th 665, 674-675. However, an expert's opinion "is no better
8 than the facts on which it is based" (*People v. Gardeley* (1996) 14 Cal.4th 605, 618), and experts
9 are therefore generally allowed to testify to *all* facts upon which they base their opinions,
10 including the underlying work and observations performed by the expert. See *People v. Bordelon*
11 (2008) 162 Cal.App.4th 1311, 1324-1325. Here, Mr. Van Camp's expert opinion was based upon
12 the other exhibits submitted by SVG, including the Joint Districts Report. SVG-01-001, pp. 11-
13 12.

14 In his oral summary of testimony, Mr. Van Camp offered expert opinions describing the
15 water rights held and claimed by SVG water users. The Joint Districts Report is part of the direct
16 testimony offered by Mr. Van Camp, submitted in accordance with the procedures set out by the
17 Hearing Officers. The Joint Districts Report, together with related exhibits SVG-20-001 through
18 SVG-20-072, substantiates the existence and use of the water rights claimed by Sutter Extension
19 Water District. See SVG-01-001, pp. 11-12. Mr. Van Camp affirmed that Exhibits SVG-02-001
20 through SVG-25-037, including the contested exhibit, contained "true and correct copies of the
21 water rights claimed and held by protestants of the Sacramento Valley Group...and the use of
22 those rights." Oct. 21, 2016 Hearing Video at 4:13:35 through 4:15:03.

23 In this hearing, written testimony affirmed by the witness is direct testimony. Notice,
24 Enclosure D, at 35. The Joint Districts Report, twice affirmed by Mr. Van Camp and
25 incorporated into his written and oral testimony, is as much a part of Mr. Van Camp's direct
26 testimony as the other opinions by him in his written summary of testimony and during his oral
27 summary of testimony and cross-examination at the Hearing on October 21, 2016.

28 It is a fundamental premise of the hearsay rule that neither the rule nor its exceptions "are

1 concerned with the credibility of witnesses who testify directly to the jury.” *People v. Cudjo*
2 (1993) 6 Cal.4th 585, 608. The theory underlying this rule is that “the many possible
3 deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare
4 untested assertion of a witness, may be best brought to light and exposed by the test of cross-
5 examination.” *Buchanan v. Nye* (1964) 128 Cal.App.2d 582, 585. The credibility concerns that
6 drive the hearsay rule are simply not at play here. SLDMWA and Westlands were each offered
7 the opportunity to conduct cross examination with Mr. Van Camp, and each declined to do so.
8 October 21, 2016 Hearing Video at 4:21:38 through 4:22:19. SLDMWA and Westlands’ late
9 assertion that this exhibit is evidence of “a statement made other than by a witness other than
10 while testifying at the hearing” (*see* Obj., 2:8-11) is not supported by the facts or law.

11 **C. Government Code Section 11513 Does Not Limit the Admission or Use of the**
12 **Exhibits**

13 Though SLDMWA and Westlands “object to the admission” of the Joint Districts Report
14 (Obj. 2:15-16), they do not dispute the Report’s relevance or reliability, and offer no legal support
15 for the proposition that it must be excluded. Indeed, no such support exists, because
16 section 11513, subdivision (c), is unambiguous: where evidence is “relevant and such as could be
17 relied on by responsible persons,” there is a “statutory mandate” that it be admitted. *Martin v.*
18 *State Personnel Bd.*, (1972) 26 Cal.App.3d 573, 582.

19 Instead, SLDMWA and Westlands seek to limit the use of the Joint Districts Report under
20 Government Code section 11513(d), arguing that the SWRCB must disregard it because the
21 SWRCB “cannot base a finding upon hearsay unless it corroborates non-hearsay evidence.” Obj.
22 2:4-13. This misstates the rule. Rather than barring the SWRCB from relying on hearsay
23 evidence generally, the Government Code provides that hearsay may be used to supplement or
24 explain other evidence “but is not *sufficient in itself* to support” a finding by the SWRCB in the
25 face of a hearsay objection, unless it would be otherwise admissible in a civil action. Gov. Code,
26 § 11513(d) (emphasis added); *see also* Notice, Enclosure D, p. 36. In other words, the SWRCB is
27 free to rely even upon civilly inadmissible hearsay evidence in making a finding, provided that it
28 also relies on non-hearsay evidence.

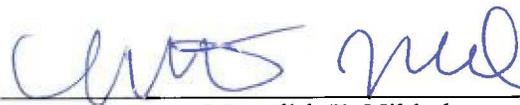
1 Here, the Joint Districts Report would be admissible over objection in a civil action,
2 because as a matter of law, it is not hearsay. Also, the Report is not offered in isolation. Even if
3 it could be considered hearsay (which it is not), Section 11513(d) allows the use of such evidence
4 to “supplement or explain” other evidence. The Joint Districts Report documents the use of
5 Sutter Extension Water District’s claimed water rights, and in that respect explains and
6 supplements Mr. Van Camp’s testimony regarding those rights. Accordingly, the Joint Districts
7 Report may be used together with other direct testimony to support the SWRCB’s findings, even
8 in the face of this Objection.

9 **III. CONCLUSION**

10 For the reasons outlined herein SLDMWA and Westlands’ objection to the Joint Districts
11 Report (Exhibit SVG-20-073) should be overruled in its entirety.

1 DATED: December 28, 2016

DOWNEY BRAND LLP

2
3 By: 

Meredith E. Nikkel

4 Attorney for CARTER MUTUAL WATER
5 COMPANY, EL DORADO IRRIGATION
6 DISTRICT, EL DORADO WATER & POWER
7 AUTHORITY, HOWALD FARMS, INC.,
8 MAXWELL IRRIGATION DISTRICT,
9 NATOMAS CENTRAL MUTUAL WATER
10 COMPANY, MERIDIAN FARMS WATER
11 COMPANY, OJI BROTHERS FARM, INC., OJI
12 FAMILY PARTNERSHIP, PELGER MUTUAL
13 WATER COMPANY, PLEASANT-GROVE
14 VERONA MUTUAL WATER COMPANY,
15 PRINCETON-CODORA-GLENN IRRIGATION
16 DISTRICT, PROVIDENT IRRIGATION
17 DISTRICT, RECLAMATION DISTRICT 108,
18 SACRAMENTO MUNICIPAL UTILITY
19 DISTRICT, HENRY D. RICHTER, ET AL.,
20 RIVER GARDEN FARMS COMPANY, SOUTH
21 SUTTER WATER DISTRICT, SUTTER
22 EXTENSION WATER DISTRICT, SUTTER
23 MUTUAL WATER COMPANY, TISDALE
24 IRRIGATION AND DRAINAGE COMPANY,
25 WINDSWEPT LAND AND LIVESTOCK
26 COMPANY

DOWNEY BRAND LLP

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);

SACRAMENTO VALLEY GROUP'S RESPONSE TO SLDMWA AND WESTLAND'S NOVEMBER 16, 2016 OBJECTIONS TO EXHIBITS SUBMITTED FOR ADMISSION INTO EVIDENCE BY GROUPS 7 AND 9 AT THE CLOSE OF THEIR 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 of 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.

For Petitioners Only:

	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: _____
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I certify that the foregoing is true and correct and that this document was executed on December 29, 2016.

Signature: 

Name: Catharine Irvine

Title: Legal Secretary

Party/Affiliation: Downey Brand, LLP

Address: 621 Capitol Mall, Sacramento, CA 95814