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9 DELTA FLOOD CONTROL GROUP

10 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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

**DELTA FLOOD CONTROL GROUP'S
13 RESPONSE TO OBJECTIONS TO
14 WRITTEN TESTIMONY AND EXHIBITS
15 SUBMITTED**

16 **I. INTRODUCTION**

17 The objections that are raised in the Department of Water Resources' Objections to
18 Testimony and Exhibits Submitted by Brannan-Andrus Levee Maintenance District, Reclamation
19 District No. 407, Reclamation District No. 2067, Reclamation District No. 317, Reclamation
20 District No. 551, Reclamation District No. 563, Reclamation District No. 150, and Reclamation
21 District No. 2098 and Motion to Strike ("DWR Objection") and San Luis Delta Mendota Water
22 Authority's Objections to Part 1B Parties' Cases in Chief ("SLDMWA Objection") are without
23 merit. As the testimony offered by Brannan-Andrus Levee Maintenance District, Reclamation
24 District No. 407, Reclamation District No. 2067, Reclamation District No. 317, Reclamation
25 District No. 551, Reclamation District No. 563, Reclamation District No. 150, and Reclamation
26 District No. 2098 (collectively, "Delta Flood Control Group" or "DFCG") is relevant, reliable,
27 and plainly admissible, the DFCG respectfully requests that the SWRCB overrule the objections
28 in their entirety and deny SLDMWA and DWR's accompanying requests to exclude this
evidence.

1 **II. PROCEDURAL BACKGROUND**

2 Water Code section 1702 requires a petitioner to establish that the change will not operate
3 to the injury of any legal user of the water involved. Consistent with that requirement, Part 1 of
4 this hearing addresses two questions: (1) whether the proposed changes would in effect initiate a
5 new water right, and (2) whether the proposed changes would cause injury to any municipal,
6 industrial or agricultural uses of water, including associated legal users of water. (October 30,
7 2015 Notice of Hearing, p. 11.) SWRCB’s pre-hearing conference ruling clarified that Part 1
8 would include the submission of evidence relating to flood-control issues and environmental
9 justice considerations. (See March 4, 2016 Ruling, at p. 5-6.)

10 On May 31, 2016 Petitioners submitted testimony and evidence in support of their case in
11 chief. On September 1, 2016, the DFCG submitted the expert testimony of Mr. Gilbert Cosio, of
12 MBK Engineers, in support of their protest. DWR and SLDMWA objected to Mr. Cosio’s
13 testimony, on the ground that it lacked foundation, and on the ground that certain exhibits
14 attached to that testimony were not relevant to this proceeding. For the reasons outlined below,
15 these objections are without merit, and should be overruled.

16 **III. ARGUMENT**

17 Evidence in a hearing on a petition for change is admitted in accordance with Government
18 Code § 11513. (Cal. Code Regs. tit. 23, § 648.5.1.) Under Government Code section 11513(c),
19 relevant evidence must be admitted if “it is the sort of evidence on which responsible persons are
20 accustomed to rely in the conduct of serious affairs, regardless of the existence of any common
21 law or statutory rule which might make improper the admission of the evidence over objection in
22 civil actions.” (Gov. Code § 11513(c).) Even so, “[t]he State Water Board’s hearing officers
23 generally prefer to admit evidence that would be admissible under the State Water Board’s
24 regulations, using the more liberal standards applicable to administrative proceedings.” (Ruling
25 on Joint Objections to Truckee-Carson Irrigation District’s Exhibits in the Truckee River Hearing
26 (Aug. 11, 2010, p. 1).)

1 **A. Testimony on Impacts to Levees Is Relevant to Part 1B**

2 Evidence that is relevant and reliable is admissible in an administrative hearing. (*Aengst*
3 *v. Bd. of Medical Quality Assurance* (1980) 110 Cal.App.3d 275, 283.) SLDMWA objects to Mr.
4 Cosio's statements regarding construction impacts on levees on the ground that this testimony is
5 irrelevant to the current issue of the change petition's potential effects on legal users of water.
6 The SWRCB's October 7 Ruling addressed this issue directly, stating it "will permit all testimony
7 concerning construction-related impacts to be presented in Part 1B, provided that it does not
8 concern potential impacts to fish, wildlife, recreation, or other public trust resources." (Oct. 7
9 Ruling, p. 2.) Mr. Cosio's testimony addresses the ways in which DFCG agencies' water
10 supplies and flood control in the Delta may be impacted by WaterFix construction, and how
11 impacts like seepage or changing water levels could jeopardize the ability of legal users of water
12 to put their water rights to use. (See DFCG-1, at ¶¶ 50-52 64-67.) To illustrate these issues, Mr.
13 Cosio provides images of existing levee cracks and damage similar to what he anticipates will
14 occur as a result of WaterFix construction. (DFCG-8, DFCG-9, DFCG-10.) This testimony and
15 the associated exhibits are relevant to Part 1 issues as identified by the SWRCB.

16 **B. Mr. Cosio's Testimony is Properly Founded on His Experience and Skills.**

17 DWR contends that Mr. Cosio's testimony lacks foundation, and characterizes that
18 testimony as lacking in supporting evidence other than Mr. Cosio's own personal experience.
19 DWR has mischaracterized the nature of this testimony, and disregards the ample foundation that
20 Mr. Cosio provides for his observations, including his civil engineering degree, many years of
21 specialized experience and training in the precise topics and geographic areas upon which he now
22 testifies, and his expert review of WaterFix technical documents and the testimony of DWR
23 witnesses. (DFCG-1, ¶¶ 1-4.)

24 Evidence Code sections 801 and following govern the admissibility of expert testimony in
25 civil actions. Under Evidence Code section 801, the opinion testimony of an expert may be based
26 on matter personally perceived by or known to the expert or any matter "made known" to the
27 expert, provided such matter is "of a type that reasonably may be relied upon by an expert in
28 forming an opinion upon the subject to which his testimony relates." (Evid.Code, § 801(b);

1 *People v. Bui* (2001) 86 Cal.App.4th 1187, 1196.) This rule ensures that an expert “whether
2 basing testimony upon professional studies or personal experience, employs in the courtroom the
3 same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”
4 (*Sargon Enterprises, Inc. v. University of Southern California*, (2012) 55 Cal. 4th 747, 772.) The
5 “matter” forming the basis of an expert’s opinion may include facts, data and intangibles such as
6 the expert’s knowledge and experience. (*People v. Parnell* (1993) 16 Cal.App.4th 862, 868-869.)

7 An adjudicative body “may, and upon objection shall, exclude testimony in the form of an
8 opinion that is based in whole or in significant part on matter that is not a proper basis for such an
9 opinion.” (Evid. Code, § 803.) When it considers whether the requirements of section 801 have
10 been met, the SWRCB “must not weigh an opinion’s probative value or substitute its own opinion
11 for the expert’s opinion. Rather, the court must simply determine whether the matter relied on can
12 provide a reasonable basis for the opinion or whether that opinion is based on a leap of logic or
13 conjecture. ...it conducts a “circumscribed inquiry” to determine “whether the matter relied on
14 can provide a reasonable basis for the opinion or whether that opinion is based on a leap of logic
15 or conjecture.” (*Sargon Enterprises, Inc. v. University of Southern California*, (2012) 55 Cal. 4th
16 747, 772.) There is no leap of logic here: Mr. Cosio’s extensive experience in matters such as
17 these leads him to the reasonable conclusions that he has offered.

18 The California Supreme Court explained the leeway given to experts on this issue:
19 “[b]ecause the jury must independently evaluate the probative value of an expert’s testimony,
20 Evidence Code section 802 properly allows an expert to relate generally the kind and source of
21 the “matter” upon which his opinion rests. A jury may repose greater confidence in an expert who
22 relies upon well-established scientific principles. It may accord less weight to the views of an
23 expert who relies on a single article from an obscure journal or on a lone experiment whose
24 results cannot be replicated.” (*People v. Sanchez*, (2016) 63 Cal.4th 665, 685-686.)

25 DWR characterizes Mr. Cosio’s testimony as lacking in foundation because portions of
26 that testimony rely on Mr. Cosio’s personal experience. Reliance on personal experience,
27 however, does not render expert testimony inadmissible. Indeed, experience is often precisely
28 what makes an expert qualified to testify. Accordingly, an expert may “rely upon experiences

1 and conversations he or she has had and information he or she has obtained without the necessity
2 of providing the specifics of such experiences and conversations.” (*Howard Entertainment v.*
3 *Kudrow* (2012) 208 Cal.App.4th 1102, 1117.) In this case, Mr. Cosio’s observations are
4 informed by his training as a civil engineer, his specialization in the area of levee rehabilitation
5 and maintenance, and 32 years of experience providing flood control and water resource planning
6 to Central Valley and Delta entities, including more than 30 reclamation districts. (DFCG-1, ¶¶
7 1-2.)

8 **C. DWR’s Overbroad Objections to Mr. Cosio’s Testimony Are Without Merit**

9 DWR also identifies a string of paragraphs of Mr. Cosio’s testimony to which it objects on
10 the basis of lack of foundation, but does not state the specific information missing from the
11 testimony to justify the objection. (See DWR Obj., p. 3:16-19 (“Other paragraphs in Mr. Cosio’s
12 testimony containing similar unsupported opinion testimony include, but are not limited to,
13 paragraphs 16, 27, 28, 29, 30, 31, 34, 36, 38, 41, 44, 45-47, 50, 51, 52, and 55.”).) As discussed
14 above, Mr. Cosio’s testimony is based on his expertise and experience with Delta levees.
15 Additionally, DWR’s objections are deficient because they are overly broad and vague. An
16 objection must be specific enough for the factfinder to determine what is lacking and for the party
17 offering the evidence to recognize and attempt to correct the claimed defect. (*See Parlier Fruit*
18 *Co. v. Fireman’s Fund ins. Co.* (1957) 151 Cal.App.2d 6, 15 (holding that an objection on the
19 grounds of insufficient foundation must include a statement of what is missing from the
20 foundation).) DWR makes no attempt to identify what specific foundation is missing or how the
21 SWRCB should exclude other paragraphs that are not even identified.

22 Finally, DWR references and appears to rely on its Master Objections as part of the
23 objection to Mr. Cosio’s testimony. (DWR Obj., 2:1.) As the SWRCB has previously ruled,
24 “[w]e do not consider such a general evidentiary objection sufficient to exclude proffered
25 evidence without specific identification of the evidence to which the party objects and the reason
26 for that objection.” (SWRCB Order WO 2012-0012, p. 11, fn. 28). For the reasons stated in the
27 Sacramento Valley Water Users’ Response to Department of Water Resources’ Master
28 Objections filed on September 29, 2016, which are incorporated herein by reference, the Master

1 Objection should be overruled in its entirety, including as referenced in the DWR Objection.

2 **IV. SPECIFIC RESPONSES**

3 The DFCG offer the following responses to the specific portions of testimony that
 4 SLDMWA and DWR have objected to:

<p>6 <u>Testimony Objected to:</u> “To mitigate against seepage damage...building construction vibration.” (DFCG-1, p.11, ¶35.)</p> <p>8 <u>DWR Objection:</u> Lacks foundation, based on conjecture.</p>	<p><u>DFCG’s Response to Objection:</u> Mr. Cosio has established his broad experience as an expert, and personal experience is a matter upon which experts may rely in forming their opinions. Moreover, an expert is entitled to opine on hypotheticals in making his opinion.</p>
<p>11 <u>Testimony Objected to:</u> “The construction of the Water Fix project will create encroachments... and levee failure.” (DFCG-1, p. 12, ¶37)</p> <p>14 <u>DWR Objection:</u> Conjecture, lacks foundation.</p>	<p><u>DFCG’s Response to Objection:</u> Mr. Cosio has established his broad experience as an expert, and personal experience is a matter upon which experts may rely in forming their opinions. Moreover, an expert is entitled to opine on hypotheticals in making his opinion.</p>
<p>16 <u>Testimony Objected to:</u> “Based on my professional experience...analyzed by the Water Fix project. (DFCG-1, p. 13, ¶40)</p> <p>19 <u>DWR Objection:</u> Conjecture, lacks foundation</p>	<p><u>DFCG’s Response to Objection:</u> Mr. Cosio has established his broad experience as an expert, and personal experience is a matter upon which experts may rely in forming their opinions. Moreover, an expert is entitled to opine on hypotheticals in making his opinion.</p>
<p>21 <u>Testimony Objected to:</u> “Water Fix proposes to drop subsurface water levels...residential water wells.” (DFCG-1, p. 18, ¶64)</p> <p>24 <u>DWR Objection:</u> Conjecture, lacks foundation.</p>	<p><u>DFCG’s Response to Objection:</u> Mr. Cosio has established his broad experience as an expert, and personal experience is a matter upon which experts may rely in forming their opinions. Moreover, an expert is entitled to opine on hypotheticals in making his opinion.</p>

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<p><u>Testimony Objected to:</u> DFCG-1, ¶¶ 16, 27, 28, 29, 30, 31, 34, 36, 38, 41, 44, 45-47, 50, 51, 52, and 55.</p> <p><u>DWR Objection:</u> Conjecture, lacks foundation.</p>	<p><u>DFCG’s Response to Objection:</u> This objection is inappropriately broad, <i>See</i> SWRCB Order WO 2012-0012, p. 11, fn. 28. Mr. Cosio has established his ample experience as an expert, and personal experience is a matter upon which experts may rely in forming their opinions.</p>
<p><u>Testimony Objected to:</u> DFCG-8, DFCG-9, DFCG-10</p> <p><u>DWR Objection:</u> Relevancy.</p>	<p><u>DFCG’s Response to Objection:</u> The Board’s October 7 ruling clarifies that testimony related to construction impacts on human uses of water is relevant and therefore admissible in Part 1B. These exhibits illustrate the precise type of impacts that Mr. Cosio anticipates as a result of WaterFix construction.</p>
<p><u>Testimony Objected to:</u> “Recently, two DWR flood protection programs... are proposed to be constructed.” (DFCG-1, at p. 7:12-22)</p> <p><u>SLDMWA Objection:</u> Lacks foundation.</p>	<p><u>DFCG’s Response to Objection:</u> Mr. Cosio has established his familiarity with the geography and levees in this area, and has identified the DWR report upon which he based his conclusion. These materials are the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, and Mr. Cosio is entitled to offer an opinion based upon them.</p>
<p><u>Testimony Objected to:</u> “In my experience in the Delta...state and federal agencies.” (DFCG-1, at p. 8:10-13.)</p> <p><u>SLDMWA Objection:</u> Lacks foundation.</p>	<p><u>DFCG’s Response to Objection:</u> Mr. Cosio has established his broad experience as an expert, his familiarity with the Delta, and his qualifications as a civil engineer. This is adequate foundation to opine on WaterFix’s design as it pertains to Delta levee and flood control issues.</p>

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<p><u>Testimony Objected to:</u> “Several years ago a subdivision...substantially increases the likelihood of levee failure.” (DFCG-1, at p.8, and similar testimony at DFCG-1, at pp. 10:2-4, 11:13-15.)</p> <p><u>SLDMWA Objection:</u> Irrelevant, lacks foundation.</p>	<p><u>DFCG’s Response to Objection:</u></p> <p>Mr. Cosio has established his broad experience as an expert, his familiarity with the Delta, and his qualifications as a civil engineer. This is adequate foundation to opine on potential impacts associated with WaterFix’s construction it pertains to Delta levee and flood control issues.</p> <p>The Board’s October 7 ruling clarifies that testimony related to construction impacts on human uses of water is relevant and therefore admissible in Part 1B.</p>
<p><u>Testimony Objected to:</u> “Following are local levee conditions...could not be predicted.” (DFCG-1, at p. 9.)</p> <p><u>SLDMWA Objection:</u> Irrelevant and lacks foundation.</p>	<p><u>DFCG’s Response to Objection:</u></p> <p>Mr. Cosio has established his broad experience as an expert, his familiarity with the Delta, and his qualifications as a civil engineer. This is adequate foundation to opine on historic seepage issues in the Delta.</p> <p>The Board’s October 7 ruling clarifies that testimony related to construction impacts on human uses of water and financial impacts are relevant and therefore admissible in Part 1B.</p>

V. CONCLUSION

For the reasons outlined herein, and summarized above, the objections filed by SLDMWA and DWR should be overruled in their entirety.

1 DATED: October 19, 2016

DOWNEY BRAND LLP

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3 By: _____



4 DAVID R.E. ALADJEM
5 Attorney for Protestants
6 DELTA FLOOD CONTROL GROUP
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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);

**DELTA FLOOD CONTROL GROUP'S RESPONSE TO OBJECTIONS TO
WRITTEN TESTIMONY AND EXHIBITS**

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 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 October 19, 2016.

Signature: 

Name: Catharine Irvine

Title: Legal Secretary

Party/Affiliation: Downey Brand, LLP

Address: 621 Capitol Mall, Sacramento, CA 95814