

1 DOWNEY BRAND LLP
2 STEVEN P. SAXTON (Bar No. 116943)
3 J. MARK ATLAS (Bar No. 65086)
4 MEREDITH E. NIKKEL (Bar No. 254818)
5 621 Capitol Mall, 18th Floor
6 Sacramento, CA 95814-4731
7 Telephone: 916.444.1000
8 Facsimile: 916.444.2100
9 ssaxton@downeybrand.com
10 matlas@downeybrand.com
11 mnikkel@downeybrand.com

12 Attorneys for Protestants
13 TEHAMA-COLUSA CANAL AUTHORITY

14 J. MARK ATLAS (Bar No. 65086)
15 Attorney at Law
16 332 West Sycamore Street
17 Willows, CA 95988
18 Telephone: 530.934.5416
19 Facsimile: 530.934.3508
20 jma@jmatlaslaw.com

21 Attorney for Protestants
22 TEHAMA-COLUSA CANAL AUTHORITY, GLEN
23 VALLEY WATER DISTRICT, MYERS-MARSH
24 MUTUAL WATER COMPANY

25 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

26 In the matter of Hearing re California
27 WaterFix Petition for Change

28 **TEHAMA-COLUSA CANAL
AUTHORITY'S RESPONSE TO
OBJECTIONS TO WRITTEN
TESTIMONY AND EXHIBITS, AND
JOINDER IN SACRAMENTO VALLEY
WATER USERS' RESPONSE TO
OBJECTIONS TO WRITTEN
TESTIMONY AND EXHIBITS**

29 **I. INTRODUCTION**

30 The objections to the testimony offered by Tehama-Colusa Canal Authority ("TCCA")
31 that are raised in the Department of Water Resources' Objections to Tehama-Colusa Canal
32 Authority Written Testimony and Exhibits Submitted by Protestants in Support of Part 1B Case in
33 Chief and Related Joinders ("DWR Objection") and San-Luis & Delta Mendota Water

1 Authority's Objections to Part 1B Parties' Cases in Chief ("SLDMWA Objection") are without
2 merit. As the testimony offered by TCCA is relevant, reliable, and plainly admissible, TCCA and
3 the water service contractors within its service area respectfully request that the SWRCB overrule
4 the objections in their entirety and deny SLDMWA and DWR's accompanying requests to
5 exclude this evidence.

6 **II. PROCEDURAL BACKGROUND**

7 Water Code section 1702 requires that when a petition for change is filed, the petitioner
8 must establish that the change will not operate to the injury of any legal user of the water
9 involved. Consistent with that requirement, Part 1 of this hearing addresses two questions: (1)
10 whether the proposed changes would in effect initiate a new water right, and (2) whether the
11 proposed changes would cause injury to any municipal, industrial or agricultural uses of water,
12 including associated legal users of water. (October 30, 2015 Notice of Hearing, p. 11.)

13 On September 1, 2016, TCCA submitted the testimony and exhibits of Jeff Sutton, the
14 General Manager of TCCA. Mr. Sutton's testimony focuses on potential impacts in the TCCA
15 service area, and addresses the unique water rights claimed by the TCCA member entities.
16 SLDMWA and DWR object to certain portions of this testimony as improper legal opinion and as
17 lacking in foundation. For the reasons outlined below, these objections are without merit, and
18 should be overruled.

19 **III. ARGUMENT**

20 Evidence in a hearing on a petition for change is admitted in accordance with Government
21 Code § 11513. (Cal. Code Regs. tit. 23, § 648.5.1.) Under Government Code section 11513(c),
22 relevant evidence must be admitted if "it is the sort of evidence on which responsible persons are
23 accustomed to rely in the conduct of serious affairs, regardless of the existence of any common
24 law or statutory rule which might make improper the admission of the evidence over objection in
25 civil actions." (Gov. Code § 11513(c).) The Board has recognized that this standard is generally
26 more permissive than the one imposed in civil actions, observing that "hearing officers generally
27 prefer to admit evidence that would be admissible under the State Water Board's regulations,
28 using the more liberal standards applicable to administrative proceedings." (Ruling on Joint

1 Objections to Truckee-Carson Irrigation District’s Exhibits in the Truckee River Hearing (Aug.
 2 11, 2010, p. 1.) Consistent with this principle, evidence that is “relevant and reliable” is
 3 admissible in administrative hearings. (*Aengst v. Bd. of Medical Quality Assurance* (1980) 110
 4 Cal.App.3d 275, 283.) Mr. Sutton’s testimony is both relevant and reliable, and moreover meets
 5 the standard for admission in any civil action. Accordingly, TCCA respectfully requests that the
 6 Board overrule the objections in their entirety.

7 **A. DWR’s general objections to Mr. Sutton’s testimony on relevance and**
 8 **foundation grounds are baseless.**

9 An adjudicative body “may, and upon objection shall, exclude testimony in the form of an
 10 opinion that is based in whole or in significant part on matter that is not a proper basis for such an
 11 opinion.” (Evid. Code, § 803.) In particular, opinion testimony must be based on the proper
 12 foundation and “provide a reasonable basis for the particular opinion offered.” (*Lockheed*
 13 *Litigation Cases* (2004) 115 Cal.App.4th 558, 564.) If a witness is not testifying as an expert, his
 14 testimony in the form of an opinion is limited to such an opinion as is permitted by law, including
 15 but not limited to an opinion that is: (a) rationally based on the perception of the witness; and (b)
 16 helpful to a clear understanding of his testimony. (Evid. Code, § 800.) Mr. Sutton’s testimony
 17 meets this standard.

18 DWR argues that Mr. Sutton’s testimony lacks foundation and is irrelevant because, for
 19 example, that testimony “fails to show how such a plan or analysis of the COA would be useful in
 20 developing an analysis of the Petitioned Project and potential to injure other legal users of water.”
 21 (DWR Obj., 2:1-4.) Elsewhere, DWR objects on the same grounds to testimony related to Mr.
 22 Sutton’s experience with contract water deliveries under the Central Valley Project’s current
 23 operations, and his analysis of how those operations might change in the future. (DWR Obj., 2:5-
 24 16.) Mr. Sutton has established his ample qualifications to make these observations: he is a
 25 lawyer with experience in business, real property and water law, and has working knowledge of
 26 farming operations in the TCCA service area. (TCCA-1, 2:27-3:11.) Mr. Sutton has served for
 27 nearly 10 years as the general manager of TCCA, an entity formed specifically to secure a reliable
 28 water supply for its member agencies (each of whom receive CVP water) and to exercise its

1 member entities' rights to water originating in the Sacramento Valley. (TCCA-1, 2:27-28, 3:13-
 2 21) In view of that experience, Mr. Sutton is well qualified to interpret the operations scenarios
 3 provided by Walter Bourez and Dan Easton of MBK engineers, and to offer testimony regarding
 4 the potential harm to TCCA that might result under the modeled results. (TCCA-1, 6:15-17, 7:4-
 5 5.)

6 DWR's relevance objections are likewise without merit. The operational scenarios
 7 identified by Mr. Bourez, and incorporated by reference into Mr. Sutton's testimony, show likely
 8 decreases in deliveries to water service contractors in the TCCA service area in all year types
 9 (SVWU-107, Table 6). Mr. Sutton's description of supply reductions due to implementation of
 10 the proposed project, including implementation of Delta flow requirements, is directly tied to
 11 adverse impacts on water service contractors within TCCA's service area. Mr. Sutton is well-
 12 acquainted with CVP operations, particularly in the TCCA service area, and therefore well
 13 qualified to offer his observations about the likely impact of those changes on TCCA member
 14 agencies. This testimony is relevant, reliable, and directly responsive to the Part 1 hearing issue
 15 of whether the proposed changes would cause injury to legal water users.

16 **B. Mr. Sutton's testimony regarding injury to area of origin users and**
 17 **Petitioner's showing regarding injury is admissible lay witness testimony.**

18 SLDMWA objects to Mr. Sutton's statement that the Petition "does not demonstrate that
 19 the proposed changes would not adversely affect any legal users of water..." on the ground that
 20 this testimony is an impermissible legal conclusion regarding whether the Petitioners have met
 21 their burden in this proceeding. (SLDMWA Obj., 84:23-25.) SLDMWA also objects to Mr.
 22 Sutton's characterization of potential injuries to TCCA water users as a result of increased
 23 deliveries outside the area of origin, on the ground that these statements amount to a legal
 24 conclusion about area of origin law. (SLDMWA Obj., 83:37-84:5.) Both statements are well
 25 within the scope of admissible witness testimony.

26 Mr. Sutton is entitled to offer opinions that are rationally based on his own perceptions
 27 and observations; and helpful to a clear understanding of his testimony. (Evid. Code, § 801.) As
 28 discussed above, Mr. Sutton has established his ample qualifications to make the observations

1 that he offers based on his experience as the General Manager of TCCA and a lawyer practicing
2 in water law. TCCA was formed in part to exercise the member entities' rights to water
3 originating in the Sacramento Valley; Mr. Sutton is responsible for these operations. (TCCA-
4 101, 3:18-21.)

5 "Testimony in the form of an opinion that is otherwise admissible is not objectionable
6 because it embraces the ultimate issue to be decided by the trier of fact." (Evid. Code, § 805;
7 *Wells Truckways v. Cebrian* (1954) 122 Cal.App.2d 666.) The fact that a witness has referenced
8 a legal agreement or theory in his testimony does not automatically render that testimony
9 inadmissible. Instead, "[a] distinction must be made between testimony that is "helpful to a clear
10 understanding of [the witness's] testimony," (Evid. Code, § 800), and that which does no more
11 than make conclusory statements as to what the law is." (Procedural Ruling on Motions filed in
12 the matter the Administrative Civil Liability Complaint against Byron-Bethany Irrigation District
13 and Draft Cease and Desist Order against West Side Irrigation District, March 18, 2016 p. 4
14 ("BBID Ruling").) Thus, a witness or expert witness may describe his understanding of the legal
15 framework governing his work or area of expertise without disturbing the general rule against
16 legal conclusions. (See *id.* ("Staff's understanding of the legal framework is relevant to explain
17 decisions by staff in the methodology and inputs for its analysis of water availability, and is also
18 relevant to other issues in the proceedings.")) The SWRCB has the expertise and ability to
19 distinguish and disregard unhelpful testimony, and to make its own conclusions about the legal
20 import of the facts before it.

21 Mr. Sutton's work as the General Manager of TCCA requires regular work in the
22 implementation of its member agencies' water rights, including in managing Central Valley
23 Project water allocations to the water service contractors in TCCA's service area and in
24 advocating for the agencies during the several years of litigation over those agencies' area of
25 origin rights. (See, generally *Tehama-Colusa Canal Authority v. U.S. Dept. of the Interior, et al.*
26 (E.D. Cal, 2011) 819 F.Supp.2d 956.) As a result of this extensive experience, Mr. Sutton is
27 uniquely qualified to offer his observations on the operation of the CVP, on the member agencies'
28 water rights, and on the potential for change in TCCA's operations as a result of changing CVP

1 operations. Mr. Sutton’s understanding of the legal framework in which his agency operates is
 2 relevant and helpful in understanding his testimony on the Part 1 issues before the hearing
 3 officers. Accordingly, this testimony should be admitted.

4 Finally, DWR references its Master Objections and appears to rely on that pleading as part
 5 of the objection to Mr. Sutton’s testimony. (DWR Obj., 2:18-19.) As the SWRCB has
 6 previously ruled, “[w]e do not consider such a general evidentiary objection sufficient to exclude
 7 proffered evidence without specific identification of the evidence to which the party objects and
 8 the reason for that objection.” (SWRCB Order WO 2012-0012, p. 11, fn. 28). For the reasons
 9 stated in the Sacramento Valley Water Users’ Response to Department of Water Resources’
 10 Master Objections filed on September 29, 2016, the Master Objection should be overruled in its
 11 entirety, including as referenced in the Objection

12 **C. TCCA Joins in SVWU’s Response to Objections.**

13 TCCA hereby joins and incorporates in full by reference the Sacramento Valley Water
 14 Users’ Response to Objections to Written Testimony and Exhibits, filed on October 19, 2016.

15 **IV. SPECIFIC RESPONSES**

16 TCCA offers the following responses to the specific portions of testimony that SLDMWA
 17 and DWR have objected to:

<p>18 <u>Testimony Objected to:</u> “The Petition 19 does not demonstrate...Coordinated Operations Agreement.” 20 (Sutton Testimony, TCCA-1 at 6:17- 21 22.) <u>SLDMWA Objection:</u> 22 Legal conclusion, lack of foundation</p>	<p><u>TCCA Response:</u> This is not legal opinion. Mr. Sutton’s testimony only speaks to the matters that he has experienced---this is sufficient foundation to state such observations.</p>
<p>23 <u>Testimony Objected to:</u> “[t]o the 24 extent...within TCCA’s service area. (See <i>State Water Resources Control</i> 25 <i>Bd. Cases</i> (2006) 136 Cal.App.4th 674, 26 758,)” 27 (Sutton Testimony, TCCA-1 at 7:19- 28 23.)</p>	<p><u>TCCA Response:</u> As the General Manager of TCCA, Mr. Sutton’s understanding of the general effect of TCCA’s water rights is based on his personal experience and knowledge, not improper legal opinion. This understanding is used to explain and provide a clear understanding of Mr. Sutton’s testimony.</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<p><u>SLDMWA Objection:</u> Legal conclusion.</p>	
<p><u>Testimony Objected to:</u> “if DWR and Reclamation were to operate the SWP and the CVP to divert and re-divert water at the proposed new points of diversion.” (Sutton Testimony, TCCA-1 at 7:24-8:14.)</p> <p><u>SLDMWA Objection:</u> Foundation, speculative, irrelevant.</p>	<p><u>TCCA Response:</u> Mr. Sutton’s testimony regarding potential impacts to water service contractors is not speculative. Earlier in his testimony, Mr. Sutton lays foundation for his testimony by incorporating the operations scenario provided by Walter Bourez of MBK Engineers. That scenario shows likely decreases in deliveries to water service contractors in the TCCA service area in all year types. (SVWU-107, Table 6.) Under those modeled results, Mr. Sutton’s testimony describes multiple ways in which TCCA could be adversely affected by WaterFix.</p> <p>Moreover, the testimony describes how supply reductions due to Delta flow requirements will be exacerbated by the proposed changes in points of diversion. It is relevant because regulatory requirements that will affect Reclamation’s ability to deliver water to contractors.</p>
<p><u>Testimony Objected to:</u> Sutton Testimony, p. 6, stating that the petition does not demonstrate that the changes would not adversely affect the TCCA service area because DWR and Reclamation did not describe an operation plan or provide an analysis of the Coordinated Operations Agreement (COA). (Sutton Testimony, TCCA-1, p. 6)</p> <p><u>DWR Objection:</u> Irrelevant, lack of foundation.</p>	<p><u>TCCA Response:</u> Mr. Sutton’s testimony directly addresses this point, noting that changes to the CVP operations could result in changes to water deliveries to the water service contractors within TCCA’s service area, and therefore risk injury to those water right holders.</p> <p>DWR does not further elaborate as to why Mr. Sutton lacks foundation to make these statements. As explained elsewhere in this response, Mr. Sutton has demonstrated his ample foundation to testify regarding TCCA and CVP operations.</p>
<p><u>Testimony Objected to:</u> Sutton testimony “hypothesizing how DWR and Reclamation might operate the SWP and CVP” (Sutton Testimony, TCCA-1, pp. 7-8)</p>	<p><u>TCCA Response:</u> Mr. Sutton’s experience with CVP operations in his role as General Manager, and the operations scenario provided by Mr. Bourez, incorporated by reference into Mr. Sutton’s testimony, provide ample foundation. Moreover, each of the water service</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<p><u>DWR Objection:</u> Irrelevant, lack of foundation.</p>	<p>contractors within TCCA's service area is a legal user of water. Potential changes to TCCA water deliveries are directly relevant to the question before the SWRCB in Part 1 of this hearing.</p>
---	--

V. CONCLUSION

For the reasons outlined herein, and summarized above, DWR's and SLDMWA's objections to the testimony and exhibits presented by TCCA should be overruled in their entirety.

DATED: October 19, 2016

DOWNEY BRAND LLP

By: 

MEREDITH E. NIKKEL
Attorney for Protestants
TEHAMA-COLUSA CANAL AUTHORITY

DATED: October 19, 2016

J. MARK ATLAS

By: 

J. MARK ATLAS
Attorney for Protestants
TEHAMA-COLUSA CANAL AUTHORITY,
GLENN VALLEY WATER DISTRICT,
MYERS-MARSH MUTUAL WATER
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);

TEHAMA-COLUSA CANAL AUTHORITY'S RESPONSE TO OBJECTIONS TO WRITTEN TESTIMONY AND EXHIBITS, AND JOINDER IN SACRAMENTO VALLEY WATER USERS' 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: _____
--	--

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