

1 ALAN B. LILLY (State Bar No. 107409)
2 RYAN S. BEZERRA (State Bar No. 178048)
3 JENNIFER T. BUCKMAN (State Bar No. 179143)
4 ANDREW J. RAMOS (State Bar No. 267313)
5 BARTKIEWICZ, KRONICK & SHANAHAN
6 A Professional Corporation
7 1011 22nd Street
8 Sacramento, CA 95816
9 Telephone: (916) 446-4254
10 Facsimile: (916) 446-4018
11 abl@bkslawfirm.com
12 rsb@bkslawfirm.com
13 jtb@bkslawfirm.com
14 ajr@bkslawfirm.com

15 Attorneys for Protestants Cities of Folsom and
16 Roseville, Sacramento Suburban Water District, and
17 San Juan Water District

18 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

19 In the matter of Hearing re California
20 WaterFix Petition for Change

21 **RESPONSE OF CITY OF FOLSOM, CITY
22 OF ROSEVILLE, SAN JUAN WATER
23 DISTRICT AND SACRAMENTO
24 SUBURBAN WATER DISTRICT TO
25 EVIDENTIARY OBJECTIONS**

26 The City of Folsom, City of Roseville, San Juan Water District and Sacramento Suburban
27 Water District (collectively, the "BKS Clients") submit the following responses to: (1) California
28 Department of Water Resources' Objections To Exhibits Submitted In Support Of Protestants'
Cases-In-Chief, filed December 30, 2016 ("DWR December Objections"), and (2) San Luis &
Delta-Mendota Water Authority and Westlands Water District's Objections to Exhibits Submitted
For Admission Into Evidence by Groups 7 and 9, etc., filed November 16, 2016
("SLDMWA/WWD November Objections").

29 **A. EXH. ROSEVILLE-3 IS RELEVANT AND PROPERLY ADMISSIBLE TO SHOW**
30 **THE INJURY TO ROSEVILLE IF THE CAL WATERFIX PROJECT WERE**
31 **IMPLEMENTED AS PROPOSED BY PETITIONERS**

32 DWR objects to Exh. Roseville-3 on the grounds of "relevance" and "lack of foundation."
33 DWR Table of Objections at p. 2, which appears at p. 32 of DWR December Objections. DWR

1 does not provide any argument to support these objections to this proffered evidence. *See* DWR
2 Objections, at p. 4, l. 6 – p. 5, l. 17.5. DWR's objections are improper, since DWR still has not
3 stated the specific rationale to justify exclusion of the preferred evidence. *See generally* SVWU's
4 Response to Department of Water Resources' Master Objections, filed September 30, 2016, esp.
5 p. 2, ll. 2 – 9, and authorities cited therein.

6 Even if DWR had properly supported its objections, neither of the objections it cites –
7 "relevance" and "lack of foundation" – provides any basis to exclude Exhibit Roseville-3 from
8 these administrative proceedings.

9 First, Exh. Roseville-3 is relevant to the injury issues presented in Phase 1B of these
10 proceedings. Exh. Roseville-3 is a table depicting the City's last 10 years of water deliveries.
11 Evidence is relevant as long as it has a "tendency in reason to prove or disprove any disputed fact
12 of consequence to the determination of the action." Cal. Evid. Code § 210; *Ortega v. Kmart*
13 *Corp.*, 26 Cal. 4th 1200, 1211 (2001).

14 Phase 1B of these proceedings considered the evidence that the Cal WaterFix project, if
15 implemented as proposed by the petitioners, will injure legal users of water. Evidence of the
16 City's recent water use is relevant because it tends to show that the City will be injured by the
17 reduced water deliveries it will suffer if the Cal WaterFix project is implemented without terms
18 and conditions being imposed to protect the City and other legal users of water whose supplies
19 would be reduced by the project in certain types of hydrologic conditions.

20 Roseville provided adequate foundation for this evidence through the written and oral
21 testimony of Richard Plecker, the City's Environmental Utilities Director. Mr. Plecker testified
22 that, as the City's Environmental Utilities Director, he has responsibility for all matters
23 concerning Roseville's water systems, including management of the City's water supplies, and he
24 testified extensively about the sources of those supplies as well as how the City meets its various
25 water demands. *See, generally*, Exh. Roseville-1, Mr. Plecker's written testimony. In its cross-
26 examination of Mr. Plecker, DWR did not raise any challenge to Mr. Plecker's competence to
27 testify to these facts, which are obviously within the scope of his job duties to manage all of the
28 City's water supplies. Moreover, as set forth more fully in the Response of City of Folsom, City

1 of Roseville, San Juan Water District and Sacramento Suburban Water District to Evidentiary
2 Objections, etc., filed October 19, 2016 ("October 19 Response"), Mr. Plecker possesses special
3 knowledge and experience sufficient to qualify him as an expert. *Id.*, p. 5, l. 17 – p. 6, l. 14. (For
4 the convenience of the hearing officers, a true and correct copy of this previously filed document
5 is attached hereto as Exhibit A.) Thus, a sufficient foundation has been laid for admission of
6 Roseville-3.

7 **B. NO VALID HEARSAY OBJECTIONS WARRANT THE EXCLUSION OF**
8 **EITHER THE POWERPOINTS PRESENTED BY RESPONDENTS' WITNESSES**
9 **OR THE 1996 REPORT CONCERNING THE LAKE LEVELS BELOW WHICH**
10 **FOLSOM'S M&I INTAKE FACILITIES CANNOT BE SAFELY OPERATED**

11 The SLDMWA/WWD November Objections raise hearsay objections to the following
12 two categories of proffered evidence: (1) Exh. Folsom-3 (including its errata), the joint
13 powerpoint slides that summarize the testimony of the witnesses for the Cities of Folsom and
14 Roseville and San Juan Water District; Exh. SSWD-3, the powerpoint slides that summarize the
15 testimony of the witness for Sacramento Suburban Water District; and Exh. ARWA-102, the
16 powerpoint slides that summarize the testimony of Jeffrey Weaver; and (2) Exh. Folsom-19, a
17 1996 report that ESA Consultants, Inc., prepared for the BKS Clients entitled "Increasing Water
18 Supply Pumping Capacity at Folsom Dam."

19 **1. The Powerpoint Summaries Presented by the Witnesses at the Hearing Do**
20 **Not Constitute Inadmissible Out-of-Court Hearsay Statements**

21 For evidence to be excluded as hearsay, the statements must be "other than by a witness
22 while testifying at the hearing" and offered to prove "the truth of the matter stated." Evid. Code
23 § 1200(a). "Hearsay is generally excluded because the out-of-court declarant is not under oath
24 and cannot be cross-examined to test perception, memory, clarity of expression, and veracity, and
25 because the jury (or other trier of fact) is unable to observe the declarant's demeanor. [Citations.]"
26 *People v. Anderson*, 208 Cal. App. 4th 851, 876 (2012); *see also People v. Bob*, 29 Cal. 2d 321,
27 325 (1946)["The essence of the hearsay rule is that witness is not in court and subject to cross-
28 examination and is not available for the [trier of fact] to judge his credibility."]. When the

1 declarants are witnesses who are present at trial and available for cross-examination, the
2 statements they make at the hearing do not constitute hearsay. *Zollars v. Barber*, 140 Cal. App.
3 2d 502, 508 (1956).

4 Here, each of the witnesses appeared at the hearing, was sworn in, and affirmed his or her
5 previously submitted written testimony, including the paragraphs stating that the powerpoint
6 slides summarize their written testimony. Exh. Folsom-1, Testimony of Marcus Yasutake, filed
7 August 31, 2016, ¶ 2; Exh. Roseville-1, Testimony of Richard Plecker, filed August 31, 2016,
8 ¶ 2; Exh. SJWD-1, Testimony of Shauna Lorance, filed August 31, 2016, ¶ 2; Exh. SSWD-1,
9 Testimony of Robert Roscoe, filed August 31, 2016, ¶ 2; Exh. ARWA-100, Testimony of Jeffrey
10 Weaver, filed August 31, 2016, ¶ 4. The witnesses presented the power point slides as part of
11 their direct examination and were subject to cross-examination. The power point slides were
12 statements made by these witnesses during their testimony at the hearing. Consequently, they do
13 not constitute inadmissible hearsay.¹

14 **2. The ESA Report Regarding the Safety Risks of Operating Folsom's M&I**
15 **Intake Facilities at Low Lake Levels Is Properly Admissible and Can**
16 **Constitute the Basis of an SWRCB Finding in These Proceedings**

17 Exh. Folsom-19 is a 1996 report prepared by ESA, an outside consulting firm, under
18 contract with the City of Roseville in conjunction with San Juan Water District, the City of
19 Folsom, and Sacramento Area Flood Control Agency, regarding means of increasing water
20 supply pumping capacity from Folsom Reservoir. Among other things, the report details the
21 danger of the formation of a vortex in the Folsom Dam M&I Intake facilities and the need to
22 maintain the lake at certain minimum levels to avoid that danger. In response to San Luis &
23 Delta-Mendota Water Authority's Objections to Part 1B Parties' Cases In Chief, filed on
24 September 21, 2016 by SLDMWA and joined in by Westlands on that same date
25 ("SLDMWA/WWD September Objections"), the BKS Clients have already demonstrated that
26 Exh. Folsom-19 is properly admissible in these administrative proceedings under both the public

27 _____
28 ¹ For the same reason, the powerpoint slides that Walter Bourez discussed and explained in his testimony on behalf of
the Sacramento Valley Water Users group likewise do not constitute hearsay.

1 records exception to the hearsay rule and Government Code section 11513(d). *See generally*
2 October 19 Response, esp., p. 6, l. 15 – p. 8, l. 28.

3 The SLDMWA/WWD November Objections reiterate the claim that Exh. Folsom-19 is
4 hearsay and should be excluded. These arguments were fully refuted in the October 19 Response.
5 In the interest of promoting the efficiency of these proceedings, the BKS Clients hereby
6 incorporate by reference, as though set forth fully herein, their October 19 Response to
7 SLDMWA's and WWD's hearsay objections to this proffered evidence.

8 The SLDMWA/WWD November Objections raise only one new argument, which is that
9 Exh. Folsom-19 and the other evidence listed in the SLDMWA/WWD table should not "be used
10 to support findings by the Hearing Officers, other than to corroborate non-hearsay evidence."
11 SLDMWA/WWD November Objections, p. 4, ll. 6- 8. As set forth in the October 19 Response,
12 the ESA Report qualifies for the public records exception to the hearsay rule since it was made by
13 an expert under contract with a public entity for use by that entity. October 19 Response, p. 8,
14 n. 3.

15 However, as SLDMWA and WWD admit, even if the ESA report were hearsay, the
16 SWRCB can base a finding on it as long as the finding corroborates non-hearsay evidence.
17 SLDMWA/WWD November Objections, p. 2, ll. 4 – 13, p. 4, ll. 6 - 8.

18 The record of these proceedings contains uncontroverted non-hearsay evidence that
19 operating the Folsom Dam M&I Intake facilities at a lake level below 340 feet above msl creates
20 unacceptable safety risks due to the potential for formation of a dangerous vortex. First, the
21 record includes the uncontroverted admission of an agent of one of the parties, Drew Lessard,
22 who is the Area Manager for USBR's Mid-Pacific Region's Central California Area Office,
23 regarding the need to serve the Folsom diverters through emergency facilities if the lake level
24 dropped below elevation 340 feet above msl. *See* Exh. Folsom-1, ¶¶ 29; Exh. Roseville-1, ¶¶ 48 –
25 51; Exh. SJWD-1, ¶¶ 44 – 47. Second, the record also includes the undisputed testimony of Mr.
26 Yasutake, Mr. Plecker, Ms. Lorange and Mr. Roscoe regarding the risk of the formation of the
27 vortex at lowered lake levels and the measures that the water agencies and Reclamation put in
28 place during the drought to avoid those potential dangers. Hence, even if the

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

ESA Report were deemed hearsay, the SWRCB may make findings based on that report because those findings merely corroborate non-hearsay evidence that is already in the record.

Respectfully submitted,

DATED: January 6, 2017

BARTKIEWICZ, KRONICK & SHANAHAN
A Professional Corporation

By: 
Jennifer T. Buckman

Attorneys for Protestants Cities of Folsom and
Roseville, Sacramento Suburban Water District, San
Juan Water District

EXHIBIT A

1 BARTKIEWICZ, KRONICK & SHANAHAN
A PROFESSIONAL CORPORATION
2 ALAN B. LILLY, SBN 107409
RYAN S. BEZERRA, SBN 178048
3 JENNIFER T. BUCKMAN,
ANDREW J. RAMOS, SBN 267313
4 1011 22nd Street, Sacramento, CA 95816-4907
Telephone (916) 446-4254
5 Fax: (916) 446-4018
E-Mail: abl@bkslawfirm.com

6
7 Attorneys for Protestants
City of Folsom, City of Roseville, Sacramento Suburban Water District,
8 San Juan Water District

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

In the matter of Hearing re California WaterFix)
Petition for Change

**RESPONSE OF CITY OF FOLSOM, CITY
OF ROSEVILLE, SAN JUAN WATER
DISTRICT AND SACRAMENTO
SUBURBAN WATER DISTRICT TO
EVIDENTIARY OBJECTIONS AND
JOINDER TO SACRAMENTO VALLEY
WATER USERS' RESPONSE TO
EVIDENTIARY OBJECTIONS**

25
26 The City of Folsom, City of Roseville, San Juan Water District and Sacramento Suburban
27 Water District hereby incorporated by reference and join in the response to evidentiary objections
28 filed by the Sacramento Valley Water Users.

1 Additionally, these protestants submit the following responses to the objections filed by
2 DWR and San Luis and Delta-Mendota Water Authority (SLDMWA).

3 **I. DWR'S OBJECTIONS DO NOT JUSTIFY EXCLUDING THE PROFFERED**
4 **TESTIMONY REGARDING THE PROJECT'S INJURY TO THE PROTESTING**
5 **AGENCIES**

6 DWR objects to paragraphs 50-56 of the testimony of Shauna Lorance; paragraphs 23, 24
7 and 26 of the testimony of Robert Roscoe; paragraphs 35-38 of the testimony of Marcus Yasutake;
8 paragraphs 54, 57, 59, 61 and 62 of the testimony of Richard Plecker; and DWR asks the Hearing
9 Officer to exclude or strike this testimony. (DWR's Objections to San Juan Water Dist., p. 2, ll. 15-
10 19; DWR's Objections to Sacramento Suburban Water Dist., p. 3, ll. 5.5-6.5, 18-19; DWR's
11 Objections to City of Folsom, p. 2, l. 27.5 – p. 3, l. 3; DWR's objections to City of Roseville, p. 2, ll.
12 25 – 27 .) This testimony consists of statements by these witnesses regarding the modeling evidence
13 that DWR has offered and the level to which Folsom Reservoir would be drawn down in future with-
14 project conditions.

15 DWR's objections are improper, since DWR has not stated a specific basis that would justify
16 exclusion of the proffered evidence. *See generally* SVWU's Response to Department of Water
17 Resources' Master Objections, filed September 30, 2016, esp. p. 2, ll. 2 – 9, and authorities cited
18 therein.¹

19 Even if DWR had made specific objections, the evidence is not subject to exclusion under the
20 evidentiary rules of this proceeding. This adjudicative proceeding is not subject to the technical
21 rules of evidence. Rather, it is governed by the evidentiary rules established under the California
22 Administrative Procedure Act, as set forth in Government Code section 11513, and Evidence Code
23 sections 801 through 805. 23 C.C.R. § 648 (SWRCB regulation adopting these evidentiary
24 standards), § 648.5.1 ("Adjudicative proceedings will be conducted in accordance with the
25 provisions and rules of evidence set forth in Government Code section 11513.") The only possible

26
27 ¹In the interest of promoting efficiency in these proceedings, the protestants who have joined this
28 response incorporate by reference, in full, the arguments advanced in the Sacramento Valley Water
Users' Response to Department of Water Resources' Master Objections, filed September 30, 2016,
rather than repeating those arguments here.

1 basis DWR could be asserting for excluding this testimony would be Government Code section
2 11513, subdivision (f) (which partially incorporates the provisions of Evidence Code section 352):
3 “The presiding officer has discretion to exclude evidence if its probative value is substantially
4 outweighed by the probability that its admission will necessitate undue consumption of time.”

5 DWR has made no showing that the probative value of the proffered testimony is
6 substantially outweighed by the probability that it will consume undue amounts of hearing time.
7 Rather, DWR has merely indicated that it disagrees with statements these witnesses have made
8 regarding the modeling evidence DWR presented and the level to which Folsom Reservoir would be
9 depleted in the future when the project is operational. This does not provide a legitimate basis for
10 excluding the testimony. DWR and Reclamation have offered no proposed terms and conditions, or
11 operations plan, to govern how they would actually operate if their pending petition were approved.
12 They have not committed to operate according to their modeling, so all potentially affected water
13 users may assert any possible operation by DWR and Reclamation with Cal WaterFix as a basis for
14 showing their injury by that project. Evidence of Folsom Reservoir being drawn down is relevant to
15 showing injury to the protestants, and this evidence should be considered in the hearing.

16 Next, DWR asks the Hearing Officer to exclude Mr. Roscoe’s testimony regarding his
17 review of the BDCP and California WaterFix draft environmental documents on the ground that it
18 lacks foundation. (DWR’s Objections to Sacramento Suburban Water Dist., p. 2, ll. 11-13, 20-21.)
19 This objection is untenable, given that Mr. Roscoe’s written testimony indicates that he reviewed the
20 documents that were cited and attached. Moreover, there is no basis for excluding this evidence
21 from this administrative hearing, since DWR has made no showing that the probative value of this
22 testimony is substantially outweighed by the probability that it will consume undue amounts of
23 hearing time.

24 Similarly, DWR moves to exclude Mr. Roscoe’s testimony regarding how reduction in
25 deliveries of supplies from the American River could lead to impacts on groundwater in the
26 Sacramento region on the grounds that it is “irrelevant.” (DWR’s Objections to Sacramento
27 Suburban Water Dist., p. 3, ll. 22-26.) DWR raises the same objection to Mr. Yasutake’s testimony,
28 which it mischaracterizes as a discussion of current operational issues and current conditions that

1 DWR does not believe are relevant to the Petition. (DWR's Objections to City of Folsom, p. 2, ll.
2 8.5-10.5.) Even if the technical rules of evidence applied to these proceedings, these objections
3 cannot be sustained. Evidence is relevant if it has "any tendency in reason to prove or disprove any
4 disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Phase
5 1 of this hearing concerns whether the proposed change will not cause injury to a legal user of water.
6 (Notice, p. 11.) Mr. Roscoe's testimony regarding the potential impacts of the proposed project on
7 the regional groundwater basin and his district's conjunctive use program, and Mr. Yasutake's
8 testimony regarding the injury to the City of Folsom's senior water rights when Folsom Reservoir
9 drops below certain levels, are indisputably relevant to the question of injury. Moreover, again,
10 DWR has made no showing that the probative value of this testimony is substantially outweighed by
11 the probability that it will consume undue amounts of hearing time, so there is no basis for excluding
12 the proffered testimony.

13 Indeed, as DWR acknowledges, Mr. Yasutake's testimony regarding recent drought
14 operations is offered in the context of giving examples of how low Folsom Reservoir levels put the
15 City's municipal water supply at risk. DWR and Reclamation have not provided an operations plan
16 to demonstrate how the Cal WaterFix project will actually work, nor did they comply with the
17 Hearing Officer's "strong urg[ing]" to submit terms and conditions that would alleviate or avoid
18 potential injury to other legal users of water. Therefore, there is no guarantee that the project will
19 not be operated to create low reservoir levels at Folsom Reservoir, and it is reasonable for Mr.
20 Yasutake and the other agencies that take water directly from the reservoir to testify as to how those
21 operations and low reservoir levels would injure them.

22 **II. SLDMWA'S OBJECTIONS DO NOT WARRANT EXCLUSION OF THE**
23 **PROFERRED EXPERT TESTIMONY OF THE AGENCIES' MANAGERS REGARDING**
24 **THE INJURIES THAT THE PROJECT WILL CAUSE**

25 SLDMWA makes objections that are parallel to DWR's and stated with more specificity, but
26 are equally infirm. Essentially, SLDMWA's objections challenge the qualifications of the American
27 River Water Agencies' managers to testify about how their agencies' operations would be affected if
28 Cal WaterFix were to cause reduced deliveries to their agencies from Folsom Reservoir. SLDMWA

1 objects that paragraph 23 of Mr. Yasutake's testimony; paragraphs 54, 65 and 66 of Mr. Plecker's
2 testimony; paragraph 27 of Mr. Roscoe's testimony; and paragraphs 38 and 58 of Ms. Lorange's
3 testimony constitute inadmissible lay witness opinion testimony because these witnesses lack
4 foundation, personal knowledge or expertise regarding how low lake levels pose a threat to their
5 agencies' water supplies. (SLDMWA Objections to Part 1B Parties' Cases in Chief, p. 38, ll. 4-6,
6 25-27, p. 69, ll. 9-10, l. 69 - p. 70, l. 1, p. 74, ll. 9 -10, 21 -23, p. 76, l. 28 - p. 77, l. 2, p. 78, ll. 4-6.)
7 Despite Mr. Yasutake's, Mr. Plecker's and Ms. Lorange's testimony regarding their participation in
8 operations meetings with Reclamation during the drought to ensure continued deliveries to their
9 agencies, and the risks that low lake levels posed to Reclamation's ability to operate the M&I intake
10 safely that were discussed amongst Reclamation and these agencies, SLDMWA objects that Mr.
11 Yasutake, Mr. Plecker and Ms. Lorange are not qualified to testify regarding these risks. SLDMWA
12 further objects that Ms. Lorange's testimony regarding the physical capacity of the emergency
13 pipeline that was installed to serve her district during the drought constitutes inadmissible lay person
14 opinion. SLDMWA also objects that Mr. Yasutake's and Ms. Lorange's testimony "incorporates
15 hearsay" "because it relies on a statement by someone other than the witness to establish the truth
16 regarding usability of the M&I intake pipe." (E.g., SLDMWA Objections, p. 77, ll. 18-20.)

17 These objections fail because Mr. Yasutake, Mr. Plecker, Mr. Roscoe and Ms. Lorange all
18 qualify as experts on the topics of their agencies' water operations and management and the
19 conditions that affect their agencies. Any person who has special knowledge, skill, or experience in
20 any occupation or trade may be qualified as an expert in his or her field. *Miller v. Los Angeles*
21 *County Flood Control Dist.*, 8 Cal. 3d 689, 701 (1973); *see also* Evid. Code § 720(a) (a witness is
22 qualified to testify as an expert if he or she has special knowledge, skill, experience, training or
23 education sufficient to qualify him or her as an expert on the subject to which the testimony relates).
24 A party's representative may also serve as its expert witness. *Douglas v. Ostermeier*, 1 Cal. App. 4th
25 729, 737 (1991). Under *Schreiber v. Kiser* (1999) 22 Cal.4th 31, 39, non-retained experts such as a
26 party's employees may provide testimony that goes beyond strict observation of events and offers an
27 opinion, as long as the opinion was not formed in anticipation of litigation or in preparation for trial.
28 *Douglas v. Ostermeier*, 1 Cal. App. 4th at 737.

1 Here, Mr. Yasutake, Mr. Plecker and Ms. Lorance have specialized knowledge, skill and
2 experience in operating and managing the supplies of their water agencies, all of which depend on
3 Reclamation's operations of Folsom Dam and reservoir. As a key part of their regular job duties,
4 they work with Reclamation's Area Office to coordinate operations and ensure successful deliveries
5 to their facilities. They project their customers' demands and provide Reclamation staff with
6 schedules requesting delivery of water, and they work with Reclamation to address any challenges
7 that may arise in delivering water under those schedules. Mr. Roscoe operates a sophisticated
8 conjunctive use program that involves not only water supplies diverted from Folsom Reservoir and
9 the lower American River, but also cooperative groundwater management involving multiple nearby
10 agencies that also pump from a formerly overdrafted basin and the monitoring of contamination
11 plumes. Based on their specialized knowledge, skill and experience, Mr. Yasutake, Mr. Plecker, Mr.
12 Roscoe and Ms. Lorance are all qualified as experts in the operations and management of their water
13 agencies, their water supplies and the conditions that affect those supplies.
14

15 To the extent Mr. Yasutake, Mr. Plecker, Mr. Roscoe and Ms. Lorance have relied on
16 technical reports (such as the 1996 report ESA prepared for their agencies) to support their
17 conclusions, this is permissible. Experts may base their opinions on "of a type that reasonably may
18 be relied upon" by experts in that field. Evid. Code § 801(b). The material need not be admissible.
19 *See, e.g., People v. Valdez*, 58 Cal. App. 4th 494, 509 (1997) (police officer properly allowed to rely
20 on hearsay in formulating expert opinions that were used to prove gang enhancement allegations). A
21 scientific report performed by a licensed professional under contract to a public agency is entitled to
22 the presumption of "official duty regularly performed." Evid. Code §§ 664, 195 (public employee
23 includes an agent of a public entity); *see Santos v. Dept. of Motor Vehicles*, 5 Cal. App. 4th 537, 547
24 & n. 6 (1992) (applying presumption that a public employee performs his or her duties in accordance
25 with the law to a blood test report prepared by a licensed forensic laboratory on behalf of a law
26 enforcement agency). Reports produced under such circumstances have the requisite indicia of
27 trustworthiness. Engineers and other water managers routinely and reasonably rely upon expert
28 reports produced by other licensed engineers in making their water management and operations

1 decisions. Therefore, the agencies' non-retained experts, Mr. Yasutake, Mr. Plecker, and Ms.
2 Lorance, appropriately relied on the 1996 ESA report in formulating their opinions about the effect
3 of lowered Folsom Lake levels on their ability to divert water through the M&I intake at Folsom
4 Dam. They must rely on such reports to manage their agencies' complex operations.

5
6 The SLDMWA objections also incorrectly characterize the statements made by Drew
7 Lessard, Reclamation's Central California Area Office Manager, regarding when low lake levels
8 render the M&I intake unsafe to use, as hearsay. While these statements were reported in the
9 testimony of Mr. Yasutake, Mr. Plecker and Ms. Lorance, they constitute admissions of a party to
10 these proceedings. Admissions are not hearsay. Evid. Code § 1220. Under this exception, any prior
11 statement of a party may be offered against that party. *People v. Carpenter*, 21 Cal.4th 1016, 1049
12 (1999) (hearsay exception for admissions is satisfied when evidence consists of a statement,
13 declarant is a party, and statement is offered against that party). Where a party is an entity or
14 organization, it is properly charged with the admissions of its employees and other agents when the
15 statements made are within the agent's express or implied authority. Evid. Code § 1222; *O'Mary v.*
16 *Mitsubishi Electronics America*, 59 Cal. App. 4th 563, 572, 573 (1997).

17 As Reclamation's Area Manager of the Mid-Pacific Region's Central California Area Office,
18 Mr. Lessard is responsible for Reclamation programs and facilities in the central part of California,
19 including the American River Division and its Folsom Dam, powerplant and reservoir facilities.² In
20 this role, Mr. Lessard is authorized by Reclamation to make statements for Reclamation to the
21 American River Division contractors concerning the operations of Folsom Dam and its associated
22 powerplant and reservoir facilities. Accordingly, the statements made by Mr. Lessard in 2015 (that
23 if Folsom Reservoir's level were projected to drop below elevation 340 feet above msl, or 111,945
24 acre-feet of storage, at any time, Reclamation would plan to serve limited supplies to the American
25

26
27 ² The SWRCB can properly take official notice of these undisputed facts. 23 C.C.R. § 648.2. A
28 copy of Reclamation's May 24, 2013 press release announcing Mr. Lessard's appointment as Area
Manager for the Central California Area office is attached. It is also available at
www.usbr.gov/newsroom/newsrelease/detail.dfm?RecordID=43225.

1 River Division contractors through emergency facilities) are properly deemed admissions by
2 Reclamation. *O'Mary v. Mitsubishi Electronics America*, 59 Cal. App. 4th 563, 572, 573 (1997);
3 Evid. Code § 1222. Evidence that squarely fits within a known hearsay exception constitutes “the
4 sort of evidence on which responsible persons are accustomed to rely in the conduct of serious
5 affairs” and is properly admissible in formal hearings conducted under the California Administrative
6 Procedure Act. Gov. Code § 11513(c)³; *see also* 23 C.C.R. § 648.5.1 (hearsay evidence is
7 admissible in formal hearings before the SWRCB, subject to the provisions of Government Code
8 section 11513).

9 Under Government Code section 11513(d), hearsay evidence is admissible in adjudicative
10 hearings such as this one “to clarify, explain or supplement” other properly admitted evidence. *See,*
11 *e.g., Hildebrand v. Department of Motor Vehicles*, 152 Cal. App. 4th 1562, 1572 (2007) (a party’s
12 statements are exceptions to the hearsay rule and are properly admitted as admissions under
13 Evidence Code § 1220; under Government Code section 11513, subd. (d), a report is properly
14 admitted to clarify, supplement, or explain a party’s own admissions).

15 The 1996 report that ESA prepared for the cities of Folsom and Roseville and San Juan
16 Water District regarding the danger of the formation of a vortex in the Folsom Dam M&I delivery
17 facilities, and the need to maintain the lake at certain levels to avoid that danger, is admissible. The
18 ESA report supplements and explains Mr. Lessard’s statement that the deliveries to the cities of
19 Folsom and Roseville and San Juan Water District would be made through emergency facilities
20 when the lake dropped below 340 feet above msl. Accordingly, it is admissible under the
21 evidentiary rules of this proceeding.
22

23
24
25 ³ Furthermore, the ESA report qualifies for the public records exception to the hearsay rule, as it is a
26 report made by an expert under contract with a public entity for use by that entity. Evid. Code §
27 1280; *Santos v. Dept. of Motor Vehicles*, 5 Cal. App. 4th 537, 547 & n. 6 (1992). A report produced
28 under such circumstances also exhibits sufficient indicia of reliability, and thus may be admissible
under Government Code section 11513, subdivision c. *See Davenport v. Department of Motor
Vehicles*, 6 Cal. App. 4th 133, 144 (1992) (the presumption that public officials regularly perform
their duties gives rise to an inference that official records produced for public agencies are reliable).

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

Dated: October 19, 2016

Respectfully submitted,
BARTKIEWICZ, KRONICK & SHANAHAN
A Professional Corporation

By: 
JENNIFER T. BUCKMAN

Attorneys for Protestants
City of Folsom, City of Roseville, Sacramento
Suburban Water District,
San Juan Water District

[MENU](#)

News Releases

Home / News & Multimedia / News Releases / Drew Lessard Appointed Area Manager for Reclamation's Central California Area Office

NEWS & MULTIMEDIA

Drew Lessard Appointed Area Manager for Reclamation's Central California Area Office

Media Contact: Pete Lucero, MP Region Public Affairs Officer, 916-978-5100

For Release: May 24, 2013



FOLSOM, Calif. – David Murillo, Regional Director for the Bureau of Reclamation's Mid-Pacific Region, announces the selection of Drew Lessard as Area Manager for the Central California Area Office, located at Folsom Dam, 23 miles east of Sacramento. As the Area Manager, Lessard is responsible for the operation of Folsom, Nimbus, New Melones and Monticello dams.

"Drew has worked at CCAO since 2000 as a Civil Engineer, as the Deputy Area Manager and most recently as the Acting Area Manager. With his experience, management skills and expertise working with customers and stakeholders, he is the ideal choice for this critical position," stated Murillo.

As Area Manager, Lessard is responsible for Reclamation programs and facilities in the central part of California. CCAO encompasses twelve counties and includes the Central Valley Project's American River Division (Folsom Dam, powerplant and reservoir; Nimbus Dam and powerplant and Lake Natoma), the Auburn-Folsom South Unit (the Auburn Dam site and the Folsom-South Canal), the Eastside Division (New Melones Dam, powerplant and reservoir on the Stanislaus River) and the Solano Project (Monticello Dam, Lake Berryessa and the Putah South Canal).

CCAO's jurisdiction extends from the coast to the crest of the Sierra Nevada and from the American River Basin to the Stanislaus River Basin. CCAO manages recreation at Lake Berryessa and New Melones and has a long-term managing partnership agreement with the California Department of Parks and Recreation for recreation management at Folsom Lake, Lake Natoma and the Auburn Recreation Area.

A federal employee for 19 years, Lessard began his career as an Environmental Engineer for the U.S. Air Force at Holloman Air Force Base, N.M., implementing the Installation Restoration Program. He then worked for the U.S. Forest Service on the Lincoln National Forest in Alamogordo, N.M., as a Civil Engineer responsible for the maintenance and engineering of Forest Service facilities.

Lessard is a graduate of the University of Wyoming with Bachelor and Master of Science degrees in Civil Engineering. He is a registered Professional Engineer. He resides in Folsom, Calif., with his wife Julie and children, Evan and Brennen.

###

Reclamation is the largest wholesale water supplier and the second largest producer of hydroelectric power in the United States, with operations and facilities in the 17 Western States. Its facilities also provide substantial flood control, recreation, and fish and wildlife benefits. Visit our website at www.usbr.gov and follow us on Twitter @USBR.

STAY IN TOUCH

Contact Us | Site Index

[Accessibility](#) | [Disclaimer](#) | [DOI](#) | [FOIA](#) | [No Fear Act](#) | [Notices](#) | [Privacy Policy](#) |
[Quality of Information](#) | [Recreation.gov](#) | [USA.gov](#)

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):

California WaterFix Hearing – Response of City of Folsom, City of Roseville, San Juan Water District and Sacramento Suburban Water District to Evidentiary Objections

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:

I certify that the foregoing is true and correct and that this document was executed on January 6, 2017.

Signature: _____



Name: Terry M. Olson

Title: Legal Assistant

Party/Affiliation: Cities of Folsom, Roseville, Sacramento Suburban Water District, San Juan Water District and Yuba County Water Agency

Address: 1011 22nd Street
Sacramento, CA 95816