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8 **BEFORE THE**
9 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

10 **HEARING IN THE MATTER OF CALIFORNIA**
11 **DEPARTMENT OF WATER RESOURCES**
12 **AND UNITED STATES BUREAU OF**
13 **RECLAMATION REQUEST FOR A CHANGE**
14 **IN POINT OF DIVERSION FOR CALIFORNIA**
15 **WATER FIX**

CALIFORNIA DEPARTMENT OF
WATER RESOURCES' RESPONSE
TO CALIFORNIA WATER
RESEARCH'S OBJECTION TO
ADMISSION OF MODELING FILES
AS STAND-ALONE EXHIBITS

16 The California Department of Water Resources ("DWR") responds to Protestants
17 Deirdre Des Jardin's March 1, 2018 oral objection and California Water Research's
18 Objection to Admission of Modeling Data Files as Stand-Alone Exhibits (together the
19 "Objection"), served, March 7, 2018, and joinders¹, in the matter of DWR's and the U.S.
20 Bureau of Reclamation's ("Reclamation") Request for a Change in Point of Diversion for
21 California WaterFix ("CWF Hearing") (Ms. Des Jardin and California Water Research are
22 collectively referred to as "Ms. Des Jardin" in this Response). Ms. Des Jardin's Objection
23 lacks factual support and legal merit, and DWR requests that the Hearing Officers overrule
24 the Objection for the reasons set out below.
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27 ¹ Protestant City of Stockton ("Stockton") filed a notice joining the Objection on March 8, 2018.
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I. STATEMENT OF FACTS

DWR incorporates by reference all of its modeling documents served and made available to the parties to the CWF Hearing.

Ms. Des Jardin objects to the admission of certain modeling files on the grounds that the exhibits are in a specialized format, require specialized software to extract, are not accompanied by “translations of key information into human-readable, English language,” and are not in “easily accessible tabular data formats.” (Objection at 1-2.) Ms. Des Jardin claims that the Objection was prompted because DWR expert Erik Reyes could not recognize what modeling scenario a single page Ms. Des Jardin represented was taken from one of the modeling files. (*Id.*) Specifically, Ms. Des Jardin objects to the admission of the following exhibits:

- DWR-1074 DSM2 HYDRO modeling files;
- DWR-1075 CALSIM BA H3+ modeling files;
- DWR-1076 DSM2 BA H3+ modeling files;
- DWR-1077 CALSIM CWF H3+ modeling files;
- DWR-1078 DSM2 CWF H3+ modeling files;
- DWR-1081 US Temperature modeling files BA H3+;
- DWR-1082 US Temperature modeling files NAA (collectively the “Modeling Exhibits”). (*Id.*)

Ms. Des Jardin’s complaints regarding the Modeling Exhibits are misplaced, lack supporting law, and ignore the history of these proceedings and DWR’s commitment to submit certain technical data in support of its Petition.

As an initial matter, Ms. Des Jardin mischaracterizes her exchange with Mr. Reyes during the March 1, 2018 CWF Hearing. Ms. Des Jardin attempted to question Mr. Reyes with one page from a modeling output without laying the foundation for which scenario it was taken from. As noted in the transcript, DWR properly objected to this line of

1 questioning because it was unclear from which scenario Ms. Des Jardin took the page, and
2 that Ms. Des Jardin should provide this information so Mr. Reyes could answer the
3 question. Rather than correcting the deficiency in the line of questioning and laying a
4 proper foundation for the page of data, Ms. Des Jardin abandoned her question and lodged
5 her oral motion. Thus, this exchange does not support Ms. Des Jardin's claim that DWR
6 and Reclamation have failed to meet their burden regarding evidence submitted in support
7 of its case-in-chief. -

8 Additionally, DWR's moving the Modeling Files into evidence is, in part, the direct
9 result of Ms. Des Jardin's request that DWR do so. In her February 4, 2016 letter to the
10 Hearing Officers, Ms. Des Jardin requested that DWR provide her access to certain
11 modeling data, stating that "the Petitioners need to include a complete list of the versions of
12 all computer models used in producing the CEQA document submitted in support of the
13 petition, and make the models and input and output data available to all interested
14 Protestants in order to have a complete Petition. . . . Distribution would be transparent and
15 efficient using the industry standard of download links to a web server." (Deidre Des Jardin
16 Letter to Hearing Officers, p. 2, Feb. 4, 2016, attached as Exhibit 1). On March 4, 2016, in
17 response to Ms. Des Jardin's request, the Hearing Officers ordered DWR to address her
18 concerns. (Revised Hearing Schedule, Revised Notices of Intent to Appear, Electronic
19 Service and Submissions, and other Procedural Issues Concerning the California WaterFix
20 Water Right Change Petition Hearing, p. 11, Mar. 4, 2016.) Subsequently, DWR provided
21 all requested modeling files to the CWF Hearing parties via the State Water Resources
22 Control Board's ("Board") designated File Transfer Protocol ("FTP") site.

23 Ms. Des Jardin correctly notes that the Hearing Officers have required that
24 "[e]xhibits based on technical studies or models shall be accompanied by sufficient
25 information to clearly identify and explain the logic, assumptions, development, and
26 operation of the studies or models." (See Notice of Petition and Notice of Public Hearing
27 and Pre-Hearing Conference to Consider the Petition, p. 33, Oct. 30, 2015.) However, Ms.

1 Des Jardin fails to mention that, in this same Notice, the Hearing Examiners required that
2 “[e]xhibits that rely on unpublished technical documents will be excluded unless the
3 unpublished technical documents are admitted as exhibits.” (*Id.* p. 34). As explained
4 below, DWR has submitted clear graphical depictions of the modeling data relied upon by
5 the Petitioners to support its case-in-chief, textual explanations in the form of testimony,
6 charts and tables of the underlying inputs to the model, and the Modeling Exhibits in
7 question. All of these pieces of testimony (graphical, textual, and data) are part of DWR’s
8 satisfaction of both of these hearing requirements.

9 As an example, the testimony of Erik Reyes (DWR-1016) and Tara Smith (DWR-
10 1015) refer to and provide figures summarizing modeling results for key criteria in Part 2.
11 Both Mr. Reyes’ and Ms. Smith’s PowerPoints show many figures summarizing the
12 modeling, and as referenced by Mr. Reyes’ testimony and shown in exhibit DWR-1069, the
13 inputs and assumptions for each modeling scenario are shown in table format. (See DWR-
14 1027, DWR-1028, DWR-1069). Moreover, as referenced in both DWR-1027 and 1028, the
15 testimony of Ms. Buchholz explains how the modeling scenarios compare to one another.
16 (DWR-1010.)

17 Thus, Ms. Des Jardin’s claims that DWR and Reclamation have not provided easily
18 understood material in support of the modeling data is simply false. Her complaint stems
19 from her disagreement with those easily understood material and the underlying data.

20 **II. ARGUMENT**

21 **A. Lack of Legal Authority for Demanding “Human Readable” “English** 22 **Language” Exhibits that are “Accessible to Non-experts”**

23 While DWR has consistently satisfied these “requirements,” Ms. Des Jardin’s
24 Objection relies on inapplicable legal authorities that do not support her requested relief,
25 and any claim that DWR and Reclamation have failed to carry their burden of proof by
26 using computer modeling to support the Petition is incorrect as a matter of law. There is no
27 requirement in the California Statutes, Regulations, Rules of Court, or the Board’s hearing
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1 rules that a petitioner must ensure that every protestant fully understand every exhibit
2 admitted into evidence.

3 While the nature of this hearing requires DWR and Reclamation to use complex
4 computer models with many inputs and variables, no authority supports Ms. Des Jardin's
5 claim that the Modeling Exhibits include an "English language index." Similarly, while Ms.
6 Des Jardin may prefer a different format that is used by certain parties in this matter, there
7 is no evidentiary or procedural authority requiring DWR to format its filings according to Ms.
8 Des Jardin's preferences.

9 **B. DWR Satisfied Regulatory Requirements in Submitting Exhibits and**
10 **Testimony**

11 DWR and Reclamation have repeatedly gone above and beyond what is
12 fundamentally required by the statutes and regulations designating what information is
13 required for a case-in-chief. In some circumstances the Hearing Officers have requested
14 additional information under their authority provided for in law. In other cases, Petitioners
15 have provided additional information in order to help the parties and Hearing Officers in
16 understanding the modeling and Petition. In addition to submitting numerous tables,
17 charts, and graphical representations of the modeling data, DWR has an entire website
18 dedicated to providing information regarding the CALSIM II model. (See, e.g., Benchmark
19 Studies Assumptions, Sept. 30, 2002, attached as Exhibit 2.)

20 This website also provides Ms. Des Jardin with access to the "specialized software,"
21 and "specialized knowledge" needed to "extract" a "translation" from DWR's model outputs.
22 DWR has provided assistance to the public in accessing the modeling, installing the
23 software, and obtaining the data files. DWR has responded to over one-hundred requests
24 for the data files. Some of those files were provided to Ms. Des Jardin. In fact, as
25 demonstrated by Ms. Des Jardin's reference to documents available on DWR's website,
26 Objection pp. 5-7, Ms. Des Jardin clearly has an understanding of how to access the model
27 and interpret its results.

1 Although Ms. Des Jardin cherry-picks statements in the 2003 peer review and the
2 2004 DWR response to that peer review, other statements in the 2004 response indicate
3 that Ms. Des Jardin is incorrect. Specifically, DWR's response states

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5 It is worth noting that the restructuring of the CalSim software as part of release 2.0
6 allows metadata describing the source of model inputs to be stored with the actual data. A brief
7 description of the proposed CalSim-II data and documentation management system is given in
8 Appendix D.

9 Appendix D goes on to state that documentation of CalSimII exists in a, "variety of formats
10 such as text documents, comments in the code, spreadsheets, supporting model reports,
11 and PDFs"

12 As stated in these quotes, there is adequate documentation of the modeling. While
13 this documentation does not occur in a stand-alone document, it is provided as part of the
14 modeling itself.

14 **C. Des Jardin Cites to Inapplicable Law**

15 Ms. Des Jardin's other legal arguments are also without merit. Ms. Des Jardin's cites to
16 California Rule of Court 3.110(g) to claim that DWR was obligated to provide "translations"
17 of its modeling exhibits certified under oath by a qualified interpreter. (Objection p. 3.) As
18 has been previously discussed, the conduct of this hearing is not synonymous with what is
19 expected in a courtroom. That principal remains true in Part 2 and the citations by Ms. Des
20 Jardin's citations to the CA Rules of Court. Nonetheless, all of the DWR's exhibits are in
21 English, and thus no foreign language translation was required. Second, Rule of Court
22 3.110(g) specifies the format of exhibits attached to motions filed in Superior Court, and
23 does not prescribe an evidentiary standard for the admission of computer data.

24 **D. Presenting a Case-in-Chief does not Deprive Protestants of Due** 25 **Process**

26 Ms. Des Jardin's suggestion that DWR's modeling exhibits deprive her of due
27 process and the right to examine and rebut evidence is also incorrect. (Objection p. 3.)
28 Rather than preventing the parties from understanding or rebutting DWR's evidence, the

1 Modeling Exhibits provide the parties with voluminous information they may use in
2 attempting to rebut DWR’s Petition. Further, it is not DWR’s burden to produce materials
3 for parties unwilling to accept that DWR’s graphical representations are accurate depictions
4 of the underlying modeling data. Through cross-examination, the parties have had the
5 opportunity to impeach the data submitted by Petitioners, whether graphical or otherwise,
6 and Ms. Des Jardin has certainly not been deprived of due process or a fair hearing as a
7 result of the format of DWR’s exhibits.

8 Ms. Des Jardin’s reliance upon *People v Sanchez* (2016) 63 Cal.4th 665 to claim
9 that DWR’s modeling exhibits violate the confrontation clause is further misplaced. (See
10 Objection p. 3.) The Sixth Amendment right to confront and cross-examine witnesses
11 protects criminal defendants, and prohibits the admission of “testimonial hearsay.” See
12 *Sanchez, supra*, 63 Cal.4th at 673. This is not a criminal proceeding, Ms. Jardin is not a
13 criminal defendant, and Ms. Jardin has been afforded numerous opportunities to “confront”
14 and cross-examine DWR’s witnesses and evidence.

15 Finally, Ms. Des Jardin incorrectly argues that the modeling exhibits do not satisfy
16 the requirements for admissibility of an “original” writing. (See Objection pp. 7-8.) Contrary
17 to her assertion, the model outputs are “readable by sight,” as they are in English, and a
18 party may read the model outputs with his or her eyes. Additionally, printouts of computer
19 data are admissible and considered an “original writing.” *Aguimatang v. California State*
20 *Lottery* (1991) 234 Cal. App. 3d 769, 798 (“[a] computer printout does not violate the best
21 evidence rule, because a computer printout is considered an ‘original’”).) Therefore, Ms.
22 Des Jardin’s claim that the model input and output exhibits are inadmissible is not
23 supported by law or fact.

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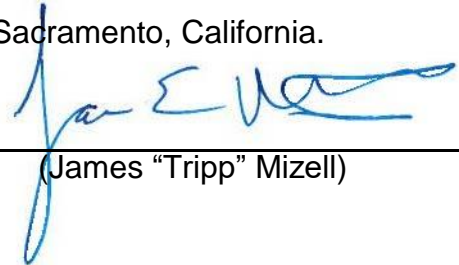
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III. CONCLUSION

For the reasons stated above, DWR requests that the Hearing Officers overrule Ms. Des Jardin's and Stockton's objections to the Modeling Exhibits.

Executed on this 12th day of March 2018 in Sacramento, California.



(James "Tripp" Mizell)