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9 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

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

**OPPOSITION TO THE OBJECTIONS TO  
ORAL TESTIMONY AND MOTION TO  
STRIKE**

1 The Natural Resources Defense Council, Defenders of Wildlife, and The Bay Institute  
2 (“NRDC et al”) oppose the objections and motion to strike filed by Downey Brand on behalf of  
3 Reclamation District et al 108 et al. For the reasons that follow, the Hearing Officers should deny the  
4 objections to oral testimony and motion to strike.

### 5 **Standard of Review**

6 The prior rulings in this proceeding have held that hearsay objections go to the weight of  
7 evidence and “should be reserved for the parties’ closing briefs.” August 31, 2017 Ruling at 13.  
8 That ruling noted that, “the bar for admission of evidence is low in administrative proceedings, and  
9 evidence may be admissible even though its probative value is low.” *Id.* With respect to hearsay,  
10 that ruling stated, “Hearsay evidence is admissible, but over timely objection may only be used for  
11 purposes of supplementing or explaining other evidence, and may not serve as the sole support for a  
12 finding, unless it would be admissible over objection in a civil court case.” *Id.* at 15.

### 14 **Argument**

15 First, the challenged testimony primarily concerns cross-examination of DWR’s witnesses  
16 regarding official records that are exceptions to the hearsay rule. *See* Cal. Evid. Code § 1280. The  
17 NMFS biological opinion for WaterFix (SWRCB-106) is an official record prepared by NMFS  
18 pursuant to its requirements under the federal Endangered Species Act. The U.S. Fish and Wildlife  
19 Service’s biological opinion for WaterFix (SWRCB-105) is an official record prepared by NMFS  
20 pursuant to its legal obligations under the federal Endangered Species Act. The California  
21 Department of Fish and Wildlife’s Finding of Facts under the California Endangered Species Act  
22 (NRDC-20) is an official record of the California Department of Fish and Game prepared pursuant  
23 to the Department’s legal obligations under the California Endangered Species Act.<sup>1</sup> The January 19,  
24 2017 draft revised Shasta Reasonable and Prudent Alternative (NRDC-29) is an official record

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28 <sup>1</sup> The objection and motion to strike admits that this document has been admitted into evidence, yet  
inexplicably maintains the objections to questions regarding this evidence.  
NRDC Opposition to Objections to Oral Testimony and Motion to Strike

1 prepared by NMFS pursuant to its obligations under the federal Endangered Species Act. The Fall  
2 Midwater Trawl survey (NRDC-103) is an official record maintained by the California Department  
3 of Fish and Game in its official capacity. The salmon doubling graphs (NRDC-104) are prepared by  
4 the U.S. Fish and Wildlife Service in its official capacity. Because these documents are official  
5 records, they are not themselves hearsay, and testimony regarding these documents is admissible to  
6 explain or supplement the documents themselves.<sup>2</sup>  
7

8 Second, the challenged cross-examination testimony pertains to documents are relevant and  
9 that are or will be offered into evidence. NRDC et al have not had an opportunity to present our case  
10 in chief, at which point most of these exhibits will be moved into evidence. Moreover, the Hearing  
11 Officers ordered that NRDC and other parties not seek to introduce exhibits used on cross-  
12 examination until the end of this phase of the hearing. In addition, other parties may seek to cross-  
13 examine other witnesses, including NRDC's witnesses, regarding any of these exhibits. As Downey  
14 Brand admits, hearsay testimony is admissible to explain or supplement other evidence. *See* Motion  
15 at 5:10-12. Until the close of this phase of the hearing, the Hearing Officers cannot determine which  
16 of these exhibits are or have been introduced into evidence. That is consistent with the prior rulings  
17 in this proceeding, which instructed that hearsay objections should be reserved for closing briefs.  
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19 Third, for several of the challenged documents the witnesses offered direct testimony  
20 regarding their contents, notwithstanding that Downey Brand's objection and motion to strike  
21 incorrectly claims that the witnesses did not offer testimony on the contents of these documents. *See*  
22 Motion at 4:3-4. In fact, for several of the documents, the witness' written testimony and oral  
23 testimony on direct examination explicitly referred to and summarized the contents of these  
24 documents, as the table below demonstrates.  
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28 <sup>2</sup> The only document cited in the Motion that does not constitute an official record exempt from  
hearsay is NRDC-40, which is one of the exhibits included with NRDC's case in chief.  
NRDC Opposition to Objections to Oral Testimony and Motion to Strike

Motion to Strike	DWR testimony
Testimony regarding NMFS biological opinion (SWRCB-106)	<p>DWR-1012 (Greenwood) testimony repeatedly references the NMFS biological opinion and explains that the testimony “based on” NMFS biological opinion and other records. <i>See</i> DWR-1012 at 3:4-8, 29:9-12. A simple word search shows that “SWRCB-106” is used 55 times in DWR-1012.</p> <p>DWR-1013 (Wilder) testimony repeatedly references the NMFS biological opinion, and explains that his testimony uses information from, and is based on information from, the NMFS biological opinion and other records. <i>See</i> DWR-1013 at 2:26-3:1, 3:17-21, 4:2-8. A word search shows that the phrase “NMFS BO” occurs 23 times in this testimony.</p>
Testimony regarding U.S. Fish and Wildlife Service biological opinion (SWRCB-105)	<p>DWR-1012 (Greenwood) testimony repeatedly references the U.S. Fish and Wildlife Service biological opinion and explains that the testimony is based on that biological opinion and other records. <i>See</i> DWR-1012 at 5:9-13. A word search shows that “SWRCB-105” is used 22 times in DWR-1012.</p>

Fourth, in several instances the Motion selectively quotes from the transcript seeking to strike testimony where the cross examination lays the foundation for a question regarding the witness’ opinion, while ignoring that NRDC did ask the witness for his or her opinion regarding the matter. For instance, page 6 of the Motion seeks to strike NRDC’s cross examination questions laying a foundation regarding the cumulative effects of WaterFix and existing CVP/SWP operations on redd dewatering (HT 194:4-13), and ignores that after laying this foundation (and after repeated NRDC Opposition to Objections to Oral Testimony and Motion to Strike

1 objections), the witness was asked his opinion regarding whether these effects constituted reasonable  
2 protection for salmon (HT 195:11-12). Similarly, while the Motion seeks to strike cross examination  
3 regarding the Fall Midwater trawl survey (HT:105-21 - 106-4), those questions laid the foundation  
4 for questions that follow where the witness provided his opinion regarding the status of species,  
5 which is the information in that official record (HT 106:6-20).  
6

7 Finally, to the extent that the Hearing Officers will consider an objection and motion to strike  
8 prior to closing briefs, the objection and motion to strike generally were untimely. Counsel first  
9 raised this objection after several hours of cross-examination (HT 249:14- 250:4). NRDC had no  
10 opportunity to cure any deficiency or to alter the mode of cross-examination with respect to any  
11 questions that were asked prior to this objection. Except where counsel made specific objections  
12 during the cross-examination, the objections were untimely and should be denied.  
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14 Dated: March 27, 2018

Natural Resources Defense Council

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Doug Obegi

18 On behalf of the Natural Resources Defense Council,  
19 Defenders of Wildlife, and the Bay Institute  
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