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10 **BEFORE THE STATE WATER RESOURCES**
11 **CONTROL BOARD**

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

18 ANTIOCH'S OBJECTIONS TO
19 NEW EVIDENCE IN THE
20 CROSS-EXAMINATION
21 TESTIMONY OF MAUREEN
22 SERGENT; MOTION TO
23 DISQUALIFY MAUREEN
24 SERGENT'S TESTIMONY

25 :

26 The City of Antioch objects to the following with respect to the following Cross-
27 Examination testimony of DWR's purported Expert Witnesses Maureen Sergent as new
28 evidence outside of the scope of DWR's case-in-chief:

1. General Objection to Disqualify Maureen Sergent testimony as an Expert

Ms. Sergent is not permitted to give the ultimate opinion as to injury to legal users of water rights from the WaterFix Project in the present case. During cross-examination by Antioch as to its water rights, Ms. Sergent inappropriately attempted to give a legal opinion as to the WaterFix Project's harm to Antioch. Further, Ms. Sergent indicated during cross examination by San Joaquin County for the first time that she conducted no independent analysis of injury to legal users nor formed an independent opinion as to such harm, but instead relied on the testimony, opinions, and exhibits of other DWR

1 witnesses.

2 An expert cannot give an opinion on the law. *Amtower v. Photon Dynamics,*
3 *Inc.*(2008) 158 Cal.App.4th 1582, 1598-1599. The reason for this rule is that it supplants
4 the function of the trier of fact:

5 [W]hen an expert's opinion amounts to nothing more than an expression
6 of his or her belief on how a case should be decided, it does not *aid* the
7 jurors, it *supplants* them. T]here is no necessity for this kind of evidence;
8 to receive it would tend to suggest that the judge and jury may shift
9 responsibility for decision to the witness. *Summers v. A.L. Gibling Co.*
10 (1999) 69 Cal.App.4th 1155, 1178, 1182-1183

11 A conclusion that a project shall not result in harm to a legal user of water is a legal
12 conclusion. Water Code 1702 provides that the change must not operate to the "injury of
13 any legal user of water involved." The very words of section 1702 mandate that it is the
14 Board's function to make the ultimate decision on injury to a legal user. Therefore, Ms.
15 Sergent's testimony during cross-examination as to the ultimate issue of injury to a legal
16 user must be stricken entirely.

17 All that Ms. Sergent actually testified to during cross-examination was that she
18 believed the WaterFix Project would be able to comply with D-1641. The sole basis of
19 her opinion was her review of testimony, evidence and opinions of the other DWR
20 experts already in the record. Therefore, Ms. Sergent's testimony is duplicative,
21 irrelevant and simply stating a conclusion that is ultimately up to the Board to make.
22 *People v. Torres* (1995) 33 Cal.App.4th 37, 45.

23 Opinion testimony is generally admissible only where it would assist the trier of fact.
24 Evidence Code 801(a). In the present case, even if Ms. Sergent's testimony as to injury
25 was not already an impermissible legal opinion, it is improper because it does not assist
26 the Board in this hearing process. By her own admission during cross-examination, Ms.
27 Sergent's testimony provides no independent analysis as to harm. Ms. Sergent testified
28

1 during cross-examination that her testimony is entirely based on other DWR and DOI
2 witnesses who had already testified. There was no new information, opinion or analysis
3 whatsoever. Expert opinion is not admissible if it consists of inferences and conclusions
4 which can be drawn as easily and intelligently by the trier of fact as by the witness. *Kotla*
5 *v. The Regents of the University of California* (2004) 115 Cal.App.4th 28. Having Ms.
6 Sergent simply “tell” the Board her opinions on either direct or cross examination of what
7 other DWR witnesses have concluded substitutes her opinion for the Boards and draws
8 conclusions that the Board can easily draw for itself based on the exact same evidence
9 already in the record.

11 Based on the foregoing, Ms. Sergent should be disqualified as an expert witness
12 in this proceeding because her testimony is little more than a regurgitation of prior
13 testimony by other DWR witnesses, she conducted no independent analysis, and she
14 attempts to inappropriately substitute her opinions for those of the Board on the ultimate
15 issues.

17 2. Specific Objections

18 The following cross-examination testimony should be stricken:

19 a. **Summary of Antioch’s Specific Objection No. 1:** Ms. Sergent’s cross-
20 examination testimony regarding harm to Antioch from the WaterFix Project
21 should be stricken entirely and Ms. Sergent should be disqualified to testify as to
22 any harm to Antioch by the Project. Ms. Sergents testimony regarding useable
23 days of water at Antioch resulting from the WaterFix Project was not part of her
24 original testimony, is outside of her expertise, was not part of the Modeler’s
25 original testimony, not part of DWR’s Case-in-Chief, and is contrary to the
26 evidence presented by DWR in its case-in-chief. Further, she demonstrated only
27 limited knowledge about the 1968 Agreement between DWR and Antioch and
28 no knowledge of the new 2016 CCWD-DWR Agreement.

1 During Antioch's cross-examination of Ms. Maureen Sergent, Antioch asked Ms.
2 Sergent about whether she had reached a purported conclusion as to any injury to
3 Antioch given that DWR does not operate to meet D-1641 standards at Antioch (as
4 confirmed by DWR witness John Leahigh). Ms. Sergent replied that she allegedly had a
5 conversation with Dr. Nader-Tehrani in which Dr. Tehrani told her that Antioch would
6 have more useable days of water under the WaterFix project than it does presently. Ms.
7 Sergent also testified on cross that harm to Antioch would be mitigated by the existing
8 1968 Agreement between Antioch and DWR (DWR-304).

10 With respect to useable days of water under Antioch's water rights in relation to an
11 alleged conversation with Dr. Nader-Tehrani, Ms. Sergent's testimony on cross-
12 examination was the first time this issue had ever been raised by DWR. Dr. Nader-
13 Tehrani never made any such statement during his testimony nor in his written testimony.
14 There is no specific exhibit introduced into the record by Dr. Tehrani relating to any such
15 alleged evidence. In fact, the evidence in the record regarding the modeling done by Dr.
16 Tehrani shows increases in EC just upstream of Antioch at Rock Slough on the San
17 Joaquin River and at Emmaton on the Sacramento River (see DWR-66, pp 6-7; DWR 5
18 errata, slides 55, 56 61). Dr. Tehrani's testimony (DWR 66 p. 7) also indicated concern
19 about higher bromides at Antioch resulting from the WaterFix Project and the
20 DREIR/SDEIS (EIR) indicates higher bromides at Antioch (See EIR at **Appendix B**, p. B-
21 87; **Chap 4**; p. 4.3.4-9). Ms. Sergent admitted during cross-exam that she was not
22 aware the EIR indicated increases in bromides at Antioch.

25 With respect to mitigation from the existing 1968 Agreement between Antioch and
26 DWR, Ms. Sergent indicated for the first time that she was not familiar with Section 10 of
27 that Agreement (DWR-304). The language of section 10 of the 1968 Agreement prevents
28

1 DWR from making any agreement with substantially better terms than granted Antioch.
2 Section 10 is one of the primary mitigation terms in the 1968 Agreement and to date the
3 DWR has not complied with its requirements. When questioned whether she knew if
4 DWR had offered Antioch substantially similar terms to the new 2016 Contra Costa Water
5 District (“CCWD”)-DWR Agreement (DWR 334), Ms. Sergent testified on cross-
6 examination that she was not familiar with the new 2016 CCWD-DWR Agreement even
7 though she refers to that agreement in her written direct testimony (DWR 53).
8

9 Based on the foregoing, Antioch requests that Ms. Sergent’s testimony regarding
10 her alleged conversation with Dr. Tehrani regarding useable days be stricken. Further,
11 Ms. Sergent demonstrated during cross-examination that she has insufficient knowledge
12 about Section 10 of the 1968 Agreement and no knowledge of the new 2016 CCWD-
13 DWR Agreement and therefore any opinion she has (on direct or cross) regarding
14 mitigation to Antioch by way of the 1968 Agreement should be stricken.
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16 **b. Summary of Antioch’s Specific Objection No. 2:** Ms. Sergent’s cross-
17 examination testimony regarding Dr. Tehrani’s analysis of the EC impacts of the
18 new 2016 DWR-CCWD Agreement (DWR 512) as “extreme” should be stricken.
19 Ms. Sergent’s testimony is a new opinion during cross-examination that is
20 contrary to the testimony of Dr. Tehrani and Jennifer Pierre.

21 During the cross examination of Ms. Maureen Sergent by Antioch, Ms. Sergent
22 attempted to imply that the analysis conducted for Dr. Tehrani of the downstream
23 impacts on water quality (DWR 512) resulting from the operational impacts of the new
24 2016 CCWD-DWR Agreement (DWR 334) did not show any actual harm. Ms. Sergent
25 stated that Dr. Tehrani’s analysis (DWR 512) addressed only “extreme” operating
26 conditions not likely to occur during the operation of the new 2016 CCWD-DWR
27 Agreement in connection with the operation of the WaterFix Project.
28

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):

City of Antioch's:

- NOTICE OF AVAILABILITY OF WITNESS RON BERNAL FOR PART 1B OF HEARING
- OBJECTIONS TO CROSS-EXAMINATION TESTIMONY OF MAUREEN SERGENT

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 Sept. 20, 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 Oct. 7, 2016

Signature: /s/ *Jessica Decker*

Name: Jessica Decker

Title: Assistant

Party/Affiliation: City of Antioch

Address: 6520 Lonetree Blvd. #1009, Rocklin CA 95765