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9 City of Antioch

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 RESPONSE TO  
19 OBJECTIONS OF SUBMISSION  
20 OF ANITOC'H'S EXHIBITS BY  
21 DEPARTMENT OF WATER  
22 RESOURCES and SAN LUIS  
23 AND DELTA MENDOTA  
24 WATER AUTHORITY WITH  
25 JOINDER BY WESTLANDS  
26 WATER DISTRICT

27 :

28 The City of Antioch provides the following response to the OBJECTIONS filed by  
THE DEPARTMENT OF WATER RESOURCES ("DWR") and SAN LUIS AND DELTA  
MENDOTA WATER AUTHORITY with WESTLANDS WATER DISTRICT joining  
(collectively "San Luis") as to Antioch's Exhibits to be submitted into evidence in support  
of its case-in-chief for Part 1B.

**RESPONSES TO DWR'S OBJECTIONS**

**1. DWR Objection A is without merit: Duplicative and Cumulative Exhibits**

DWR objects to 10 particular exhibits submitted by Antioch in support of its case-  
in-chief as duplicative and cumulative of exhibits submitted by other parties including  
DWR.

1 All of Antioch's Exhibits objected to by DWR were submitted as supporting the  
2 expert testimony (and Report) of Dr. Susan Paulsen. These exhibits were submitted  
3 independently by Antioch because such exhibits as submitted by DWR have not yet  
4 been admitted into evidence by the SWRCB. To the extent such exhibits are actually  
5 admitted into evidence by the SWRCB, Antioch would be willing to consider citing to  
6 DWR's admitted exhibits in lieu of submitting such exhibits separately - e. g, DWR  
7 Exhibits 5, 51, 53, 61, 66, 71, 301, 509, 512. However, until this occurs, Antioch  
8 contends such exhibits are not duplicative. The remaining exhibits objected to by DWR  
9 as duplicative and cumulative are submitted as materials in support of Dr. Paulsen's  
10 expert testimony and report.  
11

12 **2. DWR Objection B is without merit: Foundation and Relevance**

13 DWR objects to Antioch's Exhibit 219, which are comments that Antioch made on  
14 the WaterFix Project's draft environmental documents (SDEIR). DWR contends  
15 Antioch's 219 lacks foundation and is not relevant to this particular proceeding before  
16 the SWRCB.  
17

18 DWR's objection is entirely without merit. The purpose of submitting Exhibit 219  
19 is not to challenge the SDEIR through the Change Petition process, but rather to support  
20 Dr. Susan Paulsen's expert analysis of harm to Antioch from the proposed operation of  
21 the WaterFix Project, which is the direct subject of the SWRCB proceedings as to the  
22 WaterFix project. *In re Fields* (1990) 51 Cal.3d 1063, 1070. Exhibit 219 in particular  
23 demonstrates the potential impacts from Bromides to Antioch resulting from WaterFix  
24 Project operations. Such potential impacts from Bromides were put directly at issue in  
25 the SWRCB WaterFix hearing process by DWR itself. See for example, DWR Exhibits  
26  
27  
28

1 66 (Testimony of Dr. Tehrani) and 509 (conversion calculations for Chlorides to  
2 Bromides).

3 Dr. Tehrani testified on page 7 (Ins 17-21) of his written testimony: “There are  
4 three municipal diversion locations where bromides may be of concern.” During cross-  
5 examination by Antioch it was determined Dr. Tehrani based this part of his testimony in  
6 part on the findings in the SDEIR with respect to Bromides. Therefore, DWR put the  
7 findings in the DSEIR directly at issue in the proceeding before the SWRCB and  
8 particularly with respect as to harm to Antioch. Dr. Paulsen testified she helped prepare  
9 Antioch Exhibit 219 and authenticated that document. As a result, Antioch Exhibit 219  
10 is both relevant and proper foundation was provided. Antioch respectfully submits that  
11 DWR’s objection should be overruled.  
12

### 13 **RESPONSES TO SAN LUIS’S OBJECTIONS**

#### 14 **San Luis’s Objections that certain of Antioch Exhibits are Hearsay are** 15 **without merit and long waived** 16

17 San Luis objects to several of Antioch’s Exhibits as hearsay (see pgs 9 and 10 of  
18 San Luis’s Objections). Most of the Exhibits objected to involve documents related to  
19 Dr.Susan Paulsen’s testimony. San Luis’s Objections are entirely without merit and  
20 have in fact been waived.  
21

22 The Hearing Team should recall that San Luis (and Westlands and the State  
23 Contractors) elected to not conduct any cross-examination of the Antioch’s witnesses  
24 including Dr. Susan Paulsen. If San Luis had concerns of potential “hearsay” as to  
25 certain exhibits, San Luis had the opportunity to exam Antioch’s witnesses on this issue  
26 but intentionally chose not to do so. San Luis’s intentional decision to elect to opt out of  
27 cross-examination deprived Antioch of the opportunity to address this issue during its  
28

1 case-in-chief when it had its witnesses present at the hearing. Therefore, it is Antioch's  
2 position that San Luis (Westlands and the State Contractor's) waived any objections  
3 based on hearsay at this stage in the proceedings by not engaging Antioch's witnesses  
4 on this issue during the City's case-in-chief. See generally *Fibreboard Paper Products*  
5 *Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 698.

7 a. Dr. Paulsen's Report (Antioch 202)

8 Dr. Paulsen's Report (Antioch 202, 202 Errata) is not hearsay because it is not an  
9 out of court statement. Rather it is direct testimony by Antioch's principal witness in  
10 support of its case in chief. The Report is specifically incorporated into Dr. Paulsen's  
11 testimony. Dr. Paulsen's testimony is a summary of the Report. Again, Dr. Paulsen  
12 provided live, direct testimony in support of Antioch's case in chief before the hearing  
13 officers, and San Luis had every opportunity to question Dr. Paulsen on cross-  
14 examination but elected not to do so.<sup>1</sup> See generally *Hope v. Arrowhead & Puritas*  
15 *Waters, Inc.* (1959) 174 Cal.App.2d 222 [Expert report not hearsay when expert is a  
16 witness],<sup>2</sup>

18 It should also be pointed out that while San Luis claims that Dr. Paulsen's Report  
19 (Antioch Exhibit 202 and 202 Errata) for Antioch is somehow "hearsay." San Luis makes  
20 no such claim as to DWR's numerous reports and memorandum offered into evidence  
21 (including memorandum from non DWR witnesses such as Contra Costa Water District  
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24 <sup>1</sup> Exhibits Antioch 208, 217, 218, 219, 231 are similarly direct testimony and not hearsay because they  
25 were prepared in whole or in part by Dr. Paulsen and incorporated into Dr. Paulsen's direct testimony. They  
are therefore not out of court/hearing testimony by third parties.

26 <sup>2</sup> "Of interest in this connection is the fact that Dr. Jones was subsequently called by the court to appear as  
27 a witness "because some mention was made of his report"; and he did so, sponsored by defendant.  
Plaintiff cross-examined him and had ample opportunity to fully question him concerning his report. He did  
28 not do so. This appears to render ineffective the "hearsay" argument" *Hope* at 231.

1 – DWR 509). This selective application of argument by San Luis simply demonstrates  
2 the folly of San Luis’s objections as to Antioch. San Luis’ Objections should be  
3 overruled.

4 b. Antioch’s Urban Water Management Plan (Antioch 104)

5 Antioch’s Urban Water Management Plan (“Plan”) is also not hearsay. It was  
6 prepared for, and by, the City. It is an official statement of the City as to water  
7 management planning as required by law. Antioch had its Assistant City Manager, Ron  
8 Bernal, authenticate the Plan during his direct testimony, and his written testimony  
9 references the contents of the Plan. The Plan is direct testimony and not hearsay.  
10 Again, San Luis had every opportunity to cross-examine Mr. Bernal about the Plan but  
11 intentionally elected not to do so. Even if it could somehow be argued to be  
12 hearsay, the Plan falls within the Business and Government document exceptions to  
13 hearsay (Evidence Code sections 1271, 1280). San Luis’ Objections should be  
14 overruled.  
15

16 c. Contra Costa Water District’s Historic Salinity Report (Antioch 216)

17 Contra Costa Water District’s Salinity Report is not hearsay. Dr. Susan Paulsen  
18 testified during the City’s case-in-chief that she assisted in the preparation of Contra  
19 Costa Water District’s Salinity Report (Antioch 216). Dr. Paulsen is a named contributor  
20 to this Report. She authenticated the Report, discussed her involvement in the Report,  
21 and incorporated the Report into her direct testimony. Again, San Luis had an  
22 opportunity to examine Dr. Paulsen on the Report but failed to do so.  
23

24 Even if it could somehow be argued to be hearsay, the Plan falls within the  
25 Business and Government document exceptions to hearsay (Evidence Code sections  
26 1271, 1280). San Luis’ Objections should be overruled.  
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1 d. Documents Relied on by Dr. Paulsen (Antioch Exhibits 205-233)

2 Antioch Exhibits 205-233 are also admissible even if hearsay as they are  
3 documents relied on by Dr. Paulsen as in part forming the basis of certain of her  
4 opinions. So long as the threshold requirement of reliability is satisfied, even a matter  
5 that is ordinarily *inadmissible* can form the proper basis for an expert's opinion  
6 testimony. (*In re Fields* (1990) 51 Cal.3d 1063, 1070 [expert witness can base 'opinion  
7 on reliable hearsay, including out-of-court declarations of other persons] (*People v.*  
8 *Gardeley* (1996) 14 Cal.4th 605, 618.). Evidence Code section 801, subdivision (b)  
9 permits an expert to rely upon inadmissible evidence if it is 'of a type that reasonably  
10 may be relied upon by an expert in forming an opinion upon the subject to which his  
11 testimony relates (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal. 3d 112, 133).  
12 And, pursuant to Evidence Code section 802, the expert may state the reasons for his or  
13 her opinion and the matter upon which it is based.  
14  
15

16 The documents San Luis objects to are published and publicly available – or else  
17 are prepared by Dr. Paulsen (as described above). San Luis fails to provide any  
18 information or evidence that these documents are not reliable. Again, San Luis had an  
19 opportunity to raise this issue during cross-examination but chose not to. San Luis'  
20 Objections should be overruled.  
21

22 **CONCLUSION**

23 All of DWR's and San Luis's Objections are without merit and should be overruled.

24 Dated: Jan 4, 2017

25 /s/ *Matthew Emrick*

26 \_\_\_\_\_  
27 Matthew Emrick, Special  
28 Counsel to the City of Antioch

**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:** Responses to DWR's and San Luis's Objections to Antioch's 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 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](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 Jan. 6, 2017

Signature: /s/ *Jessica Decker*

Name: Jessica Decker

Title: Assistant

Party/Affiliation: City of Antioch

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