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

12 HEARING IN THE MATTER OF
13 CALIFORNIA DEPARTMENT OF WATER
14 RESOURCES AND UNITED STATES
15 BUREAU OF RECLAMATION
16 REQUEST FOR A CHANGE IN POINT OF
17 DIVERSION FOR CALIFORNIA WATER
18 FIX – **PART 2**

19 ANTIOCH’S JOINDER IN SAN JOAQUIN
20 COUNTY’S OPPOSITION TO DWR’S
21 OBJECTIONS TO, AND MOTION TO
22 STRIKE THE PART 2 TESTIMONY OF
23 MARC DEL PIERO, CSPA-208-
24 CORRECTED AND RELATED
25 ORAL TESTIMONY

26 Antioch hereby joins fully in San Joaquin County’s¹ Opposition to DWR’s objections
27 to, and motion to strike the Part 2 testimony of Marc Del Piero, CSPA-208-corrected and
28 related oral testimony.

In addition to the specific objections set forth by San Joaquin County, Antioch has
the following comments regarding this matter:

¹ Opposition filed cumulatively by Protestants: County of San Joaquin, San Joaquin County Flood Control and Water Conservation District, and Mokelumne River Water and Power Authority (“San Joaquin County Protestants”), Local Agencies of the North Delta (“LAND”), California Sportfishing Protection Alliance, California Water Impact Network, and AquAlliance (collectively herein, “San Joaquin County et al.”)

1 1. DWR appears to have missed the irony in challenging Mr. Del Piero's status as an
2 expert with respect to testimony relating to potential legal matters and public trust issues.
3 This Board has already permitted DWR to provide "legal" testimony and conclusions on a
4 number of issues – including water rights - during Part 1 from DWR witness Maureen Sergent.
5 Ms. Sergent is not an attorney, does not practice water rights law (took a single survey course
6 in water law), and has not been a prior member of the SWRCB – and yet, she was allowed to
7 make fundamental legal conclusions during her Part 1 testimony, including testimony relating
8 to the potential legal injury to protestants' water rights from the WaterFix Project and the
9 application of certain existing agreements between DWR and certain protestants such as
10 Antioch. It would simply be fundamentally unjust and clearly erroneous to allow Ms. Sergent's
11 testimony to stand while striking portions of Mr. Del Piero's testimony. Should the SWRCB
12 uphold DWR's objection and motion to strike in this respect, then Antioch again respectfully
13 moves to strike Ms. Sergent's Part 1 testimony in its entirety.
14
15

16 2. Mr. Del Piero's testimony regarding the no injury rule, public trust water requirements,
17 water availability, paper water etc. are all relevant to flow criteria and impacts to public trust
18 resources in Part 2. The fact that there may be some cross-over with Part 1 issues during Part
19 2 as to flows was recognized and approved by the Board during the October 19, 2017 pre-
20 hearing. The Board encouraged all parties to submit information relating to flow criteria (see
21 Transcript of pre-hearing pp. 27-29):
22

23 MR. O'LAUGHLIN: Good morning again. Tim
24 O'Laughlin, San Joaquin Tributaries Authority.
25 I have two questions regarding appropriate
26 Delta flow criteria.
27 So, if I'm understanding you correctly,
28 basically every party to the proceeding in regards to
their case in chief in Phase 2 should put forward what

10 they believe the appropriate Delta flow criteria should
11 be pursuant to the Water Code for the approval of the
12 Petition; is that correct?

13 CO-HEARING OFFICER DODUC: **If you have a**
14 **proposal to make, we would like to hear it.**

15 MR. O'LAUGHLIN: Okay. So, I'm just trying to
16 figure out how this process plays out over time.

17 **So everybody makes their appropriate Delta flow**
18 **criteria proposals.** We cross-examine all the various
19 proposals that are being made. And then at some later
20 point in time, what happens?

21 CO-HEARING OFFICER DODUC: The Board will make
22 a decision to include what we determine to be appropriate
23 flow criteria should we approve this Petition.

9
10 Having determined that all parties were welcome to submit evidence regarding
11 appropriate flow criteria, the Board then determined that such flow criteria could address
12 Phase 1 impacts (solely or in connection with Phase 2 impacts) as well as propose terms and
13 conditions. (Transcript of pre-hearing pp. 37-38):

14 MR. SALMON: And my question is, given that

15 9 Delta flow criteria is stated as a Part 2 issue --

16 10 CO-HEARING OFFICER DODUC: Um-hmm.

17 11 MR. SALMON: -- and not a Part 1 issue, can the
18 12 evidence that's introduced on that issue in a Part 2 case
19 13 in chief relate to protecting or responding to concerns
20 14 that a party has raised in Part 1? Injury to legal user
21 15 of water, for example.

22 16 CO-HEARING OFFICER DODUC: Will it also address
23 17 potential injury -- well -- to fisheries and other
24 18 resources? Or is it specific to just addressing injury
25 19 to water user?

26 20 MR. SALMON: **Would it be permissible to propose**
27 21 **Delta flow criteria for the WaterFix Project** and support

1 22 that with evidence *as to why those flow criteria are*
2 **23 needed to protect against a Part 1 impact?**

3 24 CO-HEARING OFFICER DODUC: **YES.**

4 25 MR. SALMON: *Would it be permissible to*
5 **1 introduce new evidence regarding those impacts to legal**
6 **2 users of water if it directly relates to supporting the**
7 **3 proposed Delta criteria?**

8 4 CO-HEARING OFFICER DODUC: Is there a legal
9 5 concern with that, Miss Heinrich?

10 6 As you can attest, during the course of this
11 7 hearing *we've been very open to the introduction of*
12 8 *potential terms, conditions, criteria, so I at this point*
13 9 *don't see an issue with that.*

14 Given the foregoing, Mr. Del Piero's testimony relating to public trust water needs,
15 water availability, paper water vs. wet water, etc. is appropriate and relevant even where
16 there may be some cross-over between Part 1 and Part 2. All of his testimony on these
17 issues is relevant to establishing potential flow criteria.²

18 RESPECTFULLY SUBMITTED,

19 Dated: May 2, 2018

20
21 /s/ *MATTHEW EMRICK*
22 Matthew Emrick
23 Attorney for Protestant
24 City of Antioch

25
26 _____
27 ² As SJ County states in its Opposition Brief: the Board must determine "whether sufficient water exists in
28 the system to allow approval of the petition without injury to the Public Trust or the Public Interest."