

1 MATTHEW L. EMRICK (SBN 148250)
2 LAW OFFICES OF MATTHEW EMRICK
3 6520 Lone Tree Blvd., #1009
4 Rocklin, CA 95765
5 Telephone: (916) 337-0361
6 Facsimile: (916) 771-0200
7 matthew@mlelaw.com

8 Attorneys for Protestant,
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 FROM THE
20 DEPARTMENT OF WATER
21 RESOURCES AS TO SCOPE
22 :

23 The City of Antioch provides the following response to that part of THE
24 DEPARTMENT OF WATER RESOURCES ("DWR") Objections relating to the 1968
25 Agreement between DWR and Antioch (DWR Exhibits 304, 310) in the context of an
26 "Injury" to a legal user. (Water Code Section 1702). DWR provides its objections as
27 limited to relevancy and impermissible opinion testimony and *not* to "scope." (See page 2,
28 Ins 1-13 of DWR's Brief). Nevertheless, Antioch is providing the following response in the
context of "Scope" in an abundance of caution. Antioch will provide a more detailed
response later in these proceedings as to DWR's objection in the context of relevancy
and opinion testimony.

DWR'S OBJECTION

In its specific Objections to Antioch's Part 1 B Written Testimony (pg. 2, Ins 1-13)
DWR objects to the testimony of Ron Bernal including Mr. Bernal's written testimony

1 relating to the application of the 1968 Agreement in the context of harm to Antioch from
2 DWR's failure to meet its obligations under that Agreement: DWR's objections are based
3 on relevancy and alleged impermissible opinion testimony and not as to scope. As noted
4 above, however, Antioch provides its response in an abundance of caution.

5 **ANTIOCH'S SUMMARY OF RESPONSE TO DWR'S OBJECTION**

6
7 The 1968 Agreement (DWR 304, 310) is directly relevant to the "scope" of
8 Antioch's Part 1B case-in-chief relating to injury from the California WaterFix Project
9 ("CWF"). The 1968 Agreement is an agreement between DWR and Antioch intended to
10 at least partially mitigate certain impacts to the City from DWR's operation of the State
11 Water Project ("SWP"). The 1968 Agreement admits that DWR's operation of the
12 present SWP facilities indeed harm Antioch (DWR 304, p. 2, Recital). Mr. Leahigh
13 testified during cross-exam that DWR's operations under the CWF will not change and
14 that DWR does not maintain D-1641 M&I Standards at Antioch because of the 1968
15 Agreement. Dr. Tehrani testified on cross-examination that bromides could be an issue
16 at Antioch but for the 1968 Agreement.

17
18 In the context of injury to legal user, Antioch contends that DWR has not fully
19 performed its obligations under the 1968 Agreement to mitigate the potential impacts of
20 the CWF on Antioch. Specifically, Antioch contends that under Section 10 of the 1968
21 Agreement (DWR 304), DWR is obligated to provide Antioch with the same, or
22 substantially the same, terms of mitigation as those DWR granted to Contra Costa Water
23 District ("CCWD") in March 2016 to mitigate the impacts of the CWF on CCWD. Section
24 10 provides:
25

26 10. State agrees that other municipal and industrial entities in the Delta
27 will not be granted compensation for damages caused by the State
28 Water Resources Development System under substantially more
favorable terms than those used to Compensate the City hereunder.

1 Here, Antioch contends DWR has provided CCWD with substantially more
2 favorable terms than those granted Antioch under its 1968 Agreement including but not
3 limited to: a longer fixed term, better water quality, waiver of release clause, no charge
4 for the construction of certain facilities needed to convey water to CCWD. (see for
5 example DWR 334, sections 1.2, 3.1, 3.4, 3.6, 5.1, 5.5). DWR has yet to offer such
6 terms to Antioch.
7

8 Perhaps more significantly, DWR has in fact already put the 1968 Agreement and
9 its terms and conditions directly at issue in this matter by entering the 1968 Agreement
10 as an exhibit to DWR's case-in-chief (DWR 304, 310). DWR did this in an effort to
11 allegedly contend that the 1968 Agreement somehow mitigates harm to Antioch from the
12 CWF (See for example DWR 53, p 19; and DWR 66, p, 7, Ins. 17-21). Notably, the 1968
13 Agreement, which DWR attempts to use as a shield against mitigating harm to Antioch in
14 these proceedings, **ends** in 2028 – before the operation of the CWF. Therefore, the
15 1968 Agreement as it relates to injury to Antioch within the context of Water Code 1702
16 is directly relevant and already at issue in the present proceedings and Part 1B directly
17 through the actions, contentions, and evidence of the DWR.¹
18
19

20 CONCLUSION

21 The 1968 Agreement and Section 10 of that Agreement are within the scope of
22

23 ¹ Under applicable law, DWR cannot even raise the 1968 Agreement as a “shield” to Antioch’s claims of
24 harm from the CWF unless DWR is fully in compliance with all the terms of the 1968 Agreement. Civil
25 Code section 1439 provides:

26 “Before any party to an obligation can require another party to perform any act under it, he must
27 fulfill all conditions precedent thereto imposed upon himself; and must be able and offer to fulfill
28 all conditions concurrent so imposed upon him on the like fulfillment by the other party, except as
provided by the next section.”

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Part 1B because it relates directly to harm from the CWF and mitigation from such harm. It is also within the scope and relevant because DWR has already raised the issue of the applicability of the 1968 Agreement during its case-in-chief.

As noted above, Antioch submits this response to DWR's Objection in an abundance of caution because DWR raised this objection based on relevancy and not scope. The City will respond further as to the issues of relevancy and opinion testimony prior to the start of Part 1B

Dated: Sept. 29, 2016

/s/ *Matthew Emrick*

Matthew Emrick, Special
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:

- ANTIOCH'S RESPONSE TO OBJECTIONS FROM SAN LUIS & DELTA MENDOTA WATER AUTHORITY AS TO SCOPE
- ANTIOCH'S RESPONSE TO OBJECTIONS FROM THE DEPT OF WATER RESOURCES AS TO SCOPE

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 Sept; 30, 2016

Signature: /s/ *Jessica Decker*

Name: Jessica Decker

Title: Assistant

Party/Affiliation: City of Antioch

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