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9 **BEFORE THE STATE WATER RESOURCES**

10 **CONTROL BOARD**

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

17 ANTIOCH'S RESPONSE TO
18 OBJECTIONS FROM SAN LUIS
19 & DELTA MENDOTA WATER
20 AUTHORITY AS TO SCOPE
21 :

22 The City of Antioch provides the following response to that part of SAN LUIS &
23 DELTA MENDOTA WATER AUTHORITY's ("Authority") Objections relating to the 1968
24 Agreement between DWR and Antioch (DWR Exhibits 304, 310) in the context of an
25 "Injury" to a legal user. (Water Code Section 1702). The Authority couches its objectionS
26 as being based upon relevancy and impermissible opinion testimony and *not* to "scope."
27 (See page 11, Ins 14-20 of the Authority's Brief). Nevertheless, Antioch is providing the
28 following brief summary response in an abundance of caution with respect to scope.
Antioch will provide a more detailed response later in these proceedings as to the
Authority's objection in the context of relevancy and opinion testimony.

29 **AUTHORITY'S OBJECTION**

30 Antioch responds to the following objection by the Authority as to Antioch's Part 1B
31 testimony (set forth on page 11 of the Authority's Objections) that the 1968 Agreement is
32 not relevant to impacts to legal users:

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2 The Water Authority also objects to Mr. Bernal's testimony that "Presently,
3 the City is being impacted by the WaterFix Project because DWR has not
4 yet offered Antioch mitigation from the WaterFix Project comparable to
5 that granted CCWD in the 2016 CCWD Agreement, as required by
6 Section 10 [of] the 1968 Agreement between the City and DWR." (Antioch-
7 100 at p. 9:10-14.) This testimony is irrelevant, and is an inadmissible
8 opinion regarding a question of law. ***The issue of what is required under
9 the 1968 agreement is not relevant to the issue of the effect of the
10 project on legal users and uses of water.*** The issue of what the 1968
11 Agreement requires is a question of law.

12 **ANTIOCH'S SUMMARY OF RESPONSE TO AUTHORITY'S OBJECTION**

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

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

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

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

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

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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.”

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CONCLUSION

The 1968 Agreement and Section 10 of that Agreement are within the scope of 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 the Authority’s Objection in an abundance of caution as the Authority has actually raised this objection based on relevancy and not on 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