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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 RESPONSE TO
19 OBJECTIONS FROM THE
20 DEPARTMENT OF WATER
21 RESOURCES and SAN LUIS
22 AND DELTA MENDOTA
23 WATER AUTHORITY

24 :

25 The City of Antioch provides the following response to the OBJECTIONS filed by
26 THE DEPARTMENT OF WATER RESOURCES ("DWR") and SAN LUIS AND DELTA
27 MENDOTA WATER AUTHORITY ("San Luis") as to Antioch's written testimony in support
28 of its case-in-chief for Part 1B.

Initially, Antioch will note that all of DWR's objections, both specific and "master," are vague as to Antioch. Claims of relevancy and improper opinion testimony are made generally without specific examples. It is nearly impossible to tell what if any of DWR's master objections are intended to apply to Antioch. Antioch previously filed Responses to Objections to San Luis and DWR's Objections and incorporates those previously filed Responses into this Response.

Antioch's specific responses are set forth below:

1 Percipient witnesses rely upon their experience to formulate observations, conclusions and
2 opinions.

3 Further, pursuant to Government Code section 11513(c), relevant evidence is
4 admitted if it is evidence on which responsible persons are accustomed to rely in the
5 conduct of serious affairs, regardless of the existence of any common law or statutory
6 rule which might make improper the admission of the evidence over objection in civil
7 actions. (Gov. Code § 11513(c).)

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9 As to DWR's objections based on Mr. Bernal opinions in his written testimony, Mr.
10 Bernal is the Staff person from Antioch with the most overall knowledge of the City's
11 Water Supply system and potential impacts to that system. Mr. Bernal has been in
12 involved with the 1968 Agreement analysis/negotiations (between DWR and Antioch) on
13 behalf of Antioch, and he is the City staff person with the most knowledge of the
14 conditions of that agreement from Antioch's perspective (DWR 304). Mr. Bernal is the
15 person from the City with the most knowledge of the 2013 amendment to the 1968
16 Agreement (DWR 310_). Mr. Bernal is the City staff member most familiar with Contra
17 Costa Water District's ("CCWD") 2016 agreement with DWR ("2016 CCWD-DWR
18 mitigation agreement" - DWR 334). All of this is set forth in Mr. Bernal's testimony.
19

20 Mr. Bernal's written testimony with respect to harm from the WaterFix project to
21 Antioch is a mixture of fact and opinion based in part on his real-life work experience with
22 the City of Antioch on its water system. This is literally the definition of a percipient
23 expert. Additionally, Mr. Bernal's testimony specifically states that the City has relied on
24 the work of Dr. Susan Paulsen. (see Exhibit 100, at page 8, Ins 15-17). Mr, Bernal
25 testifies further on Page 3, Ins 2-10 that the basis of his analysis of harm is based on Dr.
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1 Paulsen’s work as well as the impacts identified by WaterFix Project itself including the
2 impacts set forth in the WaterFix RDEIR/SDEIS:

3 From reviewing the WaterFix project and the impacts set forth in the
4 2015 WaterFix Project RDEIR/SDEIS, as well as in consultation with
5 the City’s lead scientist, Dr. Susan Paulsen of Exponent, it is Antioch’s
6 analysis that the WaterFix Project would impact the City’s water rights
7 and water supply. Such impacts would include, but not be limited to,
8 increased chlorides and bromides at the City’s intake resulting in less
9 days of usable water, higher treatment costs, and an increased need
10 to purchase substitute water from other sources.

11 Therefore, as to injury from the WaterFix Project, Mr. Bernal sets forth the basis of
12 his opinions specifically in his written testimony, which include in part his own personal
13 experience as the City’s Engineer and Public Works Director. Injury to Antioch in the
14 context of the WaterFix Petition for Change is relevant as it is the heart of the entire
15 proceeding (Water Code 1702).

16 With respect to Mr. Bernal’s testimony in relation to the 1968 Agreement, DWR
17 objects that Mr. Bernal’s testimony is prohibited opinion testimony (legal opinion) and
18 irrelevant. The 1968 Agreement (DWR 304, 310) is directly relevant to the “scope” of
19 Antioch’s Part 1B case-in-chief relating to injury from the California WaterFix Project
20 (“CWF”). The 1968 Agreement is an agreement between DWR and Antioch intended to
21 at least partially mitigate certain impacts to the City from DWR’s operation of the State
22 Water Project (“SWP”). The 1968 Agreement admits that DWR’s operation of the
23 present SWP facilities indeed harm Antioch (DWR 304, p. 2, Recital). The City is
24 allowed to testify as to how it has operated under the Agreement and on its views on
25 how the Agreement was intended to operate.

26 In the context of injury to legal user, Antioch contends that DWR has not fully
27 performed its obligations under the 1968 Agreement to mitigate the potential impacts of
28

1 the CWF on Antioch. Specifically, Antioch contends that under Section 10 of the 1968
2 Agreement (DWR 304), DWR is obligated to provide Antioch with the same, or
3 substantially the same, terms of mitigation as those DWR granted to Contra Costa Water
4 District (“CCWD”) in March 2016 to mitigate the impacts of the WaterFix Project on
5 CCWD. Section 10 provides:

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

11 Here, Antioch contends DWR has provided CCWD with substantially more
12 favorable terms than those granted Antioch under its 1968 Agreement including but not
13 limited to: a longer fixed term, better water quality, waiver of release clause, no charge
14 for the construction of certain facilities needed to convey water to CCWD. (see for
15 example DWR 334, sections 1.2, 3.1, 3.4, 3.6, 5.1, 5.5). DWR has not yet offered such
16 terms to Antioch which is a factual statement.¹

17 Perhaps more significantly, DWR has in fact already put the 1968 Agreement and
18 its terms and conditions directly at issue in this matter by entering the 1968 Agreement
19 as an exhibit to DWR’s case-in-chief (DWR 304, 310). DWR did this in an effort to
20 allegedly contend that the 1968 Agreement somehow mitigates harm to Antioch from the
21 CWF (See for example DWR 53, p 19; and DWR 66, p, 7, Ins. 17-21). Notably, the 1968
22 Agreement, which DWR attempts to use as a shield against mitigating harm to Antioch in
23 these proceedings, **ends** in 2028 – before the operation of the CWF. Therefore, the
24 1968 Agreement as it relates to injury to Antioch within the context of Water Code 1702
25 is directly relevant and already at issue in the present proceedings and Part 1B directly

27 ¹ Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces
28 the ultimate issue to be decided by the trier of fact.(Evid. Code, §805.)

1 through the actions, contentions, and evidence of the DWR.²

2 Mr. Bernal is the City staff person who is in charge of overseeing the 1968
3 Agreement and who interacts with DWR regarding the 1968 Agreement. Therefore, he
4 has special knowledge and experience not generally held by the public at large with
5 respect to the 1968 Agreement.³
6

7 In sum, all of DWR's objections are therefore without merit and should be overruled
8 as to the testimony of Ron Bernal.

9 2. San Luis's Objections to Testimony of Ron Bernal

10 San Luis sets forth Objections relating to the testimony of Ron Bernal that are very
11 similar to those raised by DWR. San Luis objects that the following parts of Mr. Bernal's
12 Testimony "lacks foundation":

- 13 • Chloride levels above 250 ppm for longer periods of time under present than under
14 present conditions (Antioch 100 at p. 8:19-23)
- 15 • Bromide legal above 50, 100 and 300 ug/L for longer durations than under present
16 operations (Antioch 100 at p.24-9:2).
- 17 • Increased treatment costs over present conditions (Antioch 100 at p.9:3-6)
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22 ² Under applicable law, DWR cannot even raise the 1968 Agreement as a "shield" to Antioch's claims of
23 harm from the CWF unless DWR is fully in compliance with all the terms of the 1968 Agreement. Civil
Code section 1439 provides:

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

26
27 ³ DWR recognizes in the recitals to the 1968 Agreement DWR's understanding that water has been
diverted for municipal purposes at Antioch since 1868. DWR has included Antioch as a legal user of water
identified in its Petition for Change.

28

- 1 • Increased purchases of substitute water over present conditions (Antioch 100 at p.
2 9:7)

3 San Luis further objects to Mr. Bernal's statement in his written testimony that
4 Antioch has been harmed under the terms of the 1968 Agreement because DWR has to
5 date failed to offer Antioch the same mitigation terms it granted CCWD under the new
6 2016 CCWD-DWR Mitigation Agreement. (Antioch 100 at p.10-14).
7

8 Antioch's Response to San Luis's Objections to the Testimony of Ron Bernal

9 All of San Luis's objections fail. As specifically discussed above in this Response,
10 and as set forth in Mr. Bernal's testimony, Mr. Bernal's testimony is based (foundation)
11 on his experience and work at Antioch with respect to the City's water supply system.
12 Similar basis for his testimony is the work of Dr. Susan Paulsen, the WaterFix Project's
13 own analysis of harm, and the analysis set forth in the DREIR/SDEIS for the WaterFix
14 Project (Antioch 200, 202).⁴ Again, this is specifically set forth in Mr. Bernal's testimony.
15

16 With respect to Mr. Bernal's testimony relating to harm from DWR's failure to
17 perform under Section 10 of the 1968 Agreement, San Luis's objections again fail. As
18 discussed above, and incorporated here, Section 10 of the 1968 Agreement specifically
19 provides that Antioch is entitled to the same terms granted CCWD under its new
20 agreement with DWR. DWR specifically raised the issue of the 1968 Agreement by
21 alleging Antioch is barred from these proceedings by a release clause in the 1968
22

23 ⁴ Mr. Bernal testifies on Page 3, Ins 2-10 as to the basis/foundation of his analysis of harm:

24 From reviewing the WaterFix project and the impacts set forth in the 2015 WaterFix Project
25 RDEIR/SDEIS, as well as in consultation with the City's lead scientist, Dr. Susan Paulsen of
26 Exponent, it is Antioch's analysis that the WaterFix Project would impact the City's water rights
27 and water supply. Such impacts would include, but not be limited to, increased chlorides and
28 bromides at the City's intake resulting in less days of usable water, higher treatment costs, and
an increased need to purchase substitute water from other sources.

1 Agreement. As previously noted, DWR cannot even raise the issue of the release until it
2 has fully performed its outstanding obligations under the 1968 Agreement – which DWR
3 has not.

4 All of San Luis’s objections are therefore without merit and should be overruled as
5 to the Testimony of Ron Bernal.
6

7 **B. Testimony and Exhibits of Dr. Susan Paulsen**

8 1. DWR’s Objections to Testimony of Dr. Susan Paulsen

9 On page 2 of DWR’s “Objections to City of Antioch – Case in Chief, Part 1B,”
10 DWR objects to certain reports and articles submitted by Antioch’s expert, Dr. Susan
11 Paulsen. Specifically, DWR object to Antioch’s Exhibits 216, 226, 227, 228 and 229.
12 These exhibits are referenced by Dr. Susan Paulsen in her: *Report on the Effects of the*
13 *California WaterFix Project on the City of Antioch (Antioch 202 – “Report”).*
14

15 Antioch’s Response to DWR’s Objections to the Testimony of Dr. Susan Paulsen

16 Th objected to Exhibits are provided as supporting materials for the conclusions
17 and opinions set forth the Report and not as separate reports. They are foundational
18 documents supporting Dr. Paulsen’s conclusions. Ironically DWR attempts to argue that
19 Antioch’s conclusions are unsupported, and then argues at the same time, that materials
20 supporting Dr. Paulsen’s Report are not relevant. DWR in fact did the same thing during
21 its testimony by providing documents foundational or supportive of the testimony
22 provided by DWR.
23

24 In sum, these exhibits objected to by DWR are materials in support of Dr.
25 Paulsen’s Report. It should be noted that Exhibit 216, which is a report by CCWD on
26 historic salinity within the Delta, was partially co-authored by Dr. Paulsen and she is
27 acknowledged specifically as a contributor to that report.
28

1 As a result, DWR's objections to Antioch's exhibits should be overruled.

2 2. San Luis's Objections to Testimony of Dr. Susan Paulsen

3 On pages 11 to 12 of San Luis's Objections, San Luis objects to the testimony of
4 Dr. Susan Paulsen as incorporating "hearsay" evidence in the form of a Report prepared
5 by Dr. Paulsen and incorporated into her written testimony:
6

7 The Water Authority objects to Exhibit 202, which is incorporated by reference
8 in Exhibit 200 at 3:14-16, as hearsay. (Antioch-200, at p. 3:14-16.) Based on
9 the foregoing, the Water Authority objects to the following testimony of Susan
10 Antioch-200, at p. 3:14-16

11 San Luis fails to explain how a report prepared by Dr. Paulsen as part of her own
12 testimony and incorporated into her written testimony is hearsay. San Luis fails to cite
13 any authority whatsoever to support its contention – and so fails on that omission alone.
14

15 In fact, the authority in California is just the opposite. Expert testimony may be
16 based on material that is not admitted into evidence so long as it is material of a type that
17 is reasonably relied upon by experts in the particular field in forming their opinions. So
18 long as this threshold requirement of reliability is satisfied, even matter that is ordinarily
19 *inadmissible* can form the proper basis for an expert's opinion testimony. (*In re Fields*
20 (1990) 51 Cal.3d 1063, 1070 [expert witness can base 'opinion on reliable hearsay,
21 including out-of-court declarations of other persons'] (*People v. Gardeley* (1996) 14
22 Cal.4th 605, 618.). Evidence Code section 801, subdivision (b) permits an expert to rely
23 upon inadmissible evidence if it is 'of a type that reasonably may be relied upon by an
24 expert in forming an opinion upon the subject to which his testimony relates'
25 [Citation.]" (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal. 3d 112, 133. And,
26 pursuant to Evidence Code section 802, the expert may state the reasons for his or her
27 opinion and the matter upon which it is based.
28

1 In the present case, Dr. Paulsen's Report is based in large part on DWR's own
2 evidence, modeling and testimony. Dr. Paulson's report is verified and incorporated into
3 her testimony. It is relevant, reliable and not hearsay. San Luis did not make any such
4 arguments with respect to the PowerPoint Presentations of DWR's and DOI's witnesses
5 which are essentially intended as expert reports.
6

7 Therefore, San Luis' objections as to Dr. Susan Paulsen's testimony and Report
8 must be overruled.

9 DWR's Master Objections

10 DWR's "Master Objections" are vague and overbroad – and it is nearly impossible
11 to determine whether any such objections apply to Antioch specifically. The vagueness
12 of these master objections invalidly shifts the burden of determining the existence of an
13 objectionable matter to the Protestant. Without waiving the foregoing, Antioch does not
14 generally challenge the validity of DWR's water rights. Antioch does challenge the
15 priority of DWR's rights to Antioch's (both time and beneficial use based), the
16 reasonableness of DWR's diversions under the WaterFix Project in relation to Antioch's
17 needs for municipal purposes, and whether DWR is properly operating its upstream
18 facilities in such a way as to not harm Antioch or the 1968 Agreement.
19

20 Antioch has more than met the burden of showing legal injury to Antioch by way of
21 the Testimony of its witnesses, Ron Bernal and Dr. Susan Paulsen (Antioch Exhibits 100,
22 200, 202). It should be noted that DWR itself admits injury to Antioch from its present
23 operations in the recitals (page 2) of the 1968 Agreement (DWR 304). DWR witness,
24 John Leahigh, indicated that he did not expect water conditions downstream of the
25 Contra Costa Canal to improve as the result of the WaterFix Project and that DWR will
26 not operate the Project to meet D-1641 criteria at Antioch.
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DWR bases its entire position of no injury to Antioch based solely on the existence of the 1968 Agreement. The problem with that argument is the Agreement expires before the projected operation of the WaterFix Project; the Agreement mitigates only for chlorides – not other pollutants such as bromides or methylmercury; DOI/CVP is not part of the 1968 Agreement; the 1968 Agreement does not apply to the Sacramento River; and DWR has not offered Antioch terms similar to those granted CCWD in the new 2016 CCWD-DWR Agreement as required under Section 10 of the 1968 Agreement. In other words, to the extent the 1968 Agreement even still applies, it does not even come close to alleviating the harm to Antioch’s water supply from the WaterFix Project.

Therefore, all of DWR’s Master Objections as to Antioch should be overruled.

Dated: Oct. 28, 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: Responses to DWR's and San Luis's Objections to Antioch's Written Testimony

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. 31, 2016

Signature: /s/ *Jessica Decker*

Name: Jessica Decker

Title: Assistant

Party/Affiliation: City of Antioch

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