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

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

19 **City of Antioch's Opening**  
20 **Statement**

21 **Introduction**

22 It is somewhat ironic, some might say tragically so, that nearly 100 years after  
23 the City of Antioch attempted to preserve freshwater in the Delta, Antioch once again  
24 finds itself engaged in essentially the same struggle.<sup>1</sup> Over that 100-year period of  
25 time, the Delta has experienced the historic freshwater-salinity boundary move  
26 approximately 30 miles upstream from Benicia to the east of Antioch in some years.  
27 The result has been worsening water quality, loss of vast amounts of wetlands, and  
28 fish species on the brink extinction. One has to wonder what the present Delta would  
be like if only California and its judiciary had the foresight 100 years ago to have

<sup>1</sup> *Antioch v. Williams Irrigation District et al.* (1922) 188 Cal. 451, 455.

1 helped Antioch save the freshwater Delta.

2 With the proposed WaterFix Project, the Department of Water Resources  
3 (“DWR”) and the Bureau of Reclamation (“BOR”) will further damage the Delta. DWR  
4 admits that WaterFix operations will result in salinity (chloride and bromide) levels  
5 significantly higher at Antioch. This inescapable fact has essentially been proven by  
6 DWR and BOR in their case-in-chief. And yet neither DWR nor BOR propose any  
7 mitigation whatsoever to prevent such adverse impacts to a City with superior water  
8 rights providing drinking water to over 100,000 residents.

9  
10 “*Let them drink salt*” is the apparent position of DWR and BOR when it comes to  
11 Antioch’s drinking water supply and 100,000 residents.

### 12 **Summary and Overview**

13  
14 Antioch’s showing of legal injury from the WaterFix is unfortunately **very** easy in  
15 this matter. DWR (and BOR through DWR) have admitted that the present SWP  
16 project operations harm Antioch’s water rights and supply. In 1968, Antioch and DWR  
17 entered into an agreement to partially mitigate the impacts of the SWP (“1968  
18 Agreement”). This Agreement is discussed in more detail elsewhere in this Opening  
19 Statement, but one of the critical admissions by DWR in that agreement is set forth in  
20 the recitals as follows:

21  
22 In the future the average number of days per year that usable river  
23 water will be available to the City will be caused to decrease, and  
24 ***such decrease will be due in part to the operation of the State  
Water Resources Development System . . .***

25 And in fact, as will be shown in the City’s case-in-chief, the number of days of  
26 usable river water available to the City has significantly decreased due to the SWP’s  
27 adverse impacts on water quality at Antioch. During cross-exam, DWR Operations  
28 Chief, John Leahigh, testified that under present operations, DWR could not meet M&I

1 water quality standards at Antioch. This is significant because it provides the present  
2 **real** baseline for injury to Antioch's water rights and water supply – e.g. Antioch is  
3 already injured by DWR's operations.

4 With respect to the WaterFix Project - the modeling, the WaterFix DREIR/SDEIS  
5 ("Draft EIR"), and the testimony of DWR's witnesses all demonstrate significant  
6 increases in adverse water quality impacts to Antioch's water rights and supply. For  
7 example, Dr. Nadar-Tehrani demonstrated increased chloride levels at Rock Slough  
8 during extended periods of time. Given that Antioch is downstream of Rock Slough,  
9 chloride levels will increase even more significantly at Antioch due to the WaterFix  
10 Project.  
11

12 Bromide, a potential carcinogen, is also admitted by DWR to significantly  
13 increase at Antioch as the direct result of the WaterFix Project. Dr. Nadar-Tehrani  
14 stated in his testimony (clarified on cross-exam) that Antioch is one of three municipal  
15 locations in the Delta where "where bromides may be of concern." (DWR-:66, p. 7, Ins  
16 17-21). Dr. Nadar-Tehrani indicated he believed that Antioch's 1968 Agreement  
17 would mitigate for bromide increases but was uncertain about whether the agreement  
18 even actually mitigated for bromide (as discussed elsewhere in this Opening  
19 Statement bromide is not covered by the 1968 Agreement). The Draft EIR states in  
20 several places that bromides will increase at Antioch. For example:  
21  
22

23 multiple interior and western Delta assessment locations would have an  
24 increased frequency of exceedance of 50 µg/L, which is the CALFED  
25 Drinking Water Program goal for BROMIDE as a long-term average applied  
26 to drinking water intakes... These locations [include] San Joaquin River at  
27 Antioch... Similarly, these locations would have increased frequency of  
28 exceedance of 100 µg/L, which is the concentration believed to be  
sufficient to meet currently established drinking water criteria for

1 disinfection byproducts... The greatest increase in frequency of  
2 exceedance of 100 µg/L would occur at Franks Tract (6% increase) and  
3 San Joaquin River at Antioch (4-5% increase depending on operations  
4 scenario). RDEIR/SDEIS at Chap 4; p. 4.3.4-9 (**SWRCB-3**).

5 Therefore, DWR's own exhibits, testimony and Draft EIR demonstrate that  
6 Antioch will be harmed by the WaterFix Project. Degradation of water quality resulting  
7 from the WaterFix Project will result in: less usable days of water, higher treatment  
8 costs. Increased costs to purchase substitute water from other sources, and increased  
9 risk to human health. Harm to Antioch in this case is proved by DWR's own case-in-  
10 chief. Nevertheless, the Dr. Susan Paulsen will testify on the City's behalf to further  
11 demonstrate what DWR has already proved - .e.g.,. that the WaterFix Project will result  
12 in substantial harm to Antioch's water supply and water rights.  
13

14 DWR attempts to indicate that the 1968 Agreement (between Antioch and DWR)  
15 somehow mitigates harm to Antioch (e.g. DWR-:66, p. 7, Ins 17-21), but this is simply  
16 **not** true. The fixed term of the 1968 Agreement expires before the WaterFix project  
17 becomes operational in 2028. The 1968 Agreement pertains only to chloride levels  
18 and not to any other pollutant such as bromide, which is predicted to skyrocket to level  
19 far exceeding the safe drinking water thresholds set forth in the Draft EIR – and  
20 without any mitigation whatsoever to Antioch.  
21

22 There is another harm to Antioch that has already been established by DWR in  
23 its case-in-chief due directly to the WaterFix Project. The 1968 Agreement contains a  
24 provision requiring that DWR offer Antioch substantially similar terms to any  
25 agreement DWR makes with any other entity to mitigate the impacts of its operations  
26 in the Delta. As indicated in DWR's own testimony and exhibits (DWR-304, 310, 334),  
27 and as described in more detail in this Opening Statement, DWR has entered into a  
28

1 settlement agreement with Contra Costa Water District (“CCWD”) regarding the  
2 WaterFix Project granting CCWD terms far more favorable than to Antioch under its  
3 present 1968 Agreement. Therefore, not only will the WaterFix Project result in more  
4 impacts to Antioch’s water supply, DWR will be depriving Antioch of mitigation the City  
5 specifically contracted with DWR for nearly 50 years ago.  
6

### 7 **Standards for Determining Injury**

#### 8 Injury to Legal User

9 Water Code section 1702 establishes the standard upon which the SWRCB may  
10 grant permission to a proposed change in a water right over which the Board has  
11 jurisdiction:

12 Before permission to make such a change is granted, **the**  
13 **petitioner shall establish**, to the satisfaction of the Board, and it  
14 shall find, that the change **will not operate to the injury of any**  
15 **legal user of the water involved**

16 The rule established is often referred as the “no injury” rule. The rule is broad  
17 and prohibits any change to an existing water right that will “injuriously affect the right  
18 of others [water rights holders].” *Butte T. M. Co. v. Morgan* (1862) 19 Cal. 609, 616;  
19 *Lester v. Doestch* (1935) 7 Cal.App.2d 551, 555; *Craig v. Crafton Water Co.* (1903)  
20 141 Cal. 178, 183; *Kidd v. Laird* (1860) 15 Cal. 162.  
21

22 Thus, in determining whether the petitioned changes to the licenses of  
23 the irrigation districts would cause “substantial injury” to or would  
24 “unreasonably affect” riparian and appropriative users in the Delta, the  
25 Board properly focused on **the effect of those changes on the rights**  
26 **of those users**. *State Water Resources Control Board Cases* (2006)  
27 136 Cal.App.4<sup>th</sup> 674.

28 As plainly set forth under section 1702, the burden of proof is on the party

1 seeking the change to their rights (e.g. “petitioner shall establish”) – in this case the  
2 DWR. As described above, and set forth in this Opening Statement, DWR has failed  
3 to meet its burden of proof on numerous levels with respect to Antioch.

4 Compliance with D-1641

5 DWR’s case-in-chief is based primarily upon a theory of compliance with D-1641.  
6 DWR argues that if it can show the WaterFix Project has (and will) be able to comply  
7 with D-1641 standards, then DWR has somehow entirely met its burden of showing  
8 no injury to any legal users. There are a number of problems with this argument as to  
9 Antioch.  
10

11 DWR admitted during its case-in-chief that it has not operated its present  
12 facilities to meet D-1641 M&I standards at Antioch (John Leahigh on cross-  
13 examination by Antioch). DWR admitted further during its case-in-chief that DWR  
14 cannot operate its present system to meet D-1641 M&I standard at Antioch due to the  
15 high “costs” that would be associated with doing so. DWR acknowledged that the  
16 foregoing will not change with the WaterFix Project. Instead, DWR relies primarily on  
17 the existence of the 1968 Agreement between DWR and Antioch to claim no injury to  
18 Antioch. (John Leahigh and Dr. Nadar-Teharani on cross-examination by Antioch).  
19 However, as detailed elsewhere in this Opening Statement, the Agreement does not  
20 mitigate for any pollutant other than chloride (and in that case only partially so) and  
21 the fixed term of the 1968 Agreement expires before the WaterFix Project becomes  
22 operational.  
23  
24

25 In *State Water Resources Control Board Cases* (2006) 136 Cal.App.4<sup>th</sup> 674,  
26 the Appellate Court indicated that “fear” that a water project will not meet a water  
27 quality standard does not constitute a legal injury. In the present case, however,  
28

1 DWR has admitted and shown actual legal injury to Antioch during its case-in-chief –  
2 e.g. increased chlorides, increased bromides, less Sacramento River flow at Antioch’s  
3 intake. In the 1968 Agreement (p.2) DWR acknowledges the State Water Project  
4 impacts Antioch, and DWR has shown during its case-in-chief those impacts will  
5 increase substantially under the WaterFix Project.  
6

7 . Compliance with the co-equal goals of the Delta Reform Act

8 The “co-equal” goals of the 2009 Delta Reform Act are a statewide standard  
9 applying to all projects and all decisions impacting the Delta. Water Code section  
10 85020 et seq. The co-equal goals as set forth by Public Resources Code 29702 for  
11 example require:

12 The legislature finds and declares that the **basic goals of the state for**  
13 **the Delta** are the following:

14 (a) Achieve the two coequal goals of providing a *more reliable water*  
15 *supply* for California **and protecting, restoring, and enhancing the Delta**  
16 *ecosystem*. The coequal goals **shall be achieved** in a manner that  
17 protects and enhances the unique cultural, recreational, natural resource,  
18 and agricultural values of the Delta as an evolving place.

19 In the present case, the WaterFix Project is required to meet the co-equal goals.  
20 The Project however fails to meet the goals on many levels. For example, Water  
21 Code Section 85021 provides that it is state policy to **reduce** reliance on the Delta in  
22 order to achieve the first of the co-equal goals (e.g. water supply reliability). DWR  
23 Operations Manager, John Leahigh admitted during cross-examination that the  
24 WaterFix Project will not result in reduced reliance on the Delta.  
25

26 Water Code Section 85022 (d)(6) requires that new projects in the Delta  
27 “improve” water quality in the Delta to protect human health. Given the projected  
28

1 increases in pollutants at Antioch due the WaterFix Project, however, water quality at  
2 Antioch will not improve to protect human health.

3 Appendix G to the 2015 WaterFix RDEIR/SDEIS outlines how Alternative 4a  
4 could potentially attempt to meet the consistency requirements of the Delta Plan or  
5 future Delta Plan amendments. But Appendix G provides no commitment whatsoever  
6 on the part of the Project to reduce reliance on the Delta or improve water quality for  
7 human health. Appendix G is in fact little more than prohibited deferred mitigation and  
8 deferred analysis.  
9

### 10 **Antioch is a legal user of water in the Delta**

11  
12 In *Town of Antioch v. Williams Irrigation District et al.* (1922) 188 Cal. 451, 455,  
13 the California Supreme Court recognized the validity of Antioch’s pre-1914  
14 appropriative water rights. The Supreme Court further recognized that Antioch’s rights  
15 extended to both San Joaquin and Sacramento River flows. The City presently diverts  
16 water for municipal and industrial purposes. Statement of Diversion and Use  
17 #S009352). DWR has recognized municipal diversions at Antioch since 1868.  
18

19 As noted, in 1968, Antioch and DWR entered into an Agreement to mitigate  
20 Antioch (in part) from the impacts from the State Water Project. The Agreement only  
21 partially compensates Antioch one-third the cost to purchase substitute water from  
22 Contra Costa Water District (“CCWD”) in certain years based on a designated formula  
23 based on a threshold of 250 ppm chlorides. The original fixed term expired in 2008. In  
24 2013, Antioch and DWR extended the 1968 Agreement to 2028. The BOR is not a  
25 party to that Agreement. Section 10 of the 1968 Agreement (known as the “me-too”  
26 clause) requires DWR to compensate Antioch at essentially the same terms granted  
27 DWR to any other entity diverting from the Delta. In March 2016, DWR entered into a  
28

1 new Agreement with CCWD upon terms substantially more favorable terms than those  
2 granted Antioch by the 1968 Agreement. Antioch is still waiting for a response from  
3 DWR.

#### 4 **The Evidence demonstrates injury to Antioch**

5 As stated, DWR's own case-in-chief demonstrates harm to Antioch. Dr. Parviz  
6 Nadar-Tehrani testified that chlorides (in EC) will increase significantly with the  
7 operation of the WaterFix Project (over the No Action Alternative) at D-1641  
8 compliance locations Emmaton and Rock Slough (DWR-66; DWR-5 errata). Those  
9 locations are upstream of Antioch, and therefore, these levels will be even higher at  
10 Antioch. In particular, the models indicate significant increases of chlorides at Rock  
11 Slough over the present D-1641 M&I standard.  
12

13 Dr. Nadar-Tehrani testified in his written testimony (DWR-66, p. 7) and on cross-  
14 examination that Bromides "may be of concern" at Antioch. This is confirmed in the  
15 2015 WaterFix RDEIR/SDEIS which provides that Bromides will increase at Antioch  
16 above the CALFED drinking water levels for bromides. RDEIR/SDEIS at Chap 4; p.  
17 4.3.4-9. Bromide is a potential carcinogen. The bromide thresholds of harm set forth  
18 in the RDEIR/SDEIS of 50, 100 and 300 ug/L will always be far exceeded at Antioch  
19 using an M&I standard of 250 ppm Chloride which translates to about 900 ug/L  
20 bromide – far exceeding the levels of significance in the environmental document.  
21

22 As noted, John Leahigh, testified on cross-exam that DWR does not, and  
23 cannot, meet D-1641 standards at Antioch. Mr. Leahigh stated further that this would  
24 not change under the WaterFix Project.  
25

26 Both Mr. Leahigh and Dr. Nadar-Tehrani testified that their respective  
27 conclusions of no legal injury to Antioch rested solely on the 1968 Agreement  
28

1 between DWR and Antioch (DWR 304, 310). Notably, neither witness for DWR knew  
2 much about the terms of the Agreement. For example, Mr. Leahigh did not know that  
3 the fixed term of the Agreement ended in 2028 – before the WaterFix Project is  
4 projected to become operational. Dr. Nadar-Tehrani did not even know whether the  
5 1968 Agreement covered bromide levels or was limited to chloride levels.  
6

7 With the foregoing in mind, Antioch will demonstrate during its case-in-chief, that  
8 Mr. Leahigh, Dr. Nadar-Tehrani and the RDEIR/SDEIS were correct in finding that  
9 water quality at Antioch will significantly degrade due to the WaterFix Project. The  
10 resulting harm to Antioch will include but not be limited to less days of usable water  
11 under the City’s water rights, increased treatment requirements, and increased costs to  
12 purchase substitute wafer.  
13

14 The 1968 Agreement is not mitigation for the WaterFix Project. The fixed term of  
15 the 1968 Agreement expires prior to the time the WaterFix Project becomes  
16 operational. The 1968 Agreement does not address pollutants other than chlorides  
17 and the threshold in the Agreement of 250 ppm chlorides exceeds the safe drinking  
18 water levels for bromides set forth by DWR itself in the Waterfix Draft EIR. BOR is not  
19 a party to the 1968 Agreement and has no mitigation program in place whatsoever as  
20 to Antioch with respect to BOR’s operations. Notably, DWR-512 demonstrates that the  
21 operation of the CCWD Agreement will result in additional chloride levels at Rock  
22 Slough and Emmaton – and eventually Antioch - adding injury to insult.  
23

24 **Uncertainty from the WaterFix Project as Legal Injury**

25 *In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, the  
26 California Supreme Court held that a water right that creates uncertainty as to other  
27 water rights is an unreasonable use. The Court explained:  
28

