

MINASIAN, MEITH, SOARES, SEXTON & COOPER, LLP
1681 Bird Street / P.O. Box 1679
Oroville, California 95965 (530) 533-2885 facsimile (530) 533-0197

1 PAUL R. MINASIAN (SBN 040692)
MINASIAN, MEITH,
2 SOARES, SEXTON & COOPER, LLP
1681 Bird Street
3 P.O. Box 1679
Oroville, California 95965-1679
4 Telephone: (530) 533-2885
Facsimile: (530) 533-0197
5 Email: pminasian@minasianlaw.com

6 Attorneys for
SAN JOAQUIN RIVER EXCHANGE CONTRACTORS WATER AUTHORITY

7
8 **BEFORE THE CALIFORNIA**
9 **STATE WATER RESOURCES CONTROL BOARD**

10
11 **HEARING IN THE MATTER OF**
12 **CALIFORNIA DEPARTMENT OF**
13 **WATER RESOURCES AND UNITED**
14 **STATES BUREAU OF**
15 **RECLAMATION'S REQUEST FOR A**
16 **CHANGE IN POINT OF DIVERSION**
17 **FOR CALIFORNIA WATER FIX**

18 } **REPLY MEMORANDUM OF**
19 } **SJRECWA TO DWR MOTION FOR**
20 } **PROTECTIVE ORDER**
21 } **PREVENTING DEPOSITION OF**
22 } **DAVID MRAZ AND/OR OTHER**
23 } **MOST KNOWLEDGEABLE**
24 } **WITNESSES TO APPEAR AT**
25 } **DEPOSITION**

26 _____
27 The San Joaquin River Exchange Contractors Water Authority ("SJRECWA")
28 presents this Reply to the Department of Water Resources's Motion for Protective Order
to prevent the taking of depositions of David Mraz and/or the other most knowledgeable
witnesses as follows:

29
30
31
32 **I. DWR's Contention that it is irrelevant whether the "second path" of cross-Delta water deliveries will be available and feasible without a SWP, CVP and local interests requirement and plan for financing levee repairs and ignores the fact that this is the proposed means of operation outlined by DWR itself in its Change Petition. If the SWP and CVP do not intend to provide for levee repairs and restore breached islands necessary to maintain the "second path" deliveries, they should modify their proposed Change Petition and submit new modeling of water quality and other effects upon legal users of water of the WaterFix proposal when levees and islands fail.**

33 If the DWR and its SWP urban users are not planning to provide portions of the
34 financing of the preventive levee maintenance costs and repair of actual levee collapse

1 measures when those failures occur, in addition to those programs currently in existence
2 (which all DRMS Reports I and II find are woefully underfunded) necessary to maintain
3 the “second path” deliveries of more than 500,000 ac/ft each year across the Delta, the
4 testimony to be offered by the SJRECWA might be irrelevant and DWR’s Protective
5 Order might be granted. However, this would require DWR to change its proposed
6 project and reopen Phase 1(a). All of the DRMS II reports and studies show there is
7 inadequate funding from State and Federal general taxpayer sources to provide a reliable
8 “second path” delivery capability. If the “reliability” is irrelevant, the SWP would have to
9 withdraw and modify Exhibit 515 and its modeling and re-open its case-in-chief because a
10 different project for changing diversions is being proposed than the project considered in
11 Phase 1(a) testimony.

12 Remember that the SWRCB itself initially agreed in its Ruling of October 7, 2016
13 that the testimony offered by SJRECWA was appropriate and expressed no concern about
14 relevancy. Only if there is competent evidence on the record that the “second path” levee
15 integrity and repair will be maintained at the cost of some other party (such as California
16 and Federal taxpayers) would the testimony offered by SJRECWA as part of Phase 1(b) be
17 irrelevant. However, there is no such testimony or evidence submitted by DWR.
18 Certainly, there is no witness of DWR or the CVP provided in Phase 1(a) who in their
19 written testimony or oral testimony represented that they had knowledge or information
20 that the taxpayers of California or the United States would pay whatever expenses to
21 assure that the levees and channels could be usable for salinity repulsion and “second
22 path” deliveries in order that the DWR modeling of harm to legal users would be correctly
23 projected.

24 DWR does not specify who exactly could have been cross examined in Part 1(a) as
25 offering expertise on this subject of whether a key element of the WaterFix plan (cross-
26 Delta deliveries to the SWP and CVP pumps) would be available without implementation
27 of funding of levee repair by the SWP and CVP. No such assertion or qualification as an
28 expert in regard to whether general State or Federal levee and channel repair programs

1 were sufficient is mentioned in any of those witnesses' written or oral testimony. In fact,
2 the DRMS I and II Reports state that without a specific additional investment in the \$
3 billions, no reliable "second path" can or will exist.

4 **II. The SWRCB has to stop this mindless maneuvering by the Project**
5 **Proponents, DWR and Reclamation. The SWRCB must ask itself whether**
6 **due process requirements will be satisfied if the proposed testimony offered by**
7 **SJRECWA is ruled as irrelevant without it even being presented? DWR will**
8 **not be there to help the SWRCB when a Court examines these facts.**

9 A Court will ask "why didn't the Board allow the individual questions to be asked
10 and then rule upon the objections as to their relevancy?" The same Court will probably
11 ask "How was it irrelevant for the Board to find out if the 'second path' really was a
12 reliable means of delivering water if the SWP users and CVP had the tunnels available to
13 them after the levees essential for 'second path' operations failed? DWR did not present
14 any testimony as to how levee deficiencies and failures critical to the 'second path'
15 deliveries would be responded to even though interruptions caused by those failures' risks
16 was a significant reason for the Tunnel proposal?" The Court may also ask "Why was the
17 Board excluding evidence which would indicate that the true project design was that the
18 'second path' means of delivery was to be abandoned when levee integrity became too
19 expensive or inconvenient to maintain with general public funds after the Tunnels were in
20 operation?"

21 DWR is risking the reputation and credibility of the Board if no evidence as to how
22 water quality in the Delta areas would be affected by unavailability of the "second path"
23 deliveries and no evidence of what harm would occur to those users who prior to the levee
24 collapses received the 500,000 ac/ft of cross-Delta flows proposed. If the Board Hearing
25 Officers refuse to consider such evidence after having first ruled the SJRECWA offered
26 evidence was admissible and did not reject it as irrelevant, it may be viewed by a Court
27 reviewing this administrative proceeding as evidence of reviewing questions of harm to
28 legal users of water in a selective and arbitrary manner.

///

///

1 **III. The Board cannot approve the DWR and CVP plan that promises a “second**
2 **path” delivery of water through cross-Delta flows and ignore the cost**
3 **contribution from the SWP and CVP necessary to make that delivery plan a**
4 **reality. The DWR protests and citation to internet reports regarding plans for**
5 **levee maintenance utilizing general taxpayer funding unveils a deficit that**
6 **DWR clearly has the burden of proof upon it but has submitted no testimony**
7 **upon.**

8 The change plan submitted by DWR calls for the “second path” delivery in the
9 months of July through September. If the Board approves that plan, is not the DWR and
10 CVP affirming that it will cause that system to continue to operate? Is the DWR and CVP
11 really saying to the Board that the “second path” can be dropped without approval of the
12 SWRCB if it becomes inconvenient or too costly in the future?

13 If such a permit for change of method and point of diversion were granted implied
14 allowing the SWP and CVP to simply refuse to partially fund, together with local
15 interests, the repair of levees necessary for the conveyance and preservation of quality of
16 the “second path” water, would not the Board have to examine the water quality and
17 supply changes in that eventuality of abandonment as part of the test of whether harm to
18 other legal users of water would occur?

19 The attachments and references supplied by DWR to internet sites attached to its
20 Motion for Protective Order as Exhibits “B” and “C” seem to imply or state that only the
21 taxpayers of the State of California, taxpayers of the Federal government through the
22 Army Corps of Engineers, and local interests – not the water diverters of DWR and CVP –
23 will be funding levee maintenance and repair to maintain the “second path” deliveries. As
24 an example, promises of future public bond issues for that funding are described in the
25 Draft Central Valley Flood Protection Plan, 2017 Update, December 2016. (DWR
26 Response, Exhibit “C”, pages 3-5.) The ongoing State of California general funding of
27 levee repairs is cited. However, each of these programs has been declared insufficient by
28 the DRMS I and II reports. The DRMS reports require that billions of Dollars be invested
to have a reasonably reliable “second path.”

If the “second path” is not financially maintained or feasible because the CVP and
SWP do not wish to fund repairs if other programs are insufficient, the description of

1 operations and modeling provided by DWR does not explain what changes will occur in
2 the authority to divert water through the Tunnel operations when and if the levees fail and
3 the “second path” ends. This is the burden of proof incumbent upon the party proposing a
4 change petition regarding water rights under Water Code section 1702. If DWR is now
5 arguing that its Change Petition always contemplated that without further SWRCB order,
6 the “second path” could be abandoned by the SWP and CVP if it became too expensive or
7 they could argue “Act of God” without a specific hearing or order of the Board and
8 abandon the use, that assertion appears nowhere in the Change Petition or Record of the
9 proceedings.

10 **IV. Conclusion**

11 We refer the Board Hearing Officers to the previous detailed Motion for
12 Reconsideration submitted by the SJRECWA on this exact subject filed December 23,
13 2016 which has not yet been ruled upon. DWR’s Opposition seems to be divulging
14 through citations to the 2016 EIR/EIS and Delta Plan documents that the WaterFix Project
15 proposes that the cross-Delta flow “second path” be used and operated only so long as it is
16 funded by and feasible under the current general taxpayer public funding mechanisms, and
17 that that “second path” method of water conveyance will end with the almost certain
18 collapse of Delta levees under the weight of their current condition in the vicinity of the
19 SWP and CVP pumps as described in DWR’s own DRMS I and II reports. If that is
20 DWR’s “true project” for submitting a Change Petition, no showing of what harm to legal
21 users will occur in that circumstance and how the Tunnels will be utilized in that
22 circumstance has been made.

23 The Board’s options are to allow the testimony proposed by SJRECWA to be
24 included in the record. Alternatively, upon review for due process compliance, if the
25 testimony is not allowed, this record will now evidence that Phase 1(a) should be
26 reopened to show the effect on legal users of water of their circumstances if the “second
27 path” is not utilized, as apparently is DWR’s intent and plan if the expense becomes too
28 great or inconvenient. The authority to take and submit the deposition of those DWR

1 witnesses so that the Board can rule on the relevancy of each question and answer is a
2 much more efficient way to preserve due process and the administrative record.

3 Respectfully submitted,

4 MINASIAN, MEITH, SOARES
5 SEXTON & COOPER, LLP

6
7 By: 
8 PAUL R. MINASIAN
9 Attorney for SAN JOAQUIN RIVER EXCHANGE
10 CONTRACTORS WATER AUTHORITY
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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, March 14, 2017, submitted to the State Water Resource Control Board and caused a true and correct copy of the following document(s):

**REPLY MEMORANDUM OF SJRECWA TO DWR MOTION FOR
PROTECTIVE ORDER PREVENTING DEPOSITION OF DAVID MRAZ
AND/OR OTHER MOST KNOWLEDGEABLE WITNESSES TO APPEAR AT
DEPOSITION**

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 March 14, 2017, posted by the State Water Resources Control Board at:

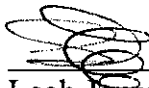
http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml:

Service also perfected by placing for collection and deposit in the United States mail a copy/copies of the documents(s) at: MINASIAN, MEITH, SOARES, SEXTON & COOPER, LLP, in Oroville, Butte County, California in a sealed envelope, with postage fully prepaid, addressed to:

JAMES MIZELL
DEPARTMENT OF WATER RESOURCES
Office of the Chief Counsel
1416 Ninth Street, Room 1104
Sacramento, CA 95814

I am familiar with the practice of MINASIAN, MEITH, SOARES, SEXTON & COOPER, LLP for the collection and processing of correspondence for mailing with the United States Postal Service. In accordance with the ordinary course of business, the above-mentioned document(s) would have been deposited with the United States Postal Service on March 14, 2017, the same day on which it/they were placed at MINASIAN, MEITH, SOARES, SEXTON & COOPER, LLP for deposit.

I certify that the foregoing is true and correct and that this document was executed on March 14, 2017.



Leah Janowski, Secretary to Paul R. Minasian
On behalf of SAN JOAQUIN RIVER EXCHANGE
CONTRACTORS WATER AUTHORITY
Minasian, Meith, Soares, Sexton & Cooper, LLP
Post Office Box 1679 / 1681 Bird Street
Oroville, California 95965