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7 Attorneys for San Joaquin Exchange Contractors Water Authority

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

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

17 **REPLY OF THE SAN JOAQUIN**
18 **RIVER EXCHANGE**
19 **CONTRACTORS WATER**
20 **AUTHORITY TO CALIFORNIA**
21 **DEPARTMENT OF WATER**
22 **RESOURCES' MOTION FOR**
23 **PROTECTIVE ORDER AND**
24 **OBJECTIONS OF CALIFORNIA**
25 **DEPARTMENT OF WATER**
26 **RESOURCES**

27 The argument of California Department of Water Resources ("DWR") that the
28 opportunity for cross-examination of DWR modelers and operations witnesses on levee
conditions and risks now bars evidence on those subjects is not well taken.

29 I. The DWR witnesses presented no direct testimony of the plan of
30 maintaining and assuring levee maintenance and repair that at least 3,000 cfs of capacity
31 and water would be maintained at the CVP and SWP pumps and cross-Delta flows in at
32 least that amount (540,000 ac/ft) would be available for export and useable at reasonable
33 salinity and dissolved carbon levels.

34 DWR contends that its experts who were available for cross-examination
35 should have been cross-examined on the state of the levees and the measures required in
36 regard to the levees necessary to reasonably assume more cross-Delta flows. The DWR
37 experts presented no direct testimony as to the basis for their assumptions that 3,000 cfs of
38 cross-Delta flow capacity at the pumps to exist for 3 months each year and levees could be

1 maintained to permit approximately 540,000 ac/ft to be pumped as part of their conclusion
2 that no significant harm would be suffered by legal users of water. On this assumed basis,
3 it was concluded that under any of the Boundary 1 or 2 operating conditions there would
4 be no harm to any legal user of water whether located in the South Delta or receiving
5 water through the pumps. None of those modelers, however, explained how the funding
6 and organization would be provided to achieve and maintain this cross-Delta flow and
7 water quality result and none of them in their written testimony or oral testimony
8 mentioned that they were relying upon DRMS I or DRMS II reports that explain the
9 massive efforts and funding that would be required to provide reasonable assurance of this
10 continued function. None of the direct testimony of these witnesses indicated they had
11 knowledge or an opinion on the subject.

12 DWR is therefore asserting that questions outside of the scope of the direct
13 testimony of DWR and the Bureaus' modelers and operations witnesses should have been
14 presented. DWR is also arguing that the SWRCB should have been satisfied on the record
15 with the "I don't know" or "I don't have any knowledge" responses and this should
16 suffice here. It does not.

17 DWR could have had an expert testimony to how exactly the levees and
18 failed levees will be handled and addressed both before the Tunnels are completed and
19 after completion, and how no harm to water right holders will occur through Tunnel use.
20 Twenty minutes of direct testimony could be provided to understand what conditions
21 should be applied to the change in place of use, or if the levees can be practically
22 maintained and repaired, to sustain this basic assumption and as to how that funding will
23 be provided. The Protective Order should be rejected.

24 II. Alternatively, DWR objects that the DRMS I, DRMS II and Delta
25 Stewardship Council January 2015 white paper should be submitted into evidence with no
26 testimony.

27 The testimony of persons within DWR's control with knowledge of how to
28 assure the greatest chance that cross-Delta deliveries can in fact be maintained is

1 necessary because nothing in the case in chief of the DWR or Bureau explains how, with
2 the poor state of levee construction, high risk of failure, impairment of water quality
3 through salinity and dissolved organic carbon, 540,000 ac/ft is likely to be delivered with
4 some consistency as modeled. Further, there has been no testimony of how, when levee
5 failures do occur, the extensive time to repair and the funding for all of these measures is
6 to be provided. The DWR protective order, if granted, would be like designing an
7 evacuation plan for Los Angeles citizens, but barring the government from looking at the
8 condition of roads and railroads in approving the plan.

9 At this point because none of the DRMS II measures have been funded or
10 implemented (either the 10.4 Billion Dollar systematic levee improvements and repairs;
11 Building Block 2.2 or the Armored Through Delta Pathway Channel alternative (Building
12 Block 1.6) at a cost of approximately 15.6 Billion Dollars), a witness from DWR is
13 needed to explain how big a fund is necessary to repair levee breaches as fast as possible
14 and what level of improvement and repair can be expected with current levels of funding
15 unbuttressed by systematic funding as a condition of the change in point of diversion.

16 On page 5 of the motion of DWR, the levee programs and condition are
17 described as “outside the scope of this hearing.” (line 10, p. 5.) Later it is argued that San
18 Joaquin River Exchange Contractors (“SJREC”) has not shown, “. . . the information in
19 the publicly available documents are insufficient”. (Line 22-23 p. 5.) On page 6, DWR
20 argues that the testimony should not be allowed about “levee maintenance or
21 improvements as this is a complex statewide policy level decision being led by the DWC
22 and that ultimately depends on the Legislature for long term funding.” (Line 2-4 p. 6.)

23 Do we understand correctly? Does the DWR represent that the no harm test
24 is met because the levees are assumed intact, but this Board may not have evidence of how
25 to provide conditions which will make the assumption reality?

26 This witness (or witnesses) are not needed to testify as to what the
27 Legislature might do about funding of levee maintenance and multiple levee collapses.
28 But this Board might find that the testimony logically requires that the permits to construct

1 and operate the Tunnels should be conditioned (and not exercised by commencement of
2 construction) until the levee funding to assure that the modelers' assumptions that cross-
3 Delta flow and pumping of 3,000 cfs from July through September are reasonable and
4 possible. Alternatively, if the levees are to be abandoned by neglect and no funding
5 program for rapid repair, the plan presented by DWR should explain how 9,000 cfs
6 Tunnel capacity is adequate to avoid harm to legal users and how this 540,000 ac/ft will or
7 won't be transported in the Tunnel or across the Delta through some other means.

8 III. Conclusion

9 The SJREC showed good faith by spelling out the questions and areas that
10 they believed witnesses of DWR could provide valuable information to the SWRCB in
11 regard to possible conditions and requirements relating to the proposed 3,000 cfs cross-
12 Delta flow and pumping each year in conjunction with the Tunnels operations.

13 Approval of a WaterFix plan in which the outcome is a later statement,
14 "Oops, we didn't think about that....I guess we'll just have to abandon any cross-Delta
15 deliveries during summer and fall months" is embarrassing and wasteful. Let's put the
16 information about how big a risk and what the possible solutions might be on the record.
17 The SWRCB will be pleasantly surprised at the depth of knowledge of DWR and its
18 consultants. . . although akin to watching an avalanche engulf the observer. With
19 government, the problem is always bringing all facts to bear on the decision makers....you
20 and the Tunnel proponents.

21 The Motion for Protective Order should be denied.

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23 Date: Nov 1, 2016

Respectfully Submitted,

24 MINASIAN, MEITH, SOARES,
25 SEXTON & COOPER, LLP

26 By: 
27 PAUL R. MINASIAN, ESQ.

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

REPLY OF SAN JOAQUIN RIVER EXCHANGE CONTRACTORS WATER AUTHORITY TO CALIFORNIA DEPARTMENT OF WATER RESOURCES'S MOTION FOR PROTECTIVE ORDER AND OBJECTIONS OF CALIFORNIA DEPARTMENT OF WATER RESOURCES

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 August 31, 2016, and posted by the State Water Resources Control Board at:

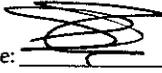
http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml :

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:

Robin McGinnis
James E. Mizell
Spencer Kenner
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 November 2, 2016, 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 November 2, 2016.

Signature:  _____

Name: LEAH JANOWSKI

Title: Secretary to PAUL R. MINASIAN

Party/Affiliation: SAN JOAQUIN RIVER

EXCHANGE CONTRACTORS WATER AUTHORITY

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