

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)  
2 JACKSON A. MINASIAN (SBN 310311)  
3 MINASIAN, MEITH,  
4 SOARES, SEXTON & COOPER, LLP  
5 1681 Bird Street  
6 P.O. Box 1679  
7 Oroville, California 95965-1679  
8 Telephone: (530) 533-2885  
9 Facsimile: (530) 533-0197  
10 Email: [pminasian@minasianlaw.com](mailto:pminasian@minasianlaw.com)  
11 [jminasian@minasianlaw.com](mailto:jminasian@minasianlaw.com)

12 Attorneys for  
13 SAN JOAQUIN RIVER EXCHANGE CONTRACTORS WATER AUTHORITY

14 **BEFORE THE CALIFORNIA**  
15 **STATE WATER RESOURCES CONTROL BOARD**

16 )  
17 )  
18 )  
19 )  
20 )  
21 )  
22 )  
23 )  
24 )  
25 )  
26 )  
27 )  
28 )  
\_\_\_\_\_ )

<b>HEARING IN THE MATTER OF</b>	)	<b>REPLY TO DEPARTMENT OF</b>
<b>CALIFORNIA DEPARTMENT OF</b>	)	<b>WATER RESOURCES' OBJECTION</b>
<b>WATER RESOURCES AND UNITED</b>	)	<b>TO SJRECWA'S SUPPLEMENTAL</b>
<b>STATES BUREAU OF</b>	)	<b>NOTICE OF INTENT TO APPEAR</b>
<b>RECLAMATION'S REQUEST FOR A</b>	)	<b>AND DEPOSITION NOTICES TO</b>
<b>CHANGE IN POINT OF DIVERSION</b>	)	<b>DWR EMPLOYEES AND</b>
<b>FOR CALIFORNIA WATER FIX</b>	)	<b>CONSULTANTS</b>

20 The San Joaquin River Exchange Contractors Water Authority ("SJRECWA")  
21 presents this Reply to the Department of Water Resources' Objection to SJRECWA's  
22 Supplemental Notice of Intent to Appear as follows:

23 //  
24 //  
25 //  
26 //  
27 //  
28 //

1 **I. DWR and Reclamation have voluntarily represented in their Change Petition**  
2 **that, despite the Tunnels and the change in the point of diversion, the Delta**  
3 **levees will continue to function effectively and over half-a-million acre feet**  
4 **(AF) will continue to be conveyed across and pumped for South-of-Delta use**  
5 **annually. DWR and Reclamation rely on that representation to conclude the**  
6 **Change Petition should be granted and is consistent with the public interest**  
7 **and will not have an unreasonable impact on fish and wildlife. Testing the**  
8 **veracity of those representations and the question of whether the SWRCB**  
9 **should impose conditions requiring Delta levee funding and maintenance to**  
10 **assure the representation that the “dual path” will continue is within the scope**  
11 **of this proceeding.**

7 DWR’s Objection to SJRECWA’s Supplemental Notice of Intent to Appear  
8 continues to promote a parochial view of the Change Petition and Tunnels that ignores the  
9 representations of DWR and Reclamation in that Change Petition. Whether the result of  
10 excessive optimism or opium, DWR has voluntarily represented in its Change Petition  
11 that, despite the change in diversion and construction of the Tunnels, the Delta levees will  
12 continue to effectively function, that water quality conditions reliant on functioning levees  
13 will continue to prevail, and that over 500,000 AF of “dual-path” deliveries made possible  
14 by effective levees will continue to occur. DWR’s only studies sought to be submitted by  
15 SJRECWA conclude that an extensive funding and repair plan is required for such a plan  
16 of “dual path” deliveries to be feasible.

17 Thus, DWR’s representation of effective Delta levees is the foundation of DWR’s  
18 assertion that granting the Change Petition is in the public interest and will not result in an  
19 unreasonable impact to other water right holders or to fish and wildlife. In the absence of  
20 effective Delta levees, if pumping continues under the “dual path”, salinity will intrude  
21 into the inner Delta and organic carbon will be released into the water pumps and  
22 exported. There will be no “dual path” as DWR represents. Fish and wildlife will be  
23 adversely impacted and the water supply for all those communities and agricultural lands  
24 that cannot rely on Metropolitan Water District to purchase them capacity in the tunnels  
25 will be cut off for substantial periods.

26 Despite DWR’s representation that the Delta levees will continue to effectively  
27 function, DWR simultaneously argues that the condition of Delta levees – and the  
28 resources required to keep those levees functioning – is an “alternate project” to the

1 tunnels and DWR's Change Petition. (DWR Objections, p. 4.) This is fiction. First,  
2 DWR voluntarily represented and relied on the continuing existence of functional Delta  
3 levees to conclude the Change Petition and Tunnels are in the public interest and won't  
4 unreasonably impact fish and wildlife. On that basis alone SJRECWA has a right to  
5 present the requested Delta Levee evidence, and the SWRCB is obligated to consider the  
6 alternative of imposing the requested levee funding and maintenance conditions to ensure  
7 that DWR honors its representation of effective Delta levees and continues "dual path"  
8 deliveries. After all, it is incumbent on the SWRCB to grant the SJRECWA and other  
9 protestants the opportunity to reasonably test the veracity of DWR's representations and  
10 to condition the Change Petition to ensure DWR's honors them – whatever they may be.

11       Second is substantial evidence already that it is the Change Petition – if granted –  
12 which will likely guarantee the disintegration of the Delta levees. There will be no  
13 political will to spend the billions of dollars needed to maintain the Delta levees after the  
14 taxpayers sink over \$13 billion into the Tunnels. It is Southern California's reliance on  
15 Delta levees for delivery of their water supply that currently ensures funding of their  
16 continued existence and effectiveness. Granting the Change Petition and constructing the  
17 Tunnels will eliminate Southern California's compelled reliance and commitment to  
18 maintaining and repairing the Delta levees so as to ensure that surface water can continue  
19 to be conveyed across the Delta and exported. Thus the SWRCB will be eliminating the  
20 mechanisms providing existing guarantees for continuing Delta levee maintenance and  
21 repair if the SWRCB grants the Change Petition without the requested Delta levee  
22 maintenance conditions. And in light of the \$13 billion sunk into the Tunnels, and the  
23 impending earthquake we all know is coming, the SWRCB will essentially be  
24 *guaranteeing* the disintegration of the Delta levees now in existence. In doing so, the  
25 SWRCB will be guaranteeing unreasonable impacts on fish and wildlife by granting the  
26 change without conditions requiring Delta levee repairs, maintenance, and funding. The  
27 SWRCB must impose conditions requiring the execution and funding of Delta levee  
28 maintenance to avoid such an outcome or must demand from DWR and Reclamation their

1 plan for water deliveries if the levees collapse and cannot be repaired. Who will then  
2 receive water service, and for what uses?

3 Third, the entire proceeding is predicated on a general understanding and  
4 acceptance that the Delta levees are going to fail over time, whether by neglect,  
5 earthquake, or changing sea levels, and therefore conveyance around the Delta is  
6 necessary to ensure a reliable water supply for Southern California. Yet in its Change  
7 Petition, DWR represents that 500,000 AC/FT will continue to magically be conveyed  
8 across the “dual path” and that the Delta levees will continue to function effectively. The  
9 absurdity of this representation and of statements that the maintenance and funding of  
10 Delta levees is a “separate issue” from WaterFix are self-evident. Conveyance around the  
11 Delta, i.e. WaterFix, the Tunnels, and this entire proceeding, is necessitated by the lack of  
12 a long-term plan to fund and execute effective Delta levees, and to some extent the  
13 impossibility of doing so (see DRMS Reports I and II). Thus, WaterFix and Delta levees  
14 are not separate issues, and the “dual path” is not going to magically be preserved for  
15 500,000 AF.

16 Fourth, the SWRCB’s failure to impose conditions requiring that Delta levee  
17 maintenance and improvements be funded and executed by DWR and the Bureau as a  
18 condition of the Change Petition for tunnel construction will effectively affirm and invite  
19 DWR’s right to abandon the Delta, abandon the levees, and abandon the “dual path”  
20 conveyance of over 500,000 AF per year to the Jones and Banks pumps. DWR has  
21 presented a change plan to the SWRCB in which it represents the existence of a “dual  
22 path” to convey 500,000 AF across the Delta every year; yet SWRCB failure to impose  
23 conditions on the Change Petition obligating DWR to honor its representation of a  
24 500,000 AF “dual path” and to fund and execute the levee repairs necessary to preserve  
25 the “dual path” is essentially a SWRCB affirmation that the “dual path” and the entire  
26 Delta may be abandoned. If the SWRCB is comfortable with such an affirmation then the  
27 SWRCB should at the least examine the water quality, water supply, and fish and wildlife

28 //

1 impacts of the outcome in this proceeding of the “dual path” not being available, and  
2 affirm that the SWRCB approves of the operating plan for the tunnels.

3 DWR is welcome to amend its Change Petition to eliminate the representation that  
4 the Delta Levees will magically continue to function despite any program for their  
5 maintenance, improvement, and funding, and to eliminate its representation that over  
6 500,000 AC/FT will magically be conveyed across the Delta every year. Doing so would  
7 be prudent in light of the fact that neither DWR nor any other entity has an obligation  
8 and/or the funding required to preserve the continuing effectiveness of the Delta levees. In  
9 its current form DWR’s Change Petition is a fictional document. Failure by the SWRCB  
10 to admit SJRECWA’s Delta levee evidence and impose the requested Delta Levee  
11 conditions will transform WaterFix into a fictional proceeding.

12  
13 **II. There Has Been No Prior Opportunity To Explore Delta Levee Maintenance,**  
14 **Improvement, Funding, and Effectiveness Issues in Part 1.**

15 SJRECWA has not had the opportunity to present evidence or cross-examine  
16 witnesses on the Delta levee issues, despite DWR assertions otherwise. (Opposition, p.  
17 4.) DWR does not specify who exactly could have been cross examined in Part 1 as  
18 offering expertise on this subject and whether cross-Delta deliveries of over 500,000 AF  
19 would be possible without a commitment from DWR or another major entity to fund and  
20 execute future levee repair and replacement projects. No such assertion or qualification as  
21 an expert in regard to the Delta levee subjects were disclosed or indicated in Phase 1, and  
22 SJRECWA hereby reiterates and incorporates by reference its prior arguments on this  
23 point in its Motion for Reconsideration filed December 23, 2016.

24  
25 **III. Failure to Grant the Supplemental Notice To Appear Will Make a Bad**  
26 **Mistake Worse.**

27 The SWRCB should give thought to the mantra of carpentry: “Do it right, or do it  
28 twice”. A reviewing Court is not going to understand how the SWRCB could justify the

1 exclusion of SJRECWA's Delta levee evidence in Phase 1, especially in light of  
2 applicable due process protections. However, absent a reopening of Phase 1, the SWRCB  
3 has committed itself to that mistake and its consequences. Admitting the requested Delta  
4 levee evidence in Phase 2 would not cure the mistake of Phase 1, but doing so would  
5 prevent the SWRCB from also having to reopen Phase 2. Like Phase 1, a reviewing Court  
6 is not going to understand how the SWRCB could justify the exclusion of SJRECWA's  
7 Delta levee evidence in Phase 2. There is no logical or lawful explanation for doing so.  
8 SJRECWA hereby reiterates and incorporates by reference its prior arguments on this  
9 point in its Motion for Reconsideration filed December 23, 2016. Admitting the requested  
10 evidence of SJRECWA and imposing the requested Delta levee funding and maintenance  
11 and improvement conditions and obligations could spare the SWRCB the embarrassment  
12 of attempting to explain to a reviewing Court its prior rulings, or at least minimize such  
13 embarrassment.

14  
15 **IV. Incorporation of Prior Statements and Arguments.**

16 SJRECWA hereby reincorporates as if set forth in full all statements and arguments  
17 in its Motion for Reconsideration filed December 23, 2016, Reply Memorandum  
18 submitted March 14, 2017, Supplemental Notice of Intent to Appeal dated October 4,  
19 2017, and Briefing Issues Statement dated January 31, 2017, Notice of Deposition August  
20 30, 2016, October 7, SWRCB Ruling of October 7, 2016, DWR Motion for Protective  
21 Order October 27, 2016, SWRCB Ruling Vacating Notice of Deposition December 8,  
22 2018, Notice of Deposition dated March 2, 2017, and DWR Motion for Protective Order  
23 March 10, 2017.

24  
25 **V. Deadline to Present Part 2 Testimony.**

26 Part 2 testimony must be submitted by November 30, 2017, in accordance with the  
27 SWRCB's August 31, 2017 Scheduling Order. In Part 1, SJRECWA twice noticed  
28 depositions for DWR's most knowledgeable persons on the issues here including Delta

1 levee maintenance, repair, improvements, and funding. On both occasions DWR refused  
2 to cooperate with the deposition notice and prohibited the depositions and presentation of  
3 evidence from occurring. In light of this history and DWR's objections to SJRECWA's  
4 Supplemental Notice to Appear in Part 2, it would be inefficient to notice and impossible  
5 to take such depositions without the SWRCB's enforcement of the duty. The resulting  
6 testimony cannot be submitted until the SWRCB rules on SJRECWA's Supplemental  
7 Notice to Appear and DWR's objections to SJRECWA's Supplemental Notice to Appear.

8 SJRECWA requests leave to take the depositions after the November 30, 2017  
9 deadline and to submit and present the testimony after that date. Doing so will not  
10 prejudice or burden the Parties to the proceeding or the SWRCB because Phase 2 is not  
11 scheduled to commence until mid- to late January of 2018 and the proceeding is expected  
12 to carry on for many months. The Draft Party Witness List released on October 18, 2017  
13 by the SWRCB also features well over 100 witnesses and over 30 Parties listed prior the  
14 SJRECWA. Thus, there is no risk of prejudice or inconvenience to any Party or the  
15 SWRCB by granting the requested leave to take depositions after the November 30, 2017  
16 deadline and to submit and present the resulting testimony after that date. SJRECWA  
17 hereby incorporates as if set forth in full all statements, facts, and arguments in its Motion  
18 for Reconsideration filed December 23, 2016, Reply Memorandum submitted March 14,  
19 2017, Supplemental Notice of Intent to Appeal dated October 4, 2017, Briefing Issues  
20 Statement dated January 31, 2017, Notice of Deposition dated August 30, 2016, SWRCB  
21 Ruling dated October 7, 2016, DWR's Motion for Protective Order dated October 27,  
22 2016, the SWRCB Ruling Vacating Notice of Deposition dated December 8, 2018, the  
23 Notice of Deposition dated March 2, 2017, and DWR's Motion for Protective Order dated  
24 March 10, 2017. The contents of the reincorporated documents fully evidence  
25 SJRECWA's reasonable decision to not notice depositions for the submission of  
26 testimony in Part 2 on the issues of Delta levee maintenance, repair, improvement, and  
27 funding because of the certainty that DWR will not comply with any such notice until

28 //

1 and/or unless the SWRCB rules on SJRECWA's Supplemental Notice to Appear and  
2 DWR's objections, as well as the basis for which the requested leave should be granted.

3  
4 **VII. Conclusion**

5 The California Legislature funded and directed DWR to study and produce reports  
6 regarding the Delta levees and their reliability and a means of assuring greater reliability  
7 of the "dual path" flows to the SWP and CVP as well. A Superior Court is not going to  
8 understand how the SWRCB could permit DWR to block consideration of these study  
9 results.

10  
11 Dated: November 2, 2017

MINASIAN, MEITH, SOARES  
SEXTON & COOPER, LLP:

12  
13 By:

  
14 JACKSON A. MINASIAN  
Attorneys for SAN JOAQUIN RIVER EXCHANGE  
15 CONTRACTORS WATER AUTHORITY  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28