

**Part 2 Attachment B:
Supplemental NOTICE OF INTENT TO APPEAR**

CALIFORNIA WATERFIX CHANGE PETITION HEARING
Part 2 of the Public Hearing is scheduled to commence on January 18, 2018

Parties identified on the second page of this form have stated their intent to present direct testimony and call witnesses in Part 2 of the above hearing. **Only** those parties are required to fill out this form. Complete forms shall be submitted to CWFhearing@waterboards.ca.gov and copied to the current Service List no later than noon on **October 13, 2017**. Failure to complete and submit this form by the deadline may be construed as intent not to present witnesses in Part 2 of the hearing.

The SAN JOAQUIN RIVER EXCHANGE CONTRACTORS WATER AUTHORITY plans to participate in **Part 2** of the water right hearing:

Check the applicable box(es) below. Be sure to accurately describe your participation in Part 2.

I/we still intend to present direct testimony in Part 2 of the hearing and plan to call the following witnesses to testify:

NAME OF WITNESS	SUBJECT OF PROPOSED TESTIMONY (Please provide a brief description of each witness' proposed testimony)	ESTIMATED LENGTH OF DIRECT TESTIMONY	EXPERT WITNESS (YES/NO)
SEE ATTACHMENT	Most knowledgeable DWR employees and consultants regarding feasibility of dual path delivery July-Sept of each year at or above 3,000 CFS without established financing for Delta levee preventive maintenance, repair and without funding an immediate action plan when levee failures occur. Effect of the absence of such measures implemented by DWR and Reclamation on the environment and public trust and public interests.	20 minutes per witness Number of witnesses estimated at no more than 3	YES

(If more space is required, please add additional pages.)

- I/we no longer intend to present direct testimony in Part 2 of the hearing and intend to participate by:
- a) A cross-examination and/or rebuttal ~~ONLY~~ and may present an opening or policy statement
- b) Presenting a policy statement only (I/we no longer intend to present evidence or participate in cross-examination and/or rebuttal)
- I/we no longer intend to participate in Part 2 of the hearing.

Fill in the following information of the Participant, Party, Attorney, or other Representative:

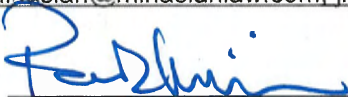
Name of Authorized Representative: PAUL R. MINASIAN / JACKSON A. MINASIAN

Representative's Affiliation: SAN JOAQUIN RIVER EXCHANGE CONTRACTORS WATER AUTHORITY

Mailing Address: P O Box 1679 / 1681 Bird Street, Oroville, California 95965

Phone Number: (530) 533-2885

Email: pminasian@minasianlaw.com; jminasian@minasianlaw.com

Signature: 

Date: October 4, 2017

**ATTACHMENT to Supplemental Notice of Intent to Appear
San Joaquin River Exchange Contractors Water Authority**

1. This Supplemental Notice of Intent to Appear in Part 2 of the California WaterFix Hearing is for the purposes of reminding the SWRCB that the San Joaquin River Exchange Contractors Water Authority (SJRECWA) continues to request, now in Part 2 (having been denied the right in Part 1 of the hearings), to take the depositions of the Department of Water Resources' Most Knowledgeable Employees and Consultants, to subpoena and present the testimony of those employees and any independent consultants that may be presented by the Department of Water Resources (DWR) in response to the Notices as written testimony before the Board, and to provide for brief cross-examination of those witnesses by the SJRECWA on direct as apparently hostile witnesses. Leave to permit such evidence to be produced would provide an opportunity for all other parties to cross-examine these witnesses.

Such evidence is clearly relevant to the issues in Part 1 and Part 2. Although stated in different ways and contexts, the State Board in its October 27, 2016 Ruling addressed the scope of Part 2 and stated:

“The key issues reserved for Part 2 of the hearing included whether the changes proposed in the Petition would unreasonably affect fish, wildlife or recreational uses of water or other public trust resources, and whether the proposed changes are in the public interest.” (Emphasis added.)

2. Evidence regarding the feasibility and the mitigation measures reasonably required to be imposed on DWR and Reclamation as a condition of granting the Change Petition in order to maintain levees and channels so that the assumed July through September “Dual Path” water flows can in fact occur, or if there is a levee failure, whether those failures can be remedied with a secure fund in a reasonable period, is relevant. Failure of the SWRCB to consider such evidence and measures would confirm

that the modeling assumptions and Project Description for CEQA purposes and Change Petition purposes is a “pipe dream.”

3. The current state of the record of actions of the DWR, the Exchange Contractors, and the SWRCB on the relevance of this evidence. A brief refreshment of the SWRCB Board Members and Staff may be helpful:

3.1 Notice to Appear Served on DWR. A Notice to Appear – the State Board’s equivalent of a Subpoena – was served upon the DWR by SJRECWA on August 30, 2016 pursuant to Government Code §11450.05 and 11450.50, and California Code of Regulations, Title 23, 649.6, requiring the appearance of Mr. David Mraz and other most knowledgeable persons of DWR on discrete subjects related to the financial requirements, feasibility and economic funding requirements of levee integrity measures and the Delta Risk Management Studies to support a “dual path” project as modeled. (See Exhibit “1” attached hereto.)

3.2 What do DWR employees know about the funding DWR and CVP would have to expend to maintain a “dual path”? Will DWR and the CVP throw up their hands when levees collapse or will the CVP and DWR fix them? DWR witnesses were listed to testify as to what exactly DWR and CVP’s channel maintenance plan and financing plan was to be to maintain channels and levees to support 3,000 cfs or more cross-Delta flow to CVP/SWP pumps as assumed in DWR Exhibit 515, page 2. (Exhibit “2”.)

3.3 DWR objections overruled by SWRCB. After DWR objected to the Notice to Appear and a protective order was sought, on October 7, 2016, over the objections of DWR, the SWRCB ruled that the Notice to Appear was proper and DWR’s witnesses could be utilized in the place of private consultants to testify regarding the conditions for a reliable “dual path” delivery. (Exhibit “3”.)

3.4 DWR refuses to follow State Board Order and objects to DWR witnesses testifying. After SJRECWA outlined the questions to be asked and areas of inquiry on the eve of the appearance of DWR employee Mr. Mraz as a witness in the Hearings, on October 27, 2017, DWR again refused to produce Mr. Mraz or any of its other employees or consultants and filed a Request for Protective Order claiming among other things that the testimony would be irrelevant. Although no other DWR witness had provided direct evidence or testimony or claimed competence on what measures existed to assure levee maintenance and emergency response funds to maintain a “dual path” delivery system or to reconstruct such a system if it was damaged, DWR claimed the testimony could have been produced through cross-examination of DWR modeling and by other witnesses. (Exhibit “4”.)

3.5 SWRCB reverses its Ruling and orders that DWR need not produce the witnesses. On December 8, 2016, the SWRCB reversed its ruling and barred the ability of the SJRECWA to present testimony of Mr. Mraz or any other independent expert in regard to the levee maintenance, repair, preventive measures and the emergency response funding and plan if there were failures which would allow the “dual path” water deliveries to be reasonably possible. (Exhibit “5”.)

3.6 Motion for Reconsideration by SJRECWA never ruled upon. Astonished, on December 23, 2016 SJRECWA filed a motion for Reconsideration, pointing out both the substantive legal requirements that required consideration of such evidence as part of due process and why DWR and the CVP description of the Project described the “dual path water delivery” as a integral part of the Project which requires that it be properly supported and financed to be reliable and usable. (Exhibit “6”.) The Board has never ruled on the requested reconsideration.

3.7 The SWRCB requests that parties suggest briefing subjects. SJRECWA asked in its briefing comments whether DWR and CVP will be permitted to abandon “dual path” because levee maintenance may become too expensive? The SWRCB asked for Parties to describe the subjects that should be briefed as part of the Part 1 proceedings. The Exchange Contractors responded, pointing out that the subject of

both the exclusion of evidence by direct order of the Board and the actions of the DWR and CVP implicated that the modeling supporting the Change Petition assuming a “dual path” delivery system and capability would exist and function had to be briefed and considered and Part 1 should be reopened for that purpose.

The failure of DWR to actually present evidence of how levees, channels and response funding for repairs would be available when levee system collapses occurred which could reinstate the “dual path” system deliveries constituted a legal deficiency in meeting their burden of proof for the Change Petition.

Alternatively, the Change Petition must describe that when levees fail, whether the 3,000 cfs is to be transported through the Tunnels, or whether a different project is allowed because the second path cannot be funded due to all funding being directed to the Tunnels. A proposed Project not describing means of future operation and maintenance has significant due process and CEQA implications in terms of the Project Description. (Exhibit “7”.)

No response has been received from the SWRCB to SJRECWA’s suggested briefing or authorities filed January 31, 2017.

3.8 The Exchange Contractors send a March 2, 2017 Deposition Notice of DWR employees. On March 2, 2017, the Exchange Contractors served a Notice of Deposition on DWR for Mr. Mraz and the other most knowledgeable persons available to DWR regarding the issues and facts of what measures and funding would be required to provide for a reasonably reliable “dual path” conveyance of 3,000 cfs during July through September. The Notice called for witnesses with knowledge of the measures DWR proposed would be in place for those levee and channel facilities maintenance and repair and reconstruction when and if they were damaged by floods, earthquakes or similar events; that information was gathered by DWR at taxpayer cost in the Delta Risk Management Strategy studies. (Exhibit “8”.)

3.9 DWR again refuses to respond or to comply with the Deposition Subpoena. DWR filed yet another Protective Order Motion with the SWRCB on March 10, 2017 in advance of the deposition scheduled for March 20, 2017. The response by the Exchange Contractors to the requested Protective Order was filed March 14, 2017. (Exhibit “9”.) The SWRCB has never ruled upon DWR’s requested Protective Order but the Deposition scheduled for March 20, 2017 was suspended by the obstruction of DWR. Because DWR unilaterally announced that it and its witnesses would not attend, the Exchange Contractors postponed the depositions because it seemed impolite not to notify all other parties that no witness would appear at that date and time.

3.10 SWRCB asks DWR and CVP to be specific. The SWRCB’s Part 2 scheduling memo issued August 31, 2017 evidences that the SWRCB ordered the DWR and CVP as follows:

“To eliminate any confusion concerning petitioner’s current proposal, we direct the petitioners to provide an updated summary of operating criteria that makes explicit whether particular criteria are proposed conditions of operations, or are set forth solely as modeling assumptions. This summary shall be submitted by petitioners by September 8, 2017.”

The CVP and SWP did not state by September 8, 2017 whether the “dual path” delivery of 3,000 cfs July through September is to be assured through SWP and CVP funding of emergency repair and maintenance of levees or to be discontinued when the expense reaches certain levels.

Discussion

The SWRCB needs to be clear that Part 2 will include this evidence. The SWRCB should recognize that DWR can be its own worst enemy in advocating this Project.

Economic pledging of financial and physical resources for Tunnels through the Delta means that when levees fail in the future, salt water will intrude and organic carbon will be pumped by tides from breached islands through the DWR and CVP pumps, making water unusable for domestic purposes under certain conditions. The “dual path” will be prevented from operating during substantial periods because funding for levee maintenance and repair work is unavailable unless mandated as a condition of the Tunnel Project. Alternatively, the SWP will wish to utilize the tunnels on a full-time basis during droughts to conserve water. Evidence of what is likely or possible if the “dual path” is not a joint financial obligation of the CVP and SWP needs to be considered and specific conditions for levee maintenance, repairs, and possibly abandonment of the “dual path” considered. Such an examination may lead to a conclusion that reasonable and beneficial use of water requires additional Project conditions or alternative facilities.


Dedication to the existence of the Tunnels of \$17 billion Dollars of debt payments and annual operation and maintenance expense has effects upon the public trust, use of public resources and public interest because it makes it impossible or impractical to prevent through maintenance and repair and funding the rapid repair of the levee system upon breaches occurring.

The evidence SJRECWA and others propose to introduce would allow conditions to be established which clearly explain what work the SWP and CVP would be required to do if levee failures occur regarding “dual path” levee repairs and emergency repairs in these predicted and likely circumstances. Perhaps the SWRCB would conclude the “dual path” is not practical or sustainable. If so, perhaps the Tunnels are a politician’s favored solution, but perhaps other physical solutions are more reasonable and beneficial.

The SJRECWA will issue a new Subpoena for the Depositions of these witnesses if the SWRCB does not prohibit it. The SWRCB can add to the confusion by doing nothing or refusing the presentations by the Exchange Contractors but the truth is....our State needs a reliable and operable delivery system through and under the Delta. This includes financing and preparation for likely events.¹

The phrase “pipe dreams” originates from the state of mind and visions experienced by opium users in past centuries. We know you would agree that the phrase should not apply to the managers of a water supply system producing food, protecting waterfowl and supplying 30 million citizens. However, what DWR and the CVP are required to or permitted to do when and if levees are overtopped, not maintained and repaired, or earthquakes occur and there is no funding reserve for rapid repair and replacement of the “dual path” system, must be specified and known if this Project moves forward. What measures should the SWRCB condition the Tunnel change permits upon, if anything? Or alternatively, is it acceptable for the SWP and CVP to simply throw up their hands and propose to abandon the reliable water supply of substantial Central Valley irrigated acreage and abandon the waterfowl resources because the funds that would have been available have been dedicated to a tunnel project...the subject of “pipe dreams”... which may solve a short-term political embarrassment but do not reflect society’s long-term needs for food, wildlife resources and stability?

Respectfully submitted,

By: 

PAUL R. MINASIAN
Attorneys for the San Joaquin River Exchange
Contractors Water Authority

¹ The issue of what is within the scope of Parts 1 and 2 is interesting, but a Court is likely to be puzzled by the refusal to hear evidence that may demonstrate an inevitable dedication of funding that abandons agriculture and waterfowl refuge use through the “dual path”.

Exhibit “1”

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 MINASIAN, MEITH,
3 SOARES, SEXTON & COOPER, LLP
4 1681 Bird Street
5 P.O. Box 1679
6 Oroville, California 95965-1679
7 Telephone: (530) 533-2885
8 Facsimile: (530) 533-0197
9 Email: pminasian@minasianlaw.com

10 Attorneys for
11 SAN JOAQUIN RIVER EXCHANGE CONTRACTORS WATER AUTHORITY

12 **BEFORE THE CALIFORNIA**
13 **STATE WATER RESOURCES CONTROL BOARD**

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

21 **NOTICE TO DEPARTMENT OF**
22 **WATER RESOURCES PURSUANT**
23 **TO GOVERNMENT CODE SECTION**
24 **11450.50 FOR DEPARTMENT OF**
25 **WATER RESOURCES WITNESSES**
26 **TO APPEAR AT WATERFIX**
27 **HEARINGS**

28 TO: THE STATE OF CALIFORNIA DEPARTMENT OF WATER RESOURCES,
AND JAMES MIZELL, its attorney:

Pursuant to Government Code Section 11450.50, NOTICE IS HEREBY GIVEN
by the San Joaquin River Exchange Contractors Water Authority to the Department of
Water Resources, by and through its attorneys, James Mizell, JamesMizell@water.ca.gov,
that the San Joaquin River Exchange Contractors Water Authority does hereby request
and demand that the Department of Water Resources produce the below-described
witnesses to appear in the WaterFix hearings. Government Code Section 11450.50(a)
states, in part:

"The service of a subpoena on the witness is not required if
written notice requesting the witness to attend with the time
and place of the hearing is served on the attorney of the party
or person."

1 NOTICE IS HEREBY GIVEN that this Notice cannot specify the date and time for
2 appearance of the witnesses on behalf of the Department of Water Resources, Petitioner in
3 the above proceeding, because the SWRCB schedule for appearance of witnesses is not
4 known at the present time.

5 1. The Department of Water Resources is provided the reasonable discretion to
6 specify the witnesses to be presented. Among the witnesses should be:

7 DAVID MRAZ, Chief
8 Delta Levees and Environmental Engineering Branch
9 FloodSAFE Environmental Stewardship and Statewide Resources Office
10 Department of Water Resources

11 David Mraz issued the Executive Summary for the Delta Risk Management Study
12 (“DRMS”) Phase 2 Report: portions of Section Eight entitled “Building Block 1.6:
13 Armored ‘Pathway’ (Through-Delta Conveyance)” at pages 8-i through 8-13, and Tables
14 T-1 through T-4, Figure 8-1; Section Nineteen entitled “Results and Observations” at
15 pages 19-1 through 19-13 (SJRECWA-2).

16 2. The other individuals employed by the Department of Water Resources or
17 employed as consultants to the Department of Water Resources who are most
18 knowledgeable and best able to demonstrate the feasibility of the assumptions contained in
19 the modeling of both Boundary 1 and Boundary 2 utilizing the H-3 Alternatives described
20 in DWR Exhibit 515, Table 4 on page 2, and the “note” which describes the assumptions
21 incorporated in Boundary 1 and 2 that states as follows:

22 “SWRCB D-1641, pumping at the South Delta intakes are
23 preferred during July through September months up to a total
24 pumping of 3,000 cfs to minimize potential water quality
25 degradation in the South Delta channels. No specific intake is
26 assumed beyond 3,000 cfs.”

27 as well as the financial contributions to be made by the DWR, Bureau of Reclamation and
28 local Reclamation Districts that would provide reasonable assurance that this dual
29 pathway for water to reach CVP and SWP pumps would exist in the future.

30 3. That individual or individuals most knowledgeable employed by Department
31 of Water Resources or employed as consultants or independent contractors to Department

1 of Water Resources with knowledge of why the proposed WaterFix facilities, which
2 assume the availability of cross-Delta flow and through-Delta flow capacity through
3 levees and channels as described in the "note" above, does not provide for a means of the
4 Department of Water Resources and United States Department of the Interior, Bureau of
5 Reclamation, and local Reclamation Districts, of implementing the Levee Improvement
6 Projects and Levee Protection Programs described in the DRMS Phase 2 Report, or any
7 portion thereof, to assure the likelihood of the ability to maintain flows across the Delta as
8 described in DWR Exhibit 515 and models depicting Boundary 1 and Boundary 2
9 conditions.

10 NOTICE IS GIVEN that the exact appearance time of the witness(es) and their
11 examinations regarding SJRECWA Exhibits 1 and 2 will be arranged with the attorney for
12 the Department of Water Resources, James Mizell. A statement of qualification of the
13 witness(es) and their educational background should accompany their appearance.
14

15 Dated: 8/30/2016

MINASIAN, MEITH, SOARES
SEXTON & COOPER, LLP

17 By: Paul R. Minasian
18 PAUL R. MINASIAN
19 Attorney for SAN JOAQUIN RIVER EXCHANGE
20 CONTRACTORS WATER AUTHORITY
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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):

1. Notice of Intent to Appear – Part I, Witness Amendment Sheet
2. Notice To Department Of Water Resources Pursuant To Government Code Section 11450.0 For Department Of Water Resources Witnesses To Appear At WaterFix Hearings
3. Notice of Unavailability of Expert Witness In Regard to Issues of Levee and Channel Maintenance to Maintain Dual Conveyance Facility Function, and Notice of Application for Relaxation Pursuant to 23 Code of Regulations Section 648.4 in regard to the Submission of 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 August 31, 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 August 31, 2016.

Signature: _____

Name: DENISE DEHART

Title: Secretary to PAUL R. MINASIAN

Party/Affiliation: SAN JOAQUIN RIVER
EXCHANGE CONTRACTORS WATER
AUTHORITY

Address: MINASIAN, MEITH SOARES, ET AL.

1681 Bird Street, P.O. Box 1679

Oroville, CA 95965-1679

ARTICLE 3. COMPELLING ATTENDANCE

Section	
1090.	Power of superior court.
1091.	Petition.
1092.	Contents.
1093.	Request for order.
1094.	Order to show cause.
1095.	Service on witness.
1096.	Order to testify and produce evidence.
1097.	Contempt.

§ 1090. Power of superior court

The superior court of the county in which any proceeding is held by the board may compel the attendance and giving of testimony by witnesses and the production of evidence as required by any subpoena issued by the board. (Stats.1943, c. 368, p. 1613, § 1090. Amended by Stats.1957, c. 1932, p. 3378, § 57.)

§ 1091. Petition

In case of the refusal of any witness to attend or testify or produce any evidence required by a subpoena issued by it, the board may report by petition to the superior court in and for the county in which the proceeding is pending. (Stats.1943, c. 368, p. 1613, § 1091. Amended by Stats.1957, c. 1932, p. 3378, § 58.)

§ 1092. Contents

The petition shall set forth the following:

(a) That due notice has been given of the time and place of attendance of the witness or for the production of evidence and that the witness has been summoned in the manner prescribed in this chapter.

(b) That the witness has failed and refused to attend or produce the evidence required by the subpoena before the board in the proceeding named in the notice and subpoena, or has refused to answer questions propounded to him in the course of the proceeding. (Stats.1943, c. 368, p. 1613, § 1092. Amended by Stats.1957, c. 1932, p. 3379, § 59.)

§ 1093. Request for order

The petition shall ask an order of court compelling the witness to attend, testify, and produce the evidence before the board. (Stats.1943, c. 368, p. 1613, § 1093. Amended by Stats.1957, c. 1932, p. 3379, § 60.)

§ 1094. Order to show cause

The court, upon the petition of the board, shall enter an order directing the witness to appear before the court at a time and place fixed by the court in the order and not more than 10 days from the date of the order, and then and there show cause, if any he have, why he refused to obey the subpoena, or refused to answer questions propounded to him by the board, or neglected, failed, or refused to produce before the board the evidence called for in the subpoena. (Stats.1943, c. 368, p. 1613, § 1094. Amended by Stats.1957, c. 1932, p. 3379, § 61.)

§ 1095. Service on witness

A copy of the order and of the petition shall be served upon the witness. (Stats.1943, c. 368, p. 1614, § 1095.)

§ 1096. Order to testify and produce evidence

If it appears to the court that the subpoena was regularly issued, the court shall thereupon enter an order that the witness appear before the board at the time and place fixed in the order and testify or produce the required evidence or both testify and produce. (Stats.1943, c. 368, p. 1614, § 1096. Amended by Stats.1957, c. 1932, p. 3379, § 62.)

§ 1097. Contempt

Upon failure to obey the order the witness shall be dealt with as for contempt of court. (Stats.1943, c. 368, p. 1614, § 1097.)

ARTICLE 4. DEPOSITIONS

Section	
1100.	Manner of taking

§ 1100. Manner of taking

The board or any party to a proceeding before it may, in any investigation or hearing, cause the deposition of witnesses residing within or without the state to be taken in the manner prescribed by law for depositions in civil actions in the superior courts of this state under Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure. (Stats.1943, c. 368, p. 1614, § 1100. Amended by Stats.1957, c. 1932, p. 3379, § 63; Stats.1998, c. 931 (S.B.2139), § 467, eff. Sept. 28, 1998; Stats.2004, c. 182 (A.B.3081), § 60, operative July 1, 2005.)

ARTICLE 5. IMMUNITY

Section	
1105.	Compulsory testimony.
1106.	Immunity.

§ 1105. Compulsory testimony

(a) Except as provided in subdivision (c), no person shall be excused from testifying or from producing any evidence in any investigation or inquiry by or hearing before the board upon the ground that the testimony or evidence required of him or her may tend to incriminate him or her or subject him or her to any penalty.

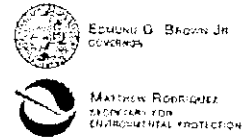
(b) The board may grant immunity to any person who is compelled to testify or to produce documentary evidence before the board and who invokes the privilege against self-incrimination.

(c) If the board does not grant immunity after a person invokes the privilege against self-incrimination, the board shall excuse the person from giving any testimony or producing any evidence to which the privilege against self-incrimination applies, and the board shall dismiss, continue, or limit the scope of the proceedings as necessary to ensure that the unavailability of the testimony or evidence does not deny due process of law to any party. (Stats.1943, c. 368, p. 1614, § 1105. Amended by Stats.1957, c. 1932, p. 3379, § 64; Stats.1970, c. 773, § 1; Stats.1994, c. 45 (A.B.2054), § 1.)

§ 1106. Immunity

No person who is granted immunity under subdivision (b) of Section 1105 shall be criminally prosecuted or be subjected

Exhibit “2”



State Water Resources Control Board

October 7, 2016

VIA ELECTRONIC MAIL

TO: CURRENT SERVICE LIST AND INTERESTED PERSONS LIST

CALIFORNIA WATERFIX HEARING – RULING ON WRITTEN TESTIMONY OUTSIDE THE SCOPE OF PART 1 AND OTHER PROCEDURAL MATTERS

This ruling addresses objections to written testimony submitted for Part 1B of the hearing on the water right change petition for California WaterFix Project on the grounds that the testimony is not relevant to the key hearing issues noticed for Part 1 of the hearing. The remaining objections to testimony and exhibits submitted for Part 1B of the hearing will be addressed after the respective parties have the opportunity to respond to the objections and present their cases in chief. This ruling also addresses several other outstanding procedural issues concerning the participation of some of the parties in Part 1B.

Written Testimony Outside the Scope of Part 1

The Department of Water Resources (DWR) and various other parties have filed objections to the written testimony of numerous witnesses submitted for Part 1B of the hearing on the grounds that the testimony is not relevant to the key hearing issues for Part 1 of the hearing.¹ We have reviewed the objections, responses to objections, and written testimony in question, and concluded that some of these objections have merit. With the exception of one subject area, the testimony that falls outside the scope of Part 1 of the hearing is relevant to the key hearing issues for Part 2 of the hearing, and affected parties will be permitted to resubmit the testimony during that part of the hearing. To ensure that the hearing is conducted in an organized manner, however, the parties identified below are directed to withdraw their testimony for Part 1B of the hearing or to revise and resubmit their testimony in accordance with the guidance contained in this letter by noon on October 17, 2016.

¹ Evidentiary objections to Part 1B cases in chief were due by noon on September 21, 2016. Due to an oversight, DWR neglected to submit some of its objections by the deadline, and as a result some of DWR's objections were submitted several hours after the deadline. Several parties have argued that we should disregard DWR's objections if they were late. We will consider DWR's objections, however, because DWR made a good faith effort to submit its objections on time, and no party appears to have been prejudiced by DWR's failure to submit all of its objections by noon.

FLORIAN MARCOS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

1001 J Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 100, Sacramento, CA 95812-0100 | www.waterboards.ca.gov



EXHIBIT 2

Request of Friends of the River et al. for Official Notice and Dismissal of the Petition

Friends of the River, Sierra Club, and the Planning and Conservation League, (Friends of the River et al.) submitted a joint opening statement that included requests for official notice and a joint motion to reconsider a previous motion to dismiss the petition. Parties presenting a case-in-chief may make an opening statement that briefly and concisely states the objectives of the case-in-chief, major points that the proposed evidence is intended to establish, and the relationship between the major points and the key issues. (Hearing Notice, p. 35.) It is not proper for Friends of the River et al. to submit an opening statement for Part 1 because they are not presenting a case in chief in Part 1B. In addition, the majority of this submittal is argument appropriate for a closing brief (when and if requested) or facts that could be presented as part of a case-in-chief in Part 2 of the hearing. Accordingly, the opening statement of Friends of the River et al. will be treated as a procedural motion, which is addressed in more detail below.

Friends of the River et al. request that the State Water Board take "official notice" of "certain facts and actions" including the U.S. Environmental Protection Agency's NEPA comments, various findings in the U.S. Bureau of Reclamation's Biological Assessment (BA), a Guidance document issued by the Council on Environmental Quality, and court opinions.

The regulations governing evidentiary hearings before the State Water Board provide that the Board or hearing officer may take official notice of any facts which can be judicially noticed by the courts. (Cal. Code Regs., tit. 23, § 648.2.) These include decisional, constitutional, and public statutory law, various rules of pleading practice and procedure, and facts and propositions "of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute." (Evid. Code, § 450 et seq.) Generally, the State Water Board's practice is to take official notice of statutes, court decisions, and precedential Board orders or decisions that are cited as legal authority in parties' closing briefs without the need for a formal request for official notice. Accordingly, Friends of the River et al.'s request for official notice of legal authority is unnecessary.

To the extent that Friends of the River et al. seek official notice of certain documents that are relevant to factual issues that will be addressed in Part 2 of the hearing, these documents should be submitted as exhibits as part of their case in chief in Part 2. In addition, consistent with an email sent to the service list on September 28, 2016, parties who are not presenting a case-in-chief in Part 1B may offer any exhibits that are identified during cross examination into the record at the end of Part 1B.

Friends of the River et al. also request reconsideration of previous and repetitive motions to dismiss the petition based on the timing of the proceeding and adequacy of relevant documents. These issues have been addressed multiple times and will not be revisited at this time. (See Rulings issued on February 11, 2016, March 4, 2016, April 25, 2016, and July 22, 2016.)

San Joaquin River Exchange Contractors Water Authority's Request to Amend Its NOI and Call DWR Witnesses

On August 30, 2016, the San Joaquin River Exchange Contractors Water Authority (SJRECWA) sent notice to DWR requesting the appearance of DWR witnesses pursuant to Government Code section 11450.50. SJRECWA's witness amendment sheet indicates its intent to substitute DWR employees and consultants instead of its previously listed witness Christopher H. Neudeck. On September 2, 2016, DWR requested that the State Water Board reject or deny

SJRECWA's request for being procedurally improper and substantively unfair. In its opposition, DWR argues that the witness substitution impermissibly broadens the topic of Mr. Neuduck's testimony and constitutes the submittal of a new NOI.

The rules governing evidentiary hearings before the State Water Board provide for the issuance of subpoenas to compel the testimony by witnesses in a proceeding. (Wat. Code, § 1080 et seq.; Gov. Code, §§ 11450.05-11450.50; Cal. Code Regs., tit. 23, § 649.6.) Under Government Code section 11450.50, the service of a subpoena on the witness is not required to compel the appearance of a party to a proceeding. Instead, written notice requesting the witness to attend, with the time and place of the hearing, must be served on the attorney of the party as provided under section 1987 of the Code of Civil Procedure. (Code of Civ. Pro., § 1987 [service shall be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance].) The notice must be served at least 10 days before the time required for attendance. This notice has the same effect as service of a subpoena on the witness. Parties have the same rights to object to its terms by a motion for a protective order, including a motion to quash. The presiding officer may issue any order that is appropriate to protect the parties or the witness from unreasonable or oppressive demands.

SJRECWA's notice complies with the provisions stated above. DWR is a party to the proceeding so a subpoena is not required. The notice was served on DWR's attorney more than 10 days before Part 1B is scheduled to begin, and provides a reasonable time for preparation and travel. DWR has not made any showing that SJRECWA's request is unreasonable or oppressive. In addition, the scope of testimony falls within the scope of testimony of the original witnesses identified. In the original NOI, the scope of proposed testimony of Christopher H. Neudeck was: "Need for comprehensive agreements between SWP/CVP/local Reclamation Districts, and funding for maintenance, repair and improvement of levees and channels for conveyance and control of water across and through Sacramento/San Joaquin Delta to CVP and SWP pumps to prevent unreasonable salinity impairment of water quality" In its amended NOI, DWR witnesses are listed to testify on "DWR plan and financing plan to maintain Channels and levees to support 3,000 cfs or move cross Delta flow to CVP/SWP pumps as assumed in DWR Exhibit 515, page 2." This revision falls within the scope of the proposed testimony of Christopher H. Neudeck.

DWR argues that the proposed substitution will potentially significantly delay the hearing by adding numerous hours surprise testimony and additional cross examination. We disagree. The Hearing Notice provides an exception to the advanced submittal of written testimony for adverse witnesses testifying in response to a subpoena or alternative arrangement. (Hearing Notice, p. 33, fn. 16.) Further, it does not appear that presentation of SJRECWA's case in chief will take more time as a result of SJRECWA's proposed changes. SJRECWA has not submitted written testimony for three expert witnesses listed on SJRECWA's original NOI, including Mr. Neudeck. In addition, it appears that SJRECWA has decided not to subpoena Daniel B. Steiner, Hydrologist-CVP/SWP as an expert witness to testify on a variety of issues. The estimated length of this witness' direct testimony was two hours.

Absent a showing of why SJRECWA's request is unreasonable or oppressive, the request to substitute witnesses as provided in SJRECWA's amended witness sheet is granted, and DWR is directed to coordinate with SJRECWA to arrange for the appearance of the appropriate witness or witnesses at the appropriate time.

Exhibit “3”

Leah Janowski

From: Paul Minasian
Sent: Monday, October 31, 2016 11:03 AM
To: Steve Chedester (stevechedester@sjrecwa.net); 'Christopher White'; Chase Hurley; Jeff Bryant; rghccc@sbcglobal.net
Subject: FW: Message from KMBT_C554
Attachments: SKMBT_C55416103111560.pdf

This motion was filed by DWR in the Water Fix hearing Thursday at 5:00. I was summoned to the SWRCB meeting at 9:00 Friday morning. The motion was never mentioned in two phone calls on Thursday. Other than to say that DRAZ would be unavailable.

What the SWRCB did is said that our witnesses would be taken out of order after the Board had ruled on the motion of DWR. I am to respond by Friday of this week.

We are probably ready for a conference call with this and the basic questions of what we are trying to accomplish and how likely is it we will accomplish those goals.

The motion is a sign that we are really worrying the DWR. Only God knows how the SWRCB will react. Robin McInnis of the DWR legal staff is young and probably doesn't realize that they put more focus on these issues of levee stability and whether the DWR and Bureau should have to pay money for a levee improvement program and fund an emergency fund for possible multiple levee repairs if there is a failure to be able to use the pumps by legal maneuvers like this.

She stated on Thursday that a stipulation to include such a funding program was not possible. I have no idea if it has been rejected by the decision makers or is just too complex for DWR staff to deal with.

Set the conference call when you have a chance this week. It will not change our response to the motion to exclude the testimony which I recommend we continue to pursue. The Conference Call is to provide guidance of what the managers think about gearing our participation up or down after this issue.

Paul R. Minasian, Esq.

Minasian, Meith, Soares, Sexton & Cooper, LLP

1681 Bird Street / P O Box 1679, Oroville, CA 95965

(530) 533-2885 / fax (530) 533-0197

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From: admin@minasianlaw.com [mailto:admin@minasianlaw.com]

Sent: Monday, October 31, 2016 12:57 PM

To: Paul Minasian

Subject: Message from KMBT_C554

1 Spencer Kenner (SBN 148930)
James E. Mizell (SBN 232698)
2 Robin McGinnis (SBN 276400)
3 **CALIFORNIA DEPARTMENT OF WATER
RESOURCES**
4 Office of the Chief Counsel
1416 Ninth Street, Room 1104
Sacramento, CA 95814
5 Telephone: (916) 653-5966
E-mail: james.mizell@water.ca.gov
6
7 Attorneys for California Department of Water
Resources

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

9
10 **HEARING IN THE MATTER OF**
11 **CALIFORNIA DEPARTMENT OF WATER**
12 **RESOURCES AND UNITED STATES**
13 **BUREAU OF RECLAMATION REQUEST**
14 **FOR A CHANGE IN POINT OF**
15 **DIVERSION FOR CALIFORNIA WATER**
16 **FIX**

CALIFORNIA DEPARTMENT OF
WATER RESOURCES' MOTION FOR
PROTECTIVE ORDER

15 California Department of Water Resources ("DWR") requests that the Hearing
16 Officers issue an order pursuant to Government Code section 11450.30, subdivision (b)
17 to protect it from the unreasonable and oppressive demands in the Notice to Appear filed
18 by San Joaquin River Exchange Contractors Water Authority ("SJREC"). DWR requests
19 that the Hearing Officers vacate SJREC's notice to appear or limit it as to avoid
20 unnecessary questioning outside the scope of this hearing or knowledge of this
21 employee.

22
23 **I. STATEMENT OF FACTS**

24 On August 26, 2015, DWR and Reclamation filed a petition for a change to their
25 water rights necessary to allow for the implementation of key components of the State's
26 California Water Fix ("CWF") program. On October 30, 2015, the Board issued a Notice
27

28

1 of Petition and Notice of Public Hearing and Pre-Hearing Conference to consider the
2 petition.

3 SJREC submitted its Notice of Intent to Appear ("NOI") on January 4, 2016
4 indicating that Christopher Neudeck would be one of its four witnesses and the subject
5 of his proposed testimony would be:

6 Need for comprehensive agreements between SWP/CVP/local
7 Reclamation Districts, and funding for maintenance, repair and
8 improvement of levees and channels for conveyance and control of water
9 across and through Sacramento/San Joaquin Delta to CVP and SWP
10 pumps to prevent unreasonable salinity impairment of water quality; flow
11 characteristics damaging to fish life[.]

12 On August 30, 2016, SJREC served a Notice to Appear demanding that DWR
13 produce witnesses on the following topics:

- 14 1. Delta Risk Management Study ("DRMS") Phase 2 Report: portions of
15 Section Eight entitled "Building Block 1.6: Armored 'Pathway'
16 (Through-Delta Conveyance)" at pages 8-i through 8-13, and Tables T-
17 1 through T-4, Figure 8-1; Section Nineteen entitled "Results and
18 Observations" at pages 19-1 through 19-13 (SJRECWA-2).
- 19 2. The feasibility of the assumptions contained in the modeling of both
20 Boundary 1 and Boundary 2 utilizing the H-3 Alternatives described in
21 DWR Exhibit 515, Table 4 on page 2, and the "note" which describes
22 the assumptions incorporated in Boundary 1 and 2 that states as
23 follows: "SWRCB D-1641, pumping at the South Delta intakes are
24 preferred during July through September months up to a total pumping
25 of 3,000 cfs to minimize potential water quality degradation in the
26 South Delta channels. No specific intake is assumed beyond 3,000
27 cfs."
- 28 3. The financial contributions to be made by the DWR, Bureau of
Reclamation and local Reclamation Districts that would provide
reasonable assurance that this dual pathway for water to reach CVP
and SWP pumps would exist in the future.
4. Why the proposed CWF facilities do not provide for a means of DWR,
DOI, Reclamation, and Reclamation Districts implementing the levee
improvement projects and levee protection programs described in the
DRMS Phase 2 report to assure the likelihood of the ability to maintain
flows across the Delta as described in DWR-515 and models depicting
Boundary 1 and 2 conditions.

1 In an attempt to meet, confer, and compromise regarding the Notice to Appear, a
2 conference call between DWR and SJREC occurred on October 14, 2016. After a
3 productive conversation, SJREC provided its "Possible Questions" to DWR on October
4 25, 2016. (See Exhibit A.) SJREC's questions cover a range of topics, including
5 modeling, operations, levee safety, and funding for levee programs. DWR offered to
6 stipulate to some of the topics in the list of possible questions, but its offer was refused,
7 because SJREC wants to include questions about the reasonableness of funding for
8 levees and future occurrences of levee failures in the Delta. (See Exhibit B.)

9
10 **II. ARGUMENT**

11 SJREC's possible questions fall into three categories, the presentation of which
12 does not require participation from a DWR witness. The three categories are:
13 (1) foundational questions about modeling (Exhibit A, Questions 1-1.2 at pages 1-2);
14 (2) questions about the 2009 and 2011 Delta Risk Management Study (DRMS) Reports
15 (Exhibit A, Questions 2-2.7 at pages 3-7 & Questions 4-4.2 at pages 10-12); and
16 (3) opinions about the reasonableness of funding for levees and future occurrences of
17 levee failures in the Delta (Exhibit A, Questions 3-3.4 at pages 7-10 & Questions 5-5.9 at
18 pages 12-17).

19
20 **A. Foundational questions about modeling were already covered.**

21 DWR's experts were available for cross-examination where parties used that
22 opportunity to establish testimony for the record. It appears that SJREC failed to explore
23 the topics on which it now seeks information. It is unreasonable for SJREC to now
24 demand that DWR produce additional witnesses to present SJREC's case-in-chief,
25 because it missed its opportunity to question the right witnesses on cross examination.
26 SJREC's Questions 1-1.2 cover modeling and operations, topics on which DWR
27
28

1 provided panels of witnesses to testify.¹ SJREC already had the opportunity to ask the
2 correct witnesses about these topics, and it is therefore unreasonable to call another
3 DWR witness to testify on these topics.

4 **B. It is unnecessary for a DWR witness to testify about the 2009 and 2011**
5 **DRMS reports.**

6 The 2009 and 2011 DRMS reports are in the public realm.² These are reports
7 prepared by DWR, a public agency, of which the Board can take official notice or that
8 can be submitted as exhibits to a party's case-in-chief. These reports are fully discussed
9 in publicly available documents, including Chapter 6 in the 2013 Draft Environmental
10 Impact Report/Environmental Impact Statement (DEIR/DEIS) and updated in the 2015
11 Partially Recirculated Draft Environmental Impact Report/Supplemental Draft
12 Environmental Impact Statement (RDEIR/SDEIS).³ (See Exhibit C.) They are also
13 discussed in the Delta Stewardship Council's (DSC's) January 2015 report entitled,
14 "State Investments in Delta Levees, Key Issues for Updating Priorities."⁴ (See Exhibit
15 D.) It should also be noted that SJREC did, in fact, submit portions of the 2011 DRMS
16 report as an exhibit to its Part 1B case-in-chief. The relevant information has already
17 been submitted as part of SJREC's case-in-chief, and it is therefore unreasonable and
18 oppressive for SJREC to require a DWR to attend and testify about the contents of these
19 reports.
20
21
22

23 ¹ The Operations panel testified on direct and was cross examined on August 10-12 and 18-19.
24 The Modeling panel testified on direct and was cross examined on August 23-26. Transcripts of the
25 hearing are available here:
http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/transcript_s.shtml.

26 ² Available here: <http://www.water.ca.gov/floodsafe/fessro/levees/drms/>.

27 ³ Available here: http://baydeltaconservationplan.com/RDEIRS/Ap_A_Rev_DEIR-S/06_SurfWater.pdf.

28 ⁴ Available here: http://deltacouncil.ca.gov/sites/default/files/2015/01/15-0109_Levee_Investment_Strategy_Issue_Paper.pdf.

1 **C. Opinions about the reasonableness of funding for levees and future**
2 **occurrences of levee failures in the Delta.**

3 SJREC's questions about levee safety and funding for levee programs, if they
4 pertained to CWF, are covered in Chapter 6 of the 2013 DEIR/DEIS and 2015
5 RDEIR/SDEIS. However, it appears that SJREC's questions apply to programs well
6 outside of CWF. Similar to some of the other issues raised by Protestants, long term
7 levee maintenance improvement and funding is a State issue, and is not limited to CWF
8 or even DWR. The Delta Stewardship Council (DSC) is leading the Delta Levee
9 Investment Strategy (DLIS) effort, specifically flood and levee long term planning and
10 funding. Again the DSC programs are outside the scope of this hearing. Information
11 about levee safety and funding is found in documents such as DSC's July 2014 DLIS
12 Fact Sheet, DLIS FAQs, and March 24, 2016 DLIS Update and Contract Amendment.
13 (Exhibits E, F & G.) In addition to the DSC's planning efforts regarding Delta levees, the
14 Central Valley Flood Management Planning (CVFMP) Program sets forth a plan for
15 sustainable flood management and investment to improve flood risk management in the
16 Central Valley through use of the State Plan of Flood Control (SPFC) facilities.⁵

17 Further, the engineering panel was cross examined for two full days and included
18 questions about levee safety related to CWF.⁶ SJREC could have had its questions
19 about the reasonableness of funding for levees and future occurrences of levee failures
20 in the Delta addressed at that time. SJREC has not shown that cross examination of
21 DWR's Part 1 witnesses or the information in the publicly available documents are
22 insufficient. It is therefore unreasonable for SJREC to demand an additional DWR
23

24
25
26 ⁵ More information is available here: <http://www.water.ca.gov/cvfmpl/>.

27 ⁶ The Engineering panel testified on direct and was cross examined on August 5 and 9.
28 Transcripts of the hearing are available here:
http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/transcripts.shtml.

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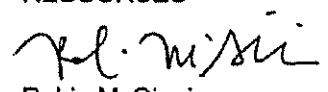
witness to testify on these topics, and it is inappropriate to ask a DWR employee to predict future funding of levee maintenance or improvements as this is a complex state wide policy level decision being led by the DSC and that ultimately depends on the legislature for long-term funding.

III. CONCLUSION

SJREC's possible questions do not require participation from a DWR witness and requiring a DWR witness to testify on these topics would be unreasonable and oppressive. DWR therefore requests that the Hearing Officers vacate SJREC's notice to appear or in the alternative limits the scope of the questioning to those that would not otherwise have been covered by other witnesses, go beyond the scope of Part 1B, or the witness's ability to predict future funding.

Dated: October 27, 2016

CALIFORNIA DEPARTMENT OF WATER
RESOURCES



Robin McGinnis
Office of the Chief Counsel

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):

Motion for protective order

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 October 6, 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:

Note: In the event that any emails to any parties on the Current Service List are undeliverable, you must attempt to effectuate service using another method of service, if necessary, and submit another statement of service that describes any changes to the date and method of service for those parties.

For Petitioners Only:

I caused a true and correct hard copy of the document(s) to be served by the following method of service to Suzanne Womack & Sheldon Moore, Clifton Court, L.P., 3619 Land Park Drive, Sacramento, CA 95818:

Method of Service: U.S Postal

I certify that the foregoing is true and correct and that this document was executed on October 27, 2016
Date

Signature: 

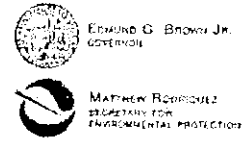
Name: Bobbie Randhawa

Title: Legal Secretary

Party/Affiliation: DWR

Address: 1416 Ninth Street 1104
Sacramento, CA 95814

Exhibit “4”



State Water Resources Control Board

December 8, 2016

VIA ELECTRONIC MAIL

TO: CURRENT SERVICE LIST

CALIFORNIA WATERFIX HEARING – RULING VACATING SAN JOAQUIN RIVER EXCHANGE CONTRACTORS WATER AUTHORITY’S NOTICE REQUESTING ATTENDANCE OF WITNESSES

On August 31, 2016, the San Joaquin River Exchange Contractors Water Authority (SJRECWA) served written notice on the Department of Water Resources (DWR), requesting the appearance of certain DWR witnesses during Part 1B of this hearing. On October 27, 2016, DWR filed a motion for protective order, seeking to vacate or limit the scope of SJRECWA’s notice. Based on our review of DWR’s motion and SJRECWA’s reply, it does not appear that SJRECWA seeks to compel DWR’s witnesses to testify concerning any issues that are relevant to the key hearing issues for Part 1 of this hearing. Accordingly, SJRECWA’s notice requesting the appearance of DWR’s witnesses is hereby vacated in its entirety.

Procedural Background

The Notice of Intent to Appear (NOI) that SJRECWA originally filed in this proceeding listed four expert witnesses, including Christopher H. Neudeck. The subject of Mr. Neudeck’s proposed testimony was the need for agreements and funding for the maintenance, repair, and improvement of Delta levees and channels “for conveyance and control of water across and through the Delta to CVP and SWP pumps” On August 31, 2016, SJRECWA notified the State Water Resources Control Board (State Water Board) and the other parties that Mr. Neudeck was no longer available, and SJRECWA proposed to call DWR employees or consultants to testify instead of Mr. Neudeck.

In order to effectuate the substitution of DWR witnesses for Mr. Neudeck, SJRECWA served a notice on DWR pursuant to Government Code section 11450.50, requesting the appearance of: (1) David Mraz, Chief of the Delta Levees and Environmental Engineering Branch within DWR, (2) other DWR employees or consultants most knowledgeable concerning the modeling assumption that preferential pumping of up to 3,000 cubic feet per second (cfs) at the South Delta intakes would occur during July through September “as well as the financial contributions . . . that would provide reasonable assurance that this dual pathway for water to reach CVP and SWP pumps would exist . . . ,” and (3) individuals with knowledge of why the California WaterFix

ELIENIA MANTON, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

1001 I Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 100, Sacramento, CA 95812-0100 | www.waterboards.ca.gov

ATTACHMENT 1

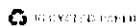


EXHIBIT 4

Project does not provide a means for DWR, the U.S. Bureau of Reclamation, and local reclamation districts to implement various levee improvement projects and levee protection programs to ensure that water can continue to be conveyed through the Delta.

Originally, DWR opposed SJRECWA's request on the grounds that SJRECWA was impermissibly seeking to expand the scope of SJRECWA's NOI. In a ruling dated October 7, 2016, this objection was overruled because the scope of the proposed testimony from DWR witnesses was within the scope of Mr. Neudeck's proposed testimony. We also affirmed that SJRECWA had followed the proper procedures to compel a party to appear in an adjudicative proceeding before the State Water Board, and directed DWR to coordinate with SJRECWA to arrange for the appearance of the appropriate witness at the appropriate time.

Following the October 7 ruling, representatives for DWR and SJRECWA met and discussed SJRECWA's request, but were unable to reach agreement. As part of these discussions, SJRECWA provided DWR with a list of possible questions for a prospective DWR witness. DWR submitted a copy of the draft questions as an exhibit to its motion for protective order. The questions concern: (1) the modeling assumption that up to 3,000 cfs would continue to be pumped from the South Delta intakes during July through September, (2) the content of two Delta Risk Management Study (DRMS) reports that addressed the risk of levee failure, and (3) the need to fund levee improvements and repairs in order to maintain the ability to convey up to 3,000 cfs through the Delta.

Discussion

SJRECWA's written notice requesting the appearance of DWR witnesses had the same legal effect as a subpoena. (See Gov. Code, §§ 11450.10, 11450.50 [providing that a subpoena is not required in the case of the production of a party if written notice requesting attendance of the witness is served on the party's attorney in accordance with section 1987 of the Code of Civil Procedure].) A person served with a subpoena, or, as in this case, a written notice requesting attendance of a witness, may object to the terms of the subpoena or notice by a motion for a protective order, including a motion to quash. (Gov. Code, § 11450.30, subd. (a).) The hearing officer has discretion to resolve any objection subject to any appropriate terms and conditions. In addition, the hearing officer may issue any order that is appropriate to protect the parties or the witness from unreasonable or oppressive demands. (*Id.*, § 11450.30, subd. (b).)

In its motion for protective order, DWR argues that SJRECWA's notice requesting the appearance of DWR witnesses is unreasonable and oppressive because: (1) SJRECWA could have asked its prospective questions during cross-examination of DWR's expert witnesses in Part 1A of the hearing, (2) the DRMS reports can be submitted as exhibits, and do not require testimony about their content, and (3) questions concerning long-term efforts to fund levee maintenance and repair are outside the scope of the hearing. In its reply, SJRECWA argues that DWR's motion should be denied because: (1) DWR did not address long-term levee maintenance and repair in its direct testimony, (2) a witness from DWR is needed to explain the level of funding needed to ensure that through-Delta conveyance can be maintained, and (3) the potential for levee failure to disrupt through-Delta conveyance is relevant to the issue of harm to legal users of water.

Having reviewed SJRECWA's prospective questions for DWR's witnesses and reply to DWR's motion for protective order, we have determined that it would be unreasonable to require DWR to provide witnesses to testify as requested by SJRECWA because SJRECWA does not seek to elicit testimony that is relevant to the key hearing issues for Part 1 of the hearing. The key hearing issues for Part 1 are whether the water right changes proposed by DWR and the U.S. Bureau of Reclamation (petitioners) constitute the initiation of a new right or will cause injury to legal users of water or otherwise impact human uses. Based on the limited description of proposed testimony contained in SJRECWA's NOI and written notice to DWR, it was unclear whether SJRECWA sought to present relevant testimony from Mr. Neudeck or DWR witnesses. Based on the more detailed prospective questions provided to DWR, however, it has become clear that the issues that SJRECWA seeks to explore do not concern the potential impacts of the proposed changes. Instead, SJRECWA seeks to present testimony concerning the need for funding for levee maintenance and repair in order to maintain the petitioners' existing ability to convey water through the Delta. This is an issue that will exist regardless of whether the WaterFix change petition is approved. Other than the fact that petitioners propose to continue to convey water through the Delta, SJRECWA has not sought to explore any connection between the WaterFix change petition and the need for funding for levee maintenance and repair. Accordingly, requiring DWR to provide a witness to testify on this issue would not be reasonable or an efficient use of time.

For the foregoing reasons, SJRECWA's written notice requesting attendance of DWR witnesses is vacated. Because the notice is vacated in its entirety, a protective order limiting the scope of SJRECWA's proposed questions is not necessary.

If you have any non-controversial, procedural questions about this ruling or other matters related to the California WaterFix Hearing, please contact the hearing team at CWFhearing@waterboards.ca.gov or (916) 319-0960.

Sincerely,

ORIGINAL SIGNED BY:

Felicia Marcus, State Water Board Chair
WaterFix Project Co-Hearing Officer

ORIGINAL SIGNED BY:

Tam M. Doduc, State Water Board Member
WaterFix Project Co-Hearing Officer

Exhibit “5”

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Oroville, California 95965-1679
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5 Email: pminasian@minasianlaw.com

6 Attorneys for San Joaquin Exchange Contractors Water Authority

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

9
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**

PETITION FOR RECONSIDERATION
OF THE RULING VACATING SAN
JOAQUIN RIVER EXCHANGE
CONTRACTORS WATER
AUTHORITY'S NOTICE
REQUESTING ATTENDANCE OF
WITNESSES AND OPPORTUNITY TO
PRODUCE EVIDENCE

16 The San Joaquin River Exchange Contractors (SJREC) hereby petition the Board
17 for reconsideration of its December 8, 2016 Ruling that the SJREC may not introduce in
18 Part 1, by Notice to Appear or by Subpoena, the testimony of the head of DWR's Levee
19 and Environmental Engineering Branch or other most knowledgeable persons employed
20 by DWR, regarding evidence of the reasonable measures necessary and economic
21 contributions required to reasonably assure 3,000 cfs cross-Delta flow deliveries in July
22 through September to the Delta pumps. The Ruling of December 8, 2016 is attached as
23 Attachment 1.

24 This Petition is made on the following grounds and bases:

25 1. The SWRCB's conduct of an adjudicatory proceeding requires that
26 constitutional due process be provided to both applicants and protestants. It is respectfully
27 submitted that the denying SJREC's right to present evidence, whether produced by
28 subpoena or pursuant to cooperative means, violates principles of due process; the

1
PETITION FOR RECONSIDERATION ON THE RULING VACATING SAN JOAQUIN RIVER
EXCHANGE CONTRACTORS WATER AUTHORITY'S NOTICE REQUESTING ATTENDANCE OF
WITNESSES AND OPPORTUNITY TO PRODUCE EVIDENCE

1 granting of reasonable opportunity to present evidence is essential for due process
2 compliance (See Attachment 2 - Legal Authorities). The rescission of authority to present
3 the testimony would violate those fundamental constitutional rights.

4 2. DWR's further objection to the testimony which gave rise to this reversal by
5 the Board and denial of the opportunity to produce evidence was based upon DWR's
6 argument that:

7 " (1) DWR did not address long-term levee maintenance and
8 repair in its direct testimony, (2) a witness from DWR is
9 needed to explain the level of funding needed to ensure that
10 through-Delta conveyance can be maintained, and (3) the
11 potential for levee failure to disrupt through-Delta conveyance
12 is (not) relevant to the issue of harm to legal users of water."
13 (Ruling, Page 2.)

14 The SWRCB states on page 3 of its Ruling:

15 "... we have determined that it would be unreasonable to
16 require DWR to provide witnesses to testify as requested by
17 SJRECWA because SJRECWA does not seek to elicit
18 testimony that is relevant to the key hearing issues for Part 1
19 of the hearing. The key hearing issues for Part 1 are whether
20 the water right changes proposed by DWR and the U.S.
21 Bureau of Reclamation (petitioners) constitute the initiation of
22 a new right or will cause injury to legal users of water or
23 otherwise impact human uses."

24 The Board ruling, based in part on a draft of preliminary questions drafted by SJRECWA
25 for the witnesses, continues by stating:

26 "... it has become clear that the issues that SJRECWA seeks
27 to explore do not concern the potential impacts of the
28 proposed changes. Instead, SJRECWA seeks to present
testimony concerning the need for funding for levee
maintenance and repair in order to maintain the petitioners'
existing ability to convey water through the Delta. This is an
issue that will exist regardless of whether the WaterFix change
petition is approved."

3. The Board's reversal through its Ruling ignores the facts in this instance, the
requirements of due process in an adjudicative hearing, and impermissibly narrows its
proceedings:

A. The authority sought by the DWR and Bureau is to provide for
facilities and uses which would divert around the Delta a majority of the usable water

1 South of the Delta at certain times. The proponents' plan submitted and testified that
2 3,000 cfs would continue to reach the Delta pumps by flowing across the Delta and would
3 be of a quality that the water would be pumped into the State and Federal aqueducts and
4 usable by municipal and agricultural users. That described condition can exist only if
5 Delta levee integrity is maintained, or after levee failure, if critical levees are quickly
6 rebuilt. DRMS I at pages 12-28 estimates a cost of \$100 Million per island for three
7 island failures, also found at page 10 of the Executive Summary. Is the Board really
8 theorizing and presuming that DWR and the Federal government are going to continue to
9 provide funding to aid local interests in protecting levees from failure or rapidly
10 reconstructing those levees if they fail, when \$15 to \$30 Billion is already invested in
11 Tunnels? There is no evidence presented to substantiate such a presumption by DWR and
12 the Bureau who have the burden of reasonably describing how their new and old
13 diversions and plan will be implemented and organized.

14 B. No one twisted DWR's arm to present modeling as part of its
15 description of the WaterFix Tunnel operations, which modeling assumes that critical
16 levees would continue to exist and that cross-Delta flows of 3,000 cfs would be available
17 for pumping in the period of July through September of each year. This is the proposal of
18 DWR and an integral part of its proposal and representation that "no harm will arise."
19 The SWRCB ruling improperly narrows the ability to present evidence showing that such
20 a "proposal" is only feasible if conditions are imposed requiring large amounts of money
21 to be marshaled and devoted to preventative levee work, and, upon failure events, if
22 prompt funding of and organization of efforts to provide repair and replacement is
23 organized and feasible. (DRMS II SJRECWA exhibits filed with the Board.)

24 It is true that the DWR has not presented any evidence of how this part of
25 the Tunnel plan will reliably exist. That is why there is a Phase 1B for protestants or
26 commenters to present the absence of such information and plans and the ease with which
27 those arrangements could be included in the DWR and Bureau plan for the Tunnels as a
28 condition of approval. If the DWR modelers and witnesses had testified that upon a flood,

1 earthquake or simple failure of critical levees, the 3,000 cfs would be routed through the
2 Tunnels, no monies would be contributed to the local Reclamation Districts to repair and
3 reconstruct critical levees, and cross-Delta flows would thereafter be available only during
4 floods, a glaring omission in the description of the Tunnel Project could have been
5 eliminated and the Board ruling might have been correct and the Board's statement in its
6 reversal of the Ruling would be true. However, no such description was included, and all
7 modeling assumes a miraculous preservation without funding for critical levees.

8 C. The Board errs when it curtails testimony of the impacts to legal
9 users of water based on carving out a critical part of DWR's proposed operations. The
10 Board makes the following statement on page 3 of its Ruling and reversal in regard to the
11 subject of what measures will be undertaken to repair upon failure or to prevent critical
12 levee failure:

13 "This is an issue that will exist regardless of whether the
14 WaterFix change petition is approved. Other than the fact that
15 petitioners propose to continue to convey water through the
16 Delta, SJRECWA has not sought to explore any connection
17 between the WaterFix change petition and the need for
18 funding for levee maintenance and repair. Accordingly,
19 requiring DWR to provide a witness to testify on this issue
20 would not be reasonable or an efficient use of time."

18 DWR proposed this operating scheme to satisfy the "no harm" test. It
19 makes no difference if the levees are fragile and expensive to protect. DWR could have
20 clearly stated that the first time three or more levees failed, efforts to preserve cross-Delta
21 flows would end, and quantify those effects in their modeling. If the Delta pump water
22 users are to be served in a different fashion or to be abandoned, DWR needs to explain
23 that.

24 1. It is the burden of the plan proponent for the new diversion
25 facilities to present evidence that its plan is feasible and will operate as is outlined in its
26 modeling. The two (2) path proposal (Tunnel and cross-Delta flow) cannot assume that
27 examination of the potential harm arising from the Tunnel path is the only subject of
28 inquiry and that someone else will take care of the second path.

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2. If the ruling of the SWRCB by the reference,

“Other than the fact that petitioners proposed to continue to convey water through the Delta, SJRECWA has not sought to explore any connection between the WaterFix change petition and the need for funding for levee maintenance and repair...”

is to infer that SJRECWA should have consumed the time of the hearing officers and parties in Part 1A asking questions of DWR witnesses, which witnesses made no offer of proof or testimony on direct as to the likelihood or means to be undertaken physically or financially to cause that the levees would remain intact, and that the 3,000 cfs of pumped water continue to be available or the necessity of proper funding or organization by the DWR and United States, the Board should state that clearly and explicitly in the Ruling. The fact is that DWR presented no such evidence (even though it is DWR’s burden to show the features of its “project” are feasible), and any such questions by SJRECWA would have been objected to by DWR as exceeding the scope of direct and not allowed or answered with “I have no knowledge.”

3. The California Legislature directed the DWR to perform the Delta Risk Management Studies Part I and Part II by State law (Assembly Bill 1200.) The Legislature has directed that tens of millions of Dollars be spent planning how to maintain a dual path method of water delivery and the costs. Is this Board really willing to state to the public and a reviewing Court that DWR and the United States had no duty to explain how, when the first wave of levee failures occurs, the 3,000 cfs would continue to be delivered, or alternatively, discontinued and routed through the Tunnels?

4. In adjudicative proceedings, sometimes the judge has a duty to save a party from its own instincts. Here, DWR needs saving. DWR appears to think it is a good idea to “hide the ball” in regard to whether parties that invest \$15 to \$30 Billion in Tunnels will be willing to continue or increase support of State and Federal financial contributions to maintaining levees or fixing the levees upon failure and preserving the 3,000 cfs dual path flow capability across the Delta. The SWRCB concludes on page 3: “This is an issue that will exist regardless of whether the WaterFix change petition is

1 approved." Yet, it is with the same logic that water users who may, because Tunnels have
2 been completed and are in operation, if State and Federal contributions to local cost
3 sharing programs for levee repair and reconstruction are not a condition of SWRCB
4 permission to install the Tunnels and operate them, will ask why those levee expenditures
5 should continue or commence. If State and Federal funding contributions are necessary to
6 support local interests in fixing levees necessary to deliver 3,000 cfs to the State and
7 Federal pumps in July through September, and those funding measures are not to be
8 conditions of the Tunnel proposal and levees that fail are to be abandoned, DWR and the
9 Bureau can easily end this inquiry by stating what their plan proposes. Will the 3,000 cfs
10 flow stop? Will the levee damage and failures be repaired utilizing only the local
11 landowners' funding capabilities which the testimony SJRECWA offers will show are
12 extremely limited? Should the Tunnels be larger, anticipating this change to a one path
13 alternative?

14 D. The attached Notice of Deposition pursuant to Water Code Section
15 1100 is designed to remind the Board of its legal duty to provide a fair proceeding so that
16 a full and correctly conditioned plan is approved or rejected. Review at the Court
17 authorities outlined in Attachment 2. DWR, and apparently some of the State Contractors,
18 are about to create legal defects in a plan and proceeding for which the public is entitled to
19 be given a fair hearing. The Tunnels can obviously provide resiliency to threatened Delta
20 physical conditions, which is a good thing. However, the desire to route water around the
21 Delta to avoid the claimed "thefts" of water, impositions of the Endangered Species Act
22 conditions, and the constant uncertainty is causing a "hide the ball" approach to these
23 issues of the Tunnel plan proponents, which is destructive of the very plan they advocate.
24 By providing a fair and open proceeding as to what the plan really proposes, the Board
25 can assure the proposal gets the attention it is entitled to and complies with the law.

26 **PRAYER**

27 The Board should allow the testimony proposed by the SJREC in Part 1B, or as
28 Rebuttal testimony if that is more efficient for the Board scheduling, whether by direct

1 testimony pursuant to Notice and Subpoena, or by Deposition. If the Deposition proceeds
2 because no reconsideration is granted, be assured a Court will only be left to wonder and
3 examine whether the proceeding which could have been conducted fairly and openly is not
4 constitutionally deficient and subject to being redone in the future.

5 Date: 12/23/16

Respectfully Submitted,
MINASIAN, MEITH, SOARES,
SEXTON & COOPER, LLP

8 By: 
PAUL R. MINASIAN, ESQ.

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Exhibit “6”

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

8
9 **HEARING IN THE MATTER OF**
10 **CALIFORNIA DEPARTMENT OF**
11 **WATER RESOURCES AND UNITED**
12 **STATES BUREAU OF RECLAMATION'S**
13 **REQUEST FOR A CHANGE IN POINT**
14 **OF DIVERSION FOR CALIFORNIA**
15 **WATER FIX**

16 **SAN JOAQUIN RIVER EXCHANGE**
17 **CONTRACTORS WATER**
18 **AUTHORITY STATEMENT OF**
19 **ISSUES THAT SHOULD BE**
20 **ADDRESSED IN BRIEF REGARDING**
21 **PART 1 HEARINGS**

22
23 In response to the request from the State Board for Protestants to indicate the
24 subjects that could be beneficially addressed in briefing, the San Joaquin River Exchange
25 Contractors Water Authority ("SJREC") submits the following discussion:

26
27 **I. Introduction.**

28 The DWR and Bureau of Reclamation have a legal and procedural duty and burden
of presenting evidence that shows with definiteness how the change proposed and the new
and existing works proposed will operate to avoid or reduce harm to legal users of water.
Briefing would allow a full examination of the lack of evidence showing how the 3,000
cfs "dual path" will be reliably available. The failure to specifically place on the record
and explain how the protection of Delta levee integrity will be organized, funded and
conducted to maintain the ability to deliver 3,000 cfs across the Delta to the State and
Federal pumps is a fundamental legal deficiency in the record of these proceedings to this
date. Alternatively, the DWR and Bureau can explain the "single path operations" that

1 will be conducted if Delta levee maintenance, improvements and repairs are not
2 effectively financed, organized and maintained with DWR and Bureau contributions and
3 efforts. Briefing at this time will explain how this defect in the record can be remedied by
4 the testimony proposed by SJREC and the conditions crafted upon the WaterFix proposal.

5 The SWRCB first determined that examination of DWR employees with expertise
6 engaged in preparation and implementation of Delta Risk Management Studies One and
7 Two (“DRMS 1 and 2”) by SJREC was relevant and appropriate to fully consider the
8 effects of the proposed WaterFix project that a “dual path” be maintained. At least 3,000
9 cfs is to be conveyed through the Delta through channels created by levees and islands
10 through “second path” through the Delta to the State and Federal pumps each year during
11 the months of July through September (approximately 540,000 acre/feet/year). Ruling of
12 October 7, 2016 attached as Exhibit “A”.

13 DWR then filed a Motion for Protective Order to prevent DWR’s witness
14 testimony, and the SWRCB then reversed its ruling on or about December 8, 2016. A
15 copy of that reversal is attached as Exhibit “B”.

16 The SJREC filed a motion for reconsideration, joined in by other hearing
17 participants, which has not been ruled upon. See Exhibit “C”.

18 Filing of the briefs proposed by the San Joaquin River Exchange Contractors
19 would aid the SWRCB, which is obviously having difficulty understanding how the
20 continued operations and maintenance of Delta levee integrity could become the partial
21 obligation of the DWR and Bureau of Reclamation when the conditions of those levees is
22 exactly the principal problem that the proposed WaterFix Tunnels are designed to address.

23 If the DWR and Bureau do not plan to establish and maintain the organizational
24 efforts and to partially fund the maintenance of levee integrity sufficient to allow
25 continued diversion through the pumps of 3,000 cfs during the summer and fall (the “dual
26 path”), then the plan for the Tunnels should state that and accurately describe the water
27 operations in that circumstance and the harm to legal users of water which is likely to
28 occur under those circumstances. The Project Proponents can contend that the lack of

1 reliability of the “dual path” is not the fault of the Tunnel project but would not be
2 accused of misleading the decisionmakers by modeling and testimony asserting that the
3 water quality conditions of the cross-Delta “dual path” operations will exist. DWR and
4 the Bureau would produce evidence as to whether the devotion of massive amounts of
5 capital to Tunnels and their operation and maintenance should be increased to scale up the
6 facilities’ capacity to accommodate the unavailability of the “second path” because of
7 failure of the levee and island system. DWR and the Bureau can contend that the harm to
8 legal users of water receiving the “dual path” waters arises from causes other than
9 permission for the Tunnel project to be built and operated, but the harm conditions must
10 be accurately described so that conditions can be applied to DWR and the Bureau which
11 would reduce that harm to legal water users.

12 The briefing would provide a glimpse into why as a matter of law and fact this
13 evidence is necessary . . . both to meet DWR and the Bureau’s burden of producing
14 evidence, and to weigh the feasibility of the DWR and Bureau’s plan. The SWRCB may
15 not process a petition for change of the point or means of diversion by arguing that there
16 will be no harm to other legal users based on an assumption that a “dual path conveyance”
17 through intact levees and channels will exist across the Delta without evidence of the
18 feasibility of this essential element of the plan (particularly, repair once breaches have
19 occurred). Repair of the levees is essential to that “dual path” and must exist (money,
20 organization, and rapid means of repair).

21 It is only necessary to consider the following hypotheticals to understand how a
22 reviewing Court will judge the current state of the record:

23 1. Would the Board consider a new substitute point of diversion for the City
24 and County of San Francisco from the Southern Delta near the existing pumps without
25 evidence of how the diversion water quality would be affected by levee failures and
26 failure to finance levee protection works and repair when levee failures occur, as the
27 DRMS Reports conclude is inevitable? Obviously, diversions for an urban population
28 require quality assurance and reliability of physical facilities.

1 2. If a governmental Agency is required to adjudge a proposal to create a
2 totally separate power supply and grid to serve the Los Angeles urban area from that
3 serving the rest of California on the basis of harm to other legal users of power, would the
4 Board accept the bald assertion of the Los Angeles advocates for a separate system that
5 there will be adequate funding and organization to maintain the power grid for the
6 remainder of California with no testimony. Prohibiting the submission of testimony by
7 other participants because proponents of the grid separation modeled all future operations
8 as if the grid for the remainder of California was economically sustainable without
9 examination of that assertion denies fundamental due process. Would the grid separation
10 proponents be permitted to ignore the aged infrastructure, the increasing costs of
11 maintenance of the power grid for the remainder of California, the limited financial
12 resources to pay repair costs without Los Angeles' power users, and to boldly assert that
13 was outside of the proper realm of review by the Board?

14 3. This is tantamount to a project proponent proposing a new roadway for 1/2
15 of the volume of existing vehicle travel because a bridge on the existing roadway
16 alignment is about to fail. The new roadway proponents present witnesses in favor of the
17 effects of the new alignment, assuring all that the 1/2 of the vehicles proposed to continue
18 to drive on the historic roadway alignment will be accommodated when and if the bridges
19 fail, but with no examination of how the remedial work upon the weakened bridges will
20 be funded or organized.

21 3.1 Apparently, in the application of this example to the Water Fix
22 proposal, the "rich" and "haves" of the water world (Tunnel users) can make vague
23 assurances about how the "have nots" will be served by trucks and vehicles using the
24 existing roadway alignment and develop models of vehicle usage which assumes the
25 bridges on the old roadway alignment will not fail, but when the bridges do fail (as all
26 DRMS studies of the bridges [levees] in our example predict will occur), and there is
27 insufficient funding and organization of public agencies to reconstruct the defective
28 bridges, the permitting authority (the equivalent of the SWRCB) is to express surprise that

1 the “dual path” did not work as planned, but has no duty to inquire if the original plan to
2 split the traffic is defective or incomplete.

3 4. The proposed briefing by SJREC would allow those questions to be
4 answered: The project considered by the Board in Phase 1 may be modified to state that
5 when and if the levees collapse and the water quality impacts of organic carbon and
6 salinity arising from the failures prevent the pumping of Delta water, those “harms” are
7 not part of the proposed new diversion plan of DWR and the Bureau? The brief would
8 address whether the Petition and proposed plan of DWR and the Bureau should more
9 accurately state that when the “dual path” levee system collapses, only the Tunnel path
10 will be utilized. This more accurate plan description will explain how the Tunnel will be
11 utilized when/if the second path levees have collapsed with no funding for their repair,
12 and will explain which water uses will end.

13 The briefing will allow DWR and Bureau to explain their proposition that the
14 Board has no jurisdiction and authority to condition the “proposal” of a “dual path”
15 conveyance upon financial and organizational feasibility of that “dual path” existing and
16 being reasonably maintained. If the DWR and Bureau wish to revise their plan to state
17 that it is impractical or impossible to finance, organize and provide for repair of the levee
18 system to reliably maintain the “dual path”, then they should simply change the project
19 proposal and modeling assumptions, explain that the detrimental effects are “harm” not
20 caused by the abandonment of cross-Delta deliveries but instead inevitable of occurrence,
21 and explain where that water formerly transported in the “dual path” will go in the
22 arguably undersized Tunnels if demands south of the Delta are to be met. Alternatively,
23 the water demands which are to end can be described.

24
25 **II. In requesting the subjects sought to be briefed, the SWRCB obviously wishes**
26 **to know how much threat there is that legal requirements have not been**
complied with and to identify the means of correction, if any exists.

27 Here, competent testimony based upon studies funded by the State of California
28 and conducted by DWR itself regarding levees and necessary measures (DRMS 1 and 2),

1 which studies were directed to be performed by the Legislature, are being prevented from
2 inclusion in the record, and testimony about the effects of the data accumulated on the
3 WaterFix's plan feasibility is thereby prohibited. Apparently this prohibition is argued to
4 be fair on the basis that because the DWR and Bureau did not present any witnesses who
5 testified to the feasibility and likelihood of Delta levee failures to permit judgment as to
6 the likelihood of a reliable "dual path" delivery system, other parties – such as SJREC –
7 may not be allowed to produce such evidence. The basis for this proposed rule of
8 evidence is not divulged. Briefing will allow the SWRCB to finally resolve its rationale if
9 there is continued refusal of submission authority.

10
11 **III. What legal standards would the SWRCB be reminded of in the proposed Brief**
12 **which may be helpful in developing a lawful decision?**

13 The SJREC brief would describe how the legal standard established in Water Code
14 Section 1702 that a petition for change must meet the following standard:

15 “(d) Include sufficient information to demonstrate a
16 reasonable likelihood that the proposed change will not injure
any other legal user of water.”

17 The brief would explain that the DWR and Bureau's evidence to date asserts that no injury
18 standard is complied with even though the "dual path" element of the change in point of
19 diversion plan is known to depend on funding, organization and measures regarding
20 levees which do not currently exist, and no evidence has been submitted indicating any
21 plan to provide for those measures.

22 The record to date includes no information that those "dual path" works will be
23 organized and maintained, nor has DWR explained that the "dual path" mechanism will be
24 abandoned upon multiple failures occurring. The Tunnels will be the sole means of
25 delivering water South of the Delta in some circumstances in July through September if
26 that occurs. The DWR/Metropolitan Water District planners apparently think the support
27
28

1 for their project will disappear if the costs of levee maintenance are added or if the Project
2 planners declare that the Tunnels will increase diversions for as long as the failures exist.

3 Water Code Section 1705 states:

4 "After the hearing, the Board shall grant or refuse, as the facts
5 may warrant, permission to change the point of diversion..."

6 The brief will explain that findings are required based on evidence that the "dual path"
7 without DWR and the Bureau's commitment to maintenance of the levee system is
8 feasible and likely. The proposed change as submitted by the DWR and Bureau now
9 proposes to deliver, pump and use 3,000 cfs in the "dual path" at the pumps. This is the
10 proposal of DWR and the Bureau.

11 The briefing can emphasize for the Board's consideration that it can be contended
12 that the condition of the approved change to permit the Tunnel diversions is the "dual
13 path" and that the DWR and Bureau will have breached the terms of the permitted change
14 authorizing the Tunnels and their operations if the levees and channels are not maintained
15 or promptly repaired when damaged and the "dual path" does not exist. Of course,
16 revoking authority for the WaterFix Tunnel operations after they are built would be an
17 ineffective remedy. Requiring some organization and funding of the "dual path" would
18 alone be an effective measure. The combined refusal to allow testimony offered by the
19 SJREC regarding the likelihood of the "dual path" being unavailable together with the
20 lack of logic and evidentiary explanation of how the SWRCB could assume that the "dual
21 path" will be maintained and repaired by someone else will mystify a Court when there is
22 no evidence to support such a proposition.

23 Protestants are denied a fair hearing if there is a prohibition upon presentation of
24 evidence (*Dare v. Board of Medical Examiners* (1943) 21 Cal.2d 790) or a failure to make
25 findings on the basis of evidence in the record (*Old Mission Portland Cement Co. v.*
26 *Helvering* (1934) 293 U.S. 289, 44 S.Ct. 158, 79 L.Ed. 367). Whether the proceedings are
27 fundamentally fair is a question of law to be resolved by the Courts, and the determination
28 of the administrative Agency as to fairness and whether the evidence is sufficient is not

1 determinative; *Garamendi v. Golden Eagle Insurance Co.* (2004) 116 Cal.App.4th 694;
2 *Crocker National Bank v. San Francisco* (1989) 49 Cal.3d 881, 888. Although deference
3 to an administrative Agency's interpretation is usually to be granted, no deference to an
4 Agency's interpretation of a statute or its requirements is conclusive, and an Agency
5 cannot disregard the clear requirements and meaning of the statute and must make explicit
6 findings supported by evidence. *Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 776-8.
7 Here, the Tunnels are argued by the Proponents to be necessary because of the risks of
8 failure of the channel and levee system for transportation of water. However, without
9 supporting evidence, the SWRCB is to presume the second path will exist and no injury or
10 harm to legal users of water will occur because the levee system will be sufficiently intact
11 to deliver 540,000 ac/ft/year through the "dual path" during the July through September
12 period.

13 The California Supreme Court and the United States Supreme Court each require
14 that findings based on evidence presented and present in the record be made in quasi-
15 judicial proceedings, such as this SWRCB hearing. If neither findings or findings upon
16 evidence in the record are available for review, "the analytic gap between the raw
17 evidence and ultimate decision or order" does not exist and the order or decision must be
18 set aside. *Overton Park v. Volpe* (1971) 401 U.S. 402, 92 S.Ct 814; 28 L.Ed.2d 136;
19 *Topanga Ass'n for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506,
20 515. What evidence will be on the record that the "dual path" will reliably exist when the
21 DWR and Bureau refuse to submit any evidence as to their participation and financial
22 support of maintenance and rebuilding failed levees? What evidentiary basis will the
23 SWRCB cite to when DWR objects to presentation of the DWR's own most
24 knowledgeable witnesses and studies on what efforts would be required to provide a
25 reasonably reliable "dual path" as described in DWR's own DRMS Reports?

26 This Board should obviously direct briefing, but equally important, grant the
27 Petition for Reconsideration of the SJREC to present the testimony.

28 //

1 If the DWR and Bureau's plan is to abandon the "dual path" when it gets too
2 burdensome for the local interests to finance, they need only describe under what
3 circumstances that will be done and what will happen to those legal users of water and to
4 the water formerly used by them through the "second path." Does the water go through
5 the Tunnels during a failure of the "second path?" The State Board gets close to the
6 accusation of "hiding facts" when it refuses evidence and testimony on this subject.
7

8 **IV. Conclusion**

9 The SWRCB in requesting an outline of the issues which would be briefed
10 provides perhaps the last opportunity to correct a fundamental flaw in judging whether
11 and what type of harm to legal users of water could be avoided by proper design and
12 operating conditions for the WaterFix Tunnels. If a "dual path" or "second path" is not to
13 be organized, funded and maintained partially by the DWR, Bureau, and the local
14 interests, that change in the project proposal should be identified and new modeling
15 submitted and an amended project description provided. However, the SWRCB must
16 consider evidence of those facts as a requirement of due process and the project
17 proponents' burden of proof under Water Code Section 1702.
18

19 Dated: January 31, 2017

MINASIAN, MEITH, SOARES,
SEXTON & COOPER, LLP


21 By: 
22 PAUL R. MINASIAN, ESQ.
23 Attorneys for SAN JOAQUIN RIVER
24 EXCHANGE CONTRACTORS WATER
25 AUTHORITY
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Exhibit “7”

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12 BEFORE THE CALIFORNIA
13 STATE WATER RESOURCES CONTROL BOARD

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

21) NOTICE TO DEPARTMENT OF
22) WATER RESOURCES OF
23) DEPOSITION OF DAVID MRAZ
24) AND/OR OTHER MOST
25) KNOWLEDGEABLE WITNESSES
26) TO APPEAR AT DEPOSITION
27) PURSUANT TO GOVERNMENT
28) CODE SECTION 11450.10 AND
) WATER CODE SECTION 1100

29 TO: THE STATE OF CALIFORNIA, DEPARTMENT OF WATER RESOURCES,
30 AND JAMES MIZELL, its attorney:

31 NOTICE IS HEREBY GIVEN to the Department of Water Resources, by and
32 through its attorneys, James Mizell, JamesMizell@water.ca.gov, that pursuant to Water
33 Code Section 1100 and Government Code Section 11450.10, the San Joaquin River
34 Exchange Contractors Water Authority, by and through its attorneys of record, Paul R.
35 Minasian of Minasian, Meith, Soares, Sexton & Cooper, LLP,
36 pminasian@minasianlaw.com, requests and demands that the Department of Water
37 Resources produce the below-described witnesses for their deposition(s) on March 20,
38 2017 commencing at 9:00 a.m., and continuing with reasonable breaks until completed, at
the offices of Capitol Reporters located at 2386 Fair Oaks Boulevard, Sacramento,
California 95825, (916) 923-5447.

1
NOTICE TO DEPARTMENT OF WATER RESOURCES OF DEPOSITION OF DAVID MRAZ AND/OR OTHER MOST
KNOWLEDGEABLE WITNESSES TO APPEAR AT DEPOSITION
PURSUANT TO GOVERNMENT CODE SECTION 11450.10 AND WATER CODE SECTION 1100

1 Notice is given that the place of deposition may change based on anticipated
2 attendance numbers. Notice will be provided of such a change by subsequent service via
3 email transmission to the parties. The deposition will be videotaped.

4 Notice is also given that the Department of Water Resources is provided the
5 reasonable discretion to specify the most knowledgeable witnesses to be presented if
6 persons other than David Mraz are most knowledgeable. First among the witnesses
7 should be:

8 DAVID MRAZ, Chief, Delta Levees and Environmental Engineering Branch
9 FloodSAFE Environmental Stewardship and Statewide Resources Office
Department of Water Resources

10 David Mraz issued the Executive Summary for the Delta Risk Management Study
11 ("DRMS") Phase 2 Report: portions of Section Eight entitled "Building Block 1.6:
12 Armored 'Pathway' (Through-Delta Conveyance)" at pages 8-i through 8-13, and Tables
13 T-1 through T-4, Figure 8-1; Section Nineteen entitled "Results and Observations" at
14 pages 19-1 through 19-13 (SJRECWA-2).

15 2. If David Mraz is not the most knowledgeable person on the following
16 subjects, the other individual or individuals employed by the Department of Water
17 Resources who are most knowledgeable and best able to testify shall appear. That person
18 shall be able to testify regarding the range of financial costs and organizational measures
19 that would be reasonably required to assure that levees necessary and essential to maintain
20 the cross-Delta flow path and to maintain reasonable salinity levels and organic carbon
21 content of water to be pumped at the SWP and Developer Delta pumps reasonably
22 required to assure the feasibility of the assumptions contained in the modeling of both
23 Boundary 1 and Boundary 2 utilizing the H-3 Alternatives described in DWR Exhibit 515,
24 Table 4 on page 2 (attached hereto), and the "note" which describes the assumptions
25 incorporated in Boundary 1 and 2 regarding cross-Delta flows through the system of
26 levees that states as follows, should appear for deposition:

27 "SWRCB D-1641, pumping at the South Delta intakes are
28 preferred during July through September months up to a total
pumping of 3,000 cfs to minimize potential water quality
degradation in the South Delta channels. No specific intake is

1 assumed beyond 3,000 cfs.”

2 The witnesses should be prepared to testify as to the amounts of monies and organization
3 of financial contributions reasonably required to be made by the DWR, Bureau of
4 Reclamation and local Reclamation Districts which would provide reasonable assurance
5 that this “second” or “dual pathway” for water to reach CVP and SWP pumps during at
6 least the July through October period would reliably exist in the future.

7 3. That individual or individuals most knowledgeable employed by Department
8 of Water Resources with knowledge of why the proposed plan of operation for the
9 WaterFix facilities, which assumes the availability of cross-Delta flow and through-Delta
10 flow capacity through levees and channels as described in the “note” above quoted in DWR
11 Exhibit 515, does not provide for a means of the Department of Water Resources and
12 United States Department of the Interior, Bureau of Reclamation, and local Reclamation
13 Districts, of implementing the Levee Improvement Projects and Levee Protection Programs
14 described in the DRMS Phase 2 Report, or any portion thereof, to assure the likelihood of
15 the ability to maintain flows across the Delta as described in DWR Exhibit 515 and models
16 depicting Boundary 1 and Boundary 2 conditions.

17 4. That individual or individuals most knowledgeable employed by the
18 Department of Water Resources who can testify to the operations plan for the Tunnels as
19 proposed in the WaterFix Petition for Change under conditions in which:

20 (A) Organic carbon discharges from failed levees and islands in the vicinity
21 of the SWP and CVP pumps exceed the capacity to treat to levels acceptable for human
22 consumption, according to EPA Drinking Water Standards; and/or,

23 (B) Salinity above 3.00 E.C. prevails at the intakes of the SWP and CVP
24 pumps because of levee breaches and failure to close the breaches; and/or,

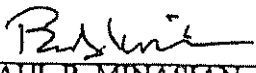
25 (C) A number of levees have collapsed in a range of 10 to 20 and it is
26 projected that the levees will not be substantially repaired for in excess of three (3)
27 irrigation seasons; and/or,

28 (D) The estimated amount of funds to repair 10 to 20 almost simultaneous

1 levee breaches or collapses caused by a flood or earthquake, the current availability of that
2 funding mechanism in 2017, and the availability of that funding proposed to exist when the
3 Tunnels are in operation.

4 Dated: March 2, 2017

MINASIAN, MEITH, SOARES
SEXTON & COOPER, LLP:

5
6 By: 
7 PAUL R. MINASIAN
8 Attorney for SAN JOAQUIN RIVER EXCHANGE
9 CONTRACTORS WATER AUTHORITY
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No Action Alternative (NAA)	H3	H4	Boundary 1	Boundary 2
<p>South Delta exports (Jones PP and Banks PP)</p> <p>SWRCB D-1641. Vernalis flow-based export limits Apr 1 - May 31 as required by NAFS BiOp (Jun 2009) Action IV.2.1 (additional 500 cfs allowed for Jul - Sep for reducing impact on SWP)</p>	<p>SWRCB D-1641. Pumping at the south Delta intakes, are expected during the July through September months up to a total pumping of 3,000 cfs to minimize potential water quality degradation in the south Delta estuary. No specific intake preference is assumed beyond 3,000 cfs.</p>	<p>Same as H3</p>	<p>Same as H3</p>	<p>Same as H3</p>
<p>Combined Flow in Old and Middle River (OMR)</p> <p>FWS BiOp (Dec 2008) Actions 1 through 3 and NAFS BiOp (Jun 2009) Action IV.2.3</p>	<p>New OMR criteria in Table 3 below or below as the NAA, whichever results in less negative OMR flows</p>	<p>Same as H3</p>	<p>Same as NAA</p>	<p>New OMR criteria in Table 5 below or same as the NAA, whichever results in less negative OMR flows</p>
<p>Head of Old River Barrier/Gate</p> <p>Head of Old River Barrier (HORB) is only installed in the fall months per FWS Delta Small BiOp Action 5; it is assumed to be not installed in April or May.</p>	<p>HOR gate operations assumptions (% OPEN) Oct 50%, Nov 100%, Dec 100%, Jan 50%, Feb - Jan, 15h, 50%; Jun 16-30, 100%, Jul - Sep 100%; HOR gate will be open 100% whenever flows are greater than 10,000 cfs at Vernalis; Oct-Nov: Before the D-1641 pulse = HOR gate open. During the D-1641 pulse = for 2 weeks HOR gate closed. After D-1641 pulse: HORB open 50% for 2 weeks</p>	<p>Same as H3</p>	<p>Same as NAA</p>	<p>HOR gate operations assumptions (% OPEN) Oct - Dec 100%, Jan - Feb 50%, Mar - Jun 0%, Jul - Sep 100%; HOR gate will be open 100% whenever flows are greater than 10,000 cfs at Vernalis; Oct-Nov: Before the D-1641 pulse = HOR gate open. During the D-1641 pulse = for 2 weeks HOR gate closed. After D-1641 pulse: HORB open 50% for 2 weeks</p>
<p>Delta Outflow Requirements</p>				
<p>Delta Outflow Index (Flow and Salinity)</p> <p>SWRCB D-1641 and USFWS BiOp (Dec 2008) Action 4 (Fall X2 Requirement)</p>	<p>Same as NAA</p>	<p>Same as NAA. In addition, enhanced spring Delta outflow required during the Mar-May period. Mar-May average outflow requirement is determined based on 90% forecast of Mar-May Elight River Index (ERI). For modeling purposes the Mar-May ERI was forecast based on a correlation between the Jan-Feb-ERI and Mar-May ERI at ELT. Each year in March, Mar-May ERI at ELT. Each year in March.</p>	<p>SWRCB D-1641</p>	<p>Same as NAA; in addition, year-round Delta outflow goals (see Table 8 below); outflow above existing requirements, attempted to achieve through Delta export curtailments by an amount needed to meet the outflow goal, such that minimum exports are greater of 1500 cfs or to meet CVP San</p>

Exhibit “8”

1 Spencer Kenner (SBN 148930)
James E. Mizell (SBN 232698)
2 Robin McGinnis (SBN 276400)
3 **CALIFORNIA DEPARTMENT OF WATER
RESOURCES**
Office of the Chief Counsel
4 1416 Ninth Street, Room 1104
Sacramento, CA 95814
5 Telephone: (916) 653-5966
E-mail: james.mizell@water.ca.gov

6
7 Attorneys for California Department of Water
Resources

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

9
10 **HEARING IN THE MATTER OF
CALIFORNIA DEPARTMENT OF WATER
11 RESOURCES AND UNITED STATES
BUREAU OF RECLAMATION REQUEST
12 FOR A CHANGE IN POINT OF
DIVERSION FOR CALIFORNIA WATER
13 FIX**

**CALIFORNIA DEPARTMENT OF
WATER RESOURCES' MOTION FOR
PROTECTIVE ORDER BASED ON
SJREC'S NOTICE OF DEPOSITION OF
DWR FOR A PERSON MOST
KNOWLEDGABLE (PMK)**

14
15 DWR requests that the Hearing Officers issue a protective order pursuant to Code
16 of Civil Procedure sections 2017.020, 2019.030, and 2025.420, because the deposition
17 is not likely to lead to the discovery of admissible evidence, it would be unreasonably
18 cumulative and duplicative, San Joaquin River Exchange Contractors Water Authority
19 (SJREC) is able to obtain the information from a more convenient, less burdensome, and
20 less expensive source, and the deposition would result in undue burden and expense.

21
22 After already having had a similar witness subpoena denied, SJREC issued a
23 Notice of Deposition dated March 3, 2017 for March 20, 2017 expanding the request
24 from Dave Mraz to the PMKs at DWR on flood and levee issues. (See Exhibit A.)
25 Besides the burden on DWR, the deposition should not be allowed because the notice is
26 not timely, and the Hearing Officers already ruled that testimony on the noticed topics
27 would not be relevant to Part 1 issues.
28

1 **I. STATEMENT OF FACTS**

2 On August 26, 2015, DWR and the U.S. Bureau of Reclamation (USBR) filed a
3 petition for a change to their water rights necessary to allow for the implementation of
4 key components of the State's California Water Fix (CWF) program. On October 30,
5 2015, the Board issued a Notice of Petition and Notice of Public Hearing and Pre-
6 Hearing Conference to consider the petition. In their February 11, 2016 ruling, the
7 Hearing Officers notified the parties that, Part 1 focuses on human uses of water,
8 including flood control issues, and Part 2 focuses on environmental issues. In their
9 October 7, 2016 ruling, they indicated that testimony concerning the potential effects of
10 the project on funding for levee maintenance may be presented in Part 1B.
11

12 SJREC filed its initial Notice to Appear on January 4, 2016 listing Chris Neudeck as
13 an expert to testify on topics related to levees and funding. SJREC filed an updated
14 witness list on August 31, 2016 indicating that Mr. Neudeck was not available and
15 adding DWR staff to testify on these issues during SJREC's Part 1 case-in-chief. SJREC
16 proposed to ask DWR witnesses about: (1) modeling assumptions; (2) Delta Risk
17 Management Study (DRMS) reports; and (3) the need to fund levee improvements and
18 repairs.
19

20 DWR filed a motion for protective order under Government Code section 11450.30,
21 subdivision (b), and in response, the Hearing Officers ruled that requiring DWR to
22 provide a witness to testify would be unreasonable and inefficient. (December 8, 2016
23 Ruling). The Hearing Officers explained that the need for funding for levee maintenance
24 and repair in order to maintain the existing ability to convey water through the Delta was
25 not relevant, being an issue that will exist regardless of whether the Water Fix change
26 petition is approved. Importantly, the Hearing Officers explained that SJREC did not
27
28

1 seek to explore any connection between the Water Fix change petition and the need for
2 funding for levee maintenance and repair.

3 Part 1B cases in chief were due on September 1, 2016. SJREC served a Notice of
4 Deposition on DWR on March 3, 2017. The notice sets the deposition on
5 March 20, 2017, three days before Part 1 rebuttal testimony is due. The topics included
6 in SJREC's notice are: (1) costs and efforts required to maintain levees and water quality
7 under the proposed dual conveyance system, including modeling assumptions; (2) why
8 the proposed plan of operation does not provide a plan of implementation for the
9 measures recommended in the DRMS Phase 2 report; and (3) details of the operational
10 plan under various conditions, including decreased water quality because of levee
11 breaches or failures, estimated timelines for levee repairs, and funding required to repair
12 levee breaches and failures (Exhibit A, Sections 2-4, at pages 2-4).

14 In an attempt to meet, confer, and compromise regarding the Deposition Notice,
15 DWR contacted SJREC on March 8, 2017 and provided links to the public documents
16 that address the issues raised in the deposition notice. SJREC responded by letter dated
17 March 9, 2017 indicating the information that DWR provided was insufficient. (See
18 Exhibits B & C.) DWR responded via e-mail on March 10, 2017 and provided excerpts
19 from some of the public documents that address the topics in SJREC's deposition notice.
20 (See Exhibit D.)

22 II. ARGUMENT

23 The Water Code governs the Board's hearing and discovery procedures and
24 incorporates elements of the Administrative Procedure Act and the Civil Discovery Act
25 (Title 4 [commencing with Section 2016.010] of Part 4 of the Code of Civil Procedure).
26 (See generally Wat. Code, § 1100; Gov. Code, § 11400 et seq.; Cal. Code Regs., tit. 23,
27
28

1 §§ 648, 648.4.) The Board or any party to proceedings before the Board may take
2 depositions of witnesses in accordance with the Civil Discovery Act. (Wat.Code, § 1100.)

3 But the right to discovery is limited. The Hearing Officer may issue an order to
4 protect a party or deponent from undue burden and expense. (Code Civ. Proc., §
5 2025.420, subd. (b).) The Hearing Officer may issue a protective order if the discovery
6 sought would be "unreasonably cumulative or duplicative, or is obtainable from some
7 other source that is more convenient, less burdensome, or less expensive." (Code Civ.
8 Proc., § 2019.030, subds. (a), (b).)

9
10 **A. The noticed deposition will not lead to the discovery of admissible**
11 **evidence and SJREC already had the opportunity to question witnesses**
12 **on these topics.**

13 SJREC's proposed deposition, just three days before rebuttal testimony is due,
14 would result in undue burden and expense, not only because it is not likely to lead to the
15 discovery of admissible evidence, but also because SJREC already had the opportunity
16 to question witnesses on these topics. The deposition notice attempts to cure the defect
17 in its August 31, 2016 witness subpoena that it did not seek to explore a connection
18 between Water Fix and the need for funding for levee maintenance and repair. But the
19 notice falls short of this goal. The topics in the deposition notice all fall within the scope
20 of the topics SJREC previously proposed, which the Hearing Officers already ruled were
21 not relevant to Part 1 key hearing issues. Further, SJREC did not identify any testimony
22 to which this deposition would be relevant that was not already covered by a witness on
23 cross-examination. The only reference to the record is found on page 2, where SJREC
24 references the operational scenarios of Exhibit 515. But SJREC fails to point out where
25 levee funding was raised during Part 1 testimony and therefore how it would now be
26 permissible on rebuttal.
27
28

1 It is unclear why SJREC did not use its own witnesses to testify on these issues
2 during its Part 1 case-in-chief. Nor is it clear how SJREC would use testimony on the
3 proposed topics. The deadline to submit Part 1B cases-in-chief passed more than six
4 months ago, and rebuttal testimony is due on March 23, 2017. Thus, it is simply too late
5 for SJREC to establish the connection between Water Fix and the need for funding for
6 levee maintenance and repair. SJREC has understandably struggled in making this
7 connection, because these topics are not part of the proposed project.

8
9 Further, DWR's experts were available for cross-examination where parties used
10 that opportunity to establish testimony for the record. It appears that SJREC failed to
11 explore the topics on which it now seeks information. It is unreasonable for SJREC to
12 now demand that DWR produce witnesses to testify at deposition, especially because
13 the deadline to submit this type of information has passed. DWR provided panels of
14 witnesses to testify on the topics of modeling, operations, and engineering.¹ SJREC
15 already had the opportunity to ask the correct witnesses about these topics, and allowing
16 SJREC to depose additional DWR witnesses on these topics would result in undue
17 burden and expense.

18
19 **B. The noticed deposition would be unreasonably cumulative and**
20 **duplicative.**

21 SJREC's questions about funding and measures required to respond to levee
22 breaches and failures, if they pertained to CWF, are covered in Chapter 6 and Appendix
23 6A of the 2016 Bay Delta Conservation Plan / California WaterFix Final Environmental
24

25 ¹ The Engineering panel testified on direct and was cross examined on August 5 and 9. The
26 Operations panel testified on direct and was cross examined on August 10-12 and 18-19. The Modeling
27 panel testified on direct and was cross examined on August 23-26. Transcripts of the hearing are available
28 here:
http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/transcripts.shtml.

1 Impact Report/Environmental Impact Statement (Final EIR/DEIS).² However, it appears
2 that SJREC's questions apply to programs well outside of CWF. Similar to some of the
3 other issues raised by Protestants, long term levee maintenance improvement and
4 funding is a State issue, and is not limited to CWF or even DWR. The Delta Stewardship
5 Council (DSC) is leading the Delta Levee Investment Strategy (DLIS) effort, specifically
6 flood and levee long term planning and funding. The DSC programs are outside the
7 scope of this hearing. Information about levee safety and funding is found in documents
8 such as DSC's July 2014 DLIS Fact Sheet,³ DLIS FAQs,⁴ and March 24, 2016 DLIS
9 Update and Contract Amendment.⁵ In addition to the DSC's planning efforts regarding
10 Delta levees, the Central Valley Flood Management Planning (CVFMP) Program sets
11 forth a plan for sustainable flood management and investment to improve flood risk
12 management in the Central Valley through use of the State Plan of Flood Control (SPFC)
13 facilities.⁶

14
15 Further, the engineering panel was cross examined for two full days and included
16 questions about levee safety related to CWF.⁷ SJREC could have had its questions
17 about the reasonableness of funding for levees in the Delta addressed at that time.
18

19
20 ² DWR & USBR, Final Environmental Impact Report/Environmental Impact Statement for the Bay
21 Delta Conservation Plan / California WaterFix, December 2016, Appendix 6A at page 6A-1 ("The proposed
22 project does not include a commitment to improve the current levee system except where the project
23 explicitly includes levees in the project construction available"; available at:
24 http://baydeltaconservationplan.com/Libraries/Dynamic_Document_Library/Final_EIR-EIS_Appendix_6A_-_BDCP_California_WaterFix_Coordination_with_Flood_Management_Requirements.sflb.ashx).

25 ³ Available at:
26 http://deltacouncil.ca.gov/sites/default/files/2014/10/DLIS_FactSheet1_Final_102314_lowres.pdf.

27 ⁴ Available at: http://deltacouncil.ca.gov/sites/default/files/2014/10/DLIS_FAQ_Final_10-31-14%28rev0%29.pdf.

28 ⁵ Available at: <http://deltacouncil.ca.gov/docs/delta-stewardship-council-march-24-2016-meeting-agenda-item-11-delta-levees-investment-strategy>.

⁶ More information is available at: <http://www.water.ca.gov/cvfmpl/>.

⁷ The Engineering panel testified on direct and was cross examined on August 5 and 9.

Transcripts of the hearing are available here:

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

1 SJREC has not shown that cross examination of DWR's Part 1 witnesses or the
2 information in the publicly available documents are insufficient. It is therefore
3 unreasonable for SJREC to depose DWR witnesses on these topics, and it is
4 inappropriate to ask a DWR employee to predict future funding of levee maintenance or
5 improvements as this is a complex state wide policy level decision being led by the DSC
6 and that ultimately depends on the legislature for long-term funding.

7
8 **C. SJREC is able to obtain the information from a more convenient, less
burdensome, and less expensive source.**

9 The 2009 and 2011 DRMS reports are in the public realm.⁸ These are reports
10 prepared by DWR, a public agency, of which the Board can take official notice or that
11 can be submitted as exhibits to a party's case-in-chief. These reports are fully discussed
12 in publicly available documents, including Chapter 6 in the 2016 Final EIR/EIS.⁹ They
13 are also discussed in the Delta Stewardship Council's (DSC's) January 2015 report
14 entitled, "State Investments in Delta Levees, Key Issues for Updating Priorities."¹⁰ It
15 should also be noted that SJREC did, in fact, submit portions of the 2011 DRMS report
16 as an exhibit to its Part 1B case-in-chief. The relevant information has already been
17 submitted as part of SJREC's case-in-chief, and it is therefore unreasonable and
18 burdensome for SJREC to depose DWR witnesses about the contents of these reports.
19

20 **III. CONCLUSION**

21 Allowing DWR witnessed to be deposed regarding funding and speculative levee
22 breaches and failures at this point in the hearing process would be unreasonable and
23 inefficient. The proposed depositions are not likely to lead to the discovery of admissible
24

25 ⁸ Available at: <http://www.water.ca.gov/floodsafe/fessro/levees/drms/>.

26 ⁹ Final EIR/EIS, Appendix 6A, at pages 6A-14 to 6A-15 & 6A-25 (available at:
http://baydeltaconservationplan.com/Libraries/Dynamic_Document_Library/Final_EIR-EIS_Appendix_6A_-_BDCP_California_WaterFix_Coordination_with_Flood_Management_Requirements.sflb.ashx).

27 ¹⁰ Available at: http://deltacouncil.ca.gov/sites/default/files/2015/01/15-0109_Levee_Investment_Strategy_Issue_Paper.pdf.

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evidence, would be unreasonably cumulative and duplicative, would result in undue burden and expense, and SJREC is able to obtain the information from a more convenient, less burdensome, and less expensive source. Indeed, DWR has repeatedly provided this information to SJREC. DWR requests that the Hearing Officers vacate SJREC's deposition notice.

Dated: March 10, 2017

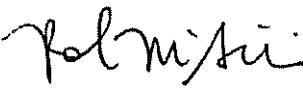
CALIFORNIA DEPARTMENT OF WATER
RESOURCES

Robin McGinnis
Office of the Chief Counsel

Exhibit A

McGinnis, Robin C.@DWR

From: McGinnis, Robin C.@DWR
Sent: Friday, March 10, 2017 2:02 PM
To: 'Paul Minasian'
Cc: Mizell, James@DWR
Subject: RE: Meet and Confer on SJREC's Deposition Notice
Attachments: Excerpts (00019407xD9FEC).docx

Hi Paul,

I received your letter yesterday. As previously explained when we met and conferred on October 14, 2016, in DWR's October 27, 2016 motion for protective order, and in my e-mail below, larger programs are thoroughly evaluating and planning for the very issues you raise, and Water Fix has committed to improve any levees impacted by Water Fix facilities. These efforts are described in various public documents. I spent some time today pulling the attached excerpts. Please let me know if you have any questions about them.

Robin

Robin McGinnis
Attorney
Office of the Chief Counsel
Department of Water Resources
Direct: (916) 657-5400
robin.mcginis@water.ca.gov

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From: McGinnis, Robin C.@DWR
Sent: Wednesday, March 08, 2017 11:13 AM
To: 'Paul Minasian'
Cc: Mizell, James@DWR
Subject: Meet and Confer on SJREC's Deposition Notice

Hi Paul,

Following up on the voicemail I just left you, this is a meet and confer to resolve the issues in SJREC's deposition notice. The information SJREC seeks is included in various public documents that were referenced in DWR's previous motion for protective order.

The documents are:

- *Draft Central Valley Flood Protection Plan, 2017 Update*, December 2016, Chapter 4 at pages 4-1 to 4-45
 - available at: <http://www.water.ca.gov/cvfmp/docs/CVFPP-2017-CVFPP-Update-Draft.pdf>
- *Final Environmental Impact Report/Environmental Impact Statement for the Bay Delta Conservation Plan / California WaterFix*, December 2016, Appendix 6A at pages 6A-1, 6A-14 to 6A-15, and 6A-25
 - Available at: [http://baydeltaconservationplan.com/Libraries/Dynamic_Document_Library/Final_EIR-EIS_Appendix_6A -
BDCA California WaterFix Coordination with Flood Management Requirements.sflb.ashx](http://baydeltaconservationplan.com/Libraries/Dynamic_Document_Library/Final_EIR-EIS_Appendix_6A_-_BDCA_California_WaterFix_Coordination_with_Flood_Management_Requirements.sflb.ashx)

DWR is willing to stipulate to the authenticity of these documents. Thus, deposing DWR witnesses on the subjects in SJREC's deposition notice is unnecessary. DWR plans to file a motion for protective order if we are not able to resolve these issues.

Robin

Robin McGinnis
Attorney
Office of the Chief Counsel
Department of Water Resources
Direct: (916) 657-5400
robin.mcginns@water.ca.gov

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McGinnis, Robin C.@DWR

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- *Final Environmental Impact Report/Environmental Impact Statement for the Bay Delta Conservation Plan / California WaterFix*, December 2016, Appendix 6A at pages 6A-1, 6A-14 to 6A-15, and 6A-25
 - Available at: <http://baydeltaconservationplan.com/Libraries/Dynamic Document Library/Final EIR-EIS Appendix 6A - BDCP California WaterFix Coordination with Flood Management Requirements.sflb.ashx>

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Robin

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Department of Water Resources
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- Page 6A-26: "Various federal and state polices are applicable to the [Water Fix] project in the Plan Area, as it relates to flood management and levees, and implementation of the project, including construction, maintenance, and operations, will be consistent with the standards associated with these polices. Project proponents will coordinate with the appropriate agencies and include design features into the project to ensure any modifications to the flood management system will not increase flood risk to the surrounding areas. Project proponents would be required to comply with the requirements of the USACE, CVFPB, and DWR to avoid increased flood potential."
- Page 6A-42: "Project proponents will coordinate with the appropriate flood agencies to ensure implementation of the proposed project is consistent with existing flood management programs and plans. . . , including the CVFPP and California Water Action Plan, and not increase flood risk or vulnerability of the current flood management system."
- Page 6A-43: "Implementing a dual conveyance system, as proposed under the California WaterFix, would complement other programs by adding additional flexibility to the way water is conveyed through the estuary. Levee improvement and habitat restoration projects focused on benefitting both ecosystems and flood conveyance under other programs could add additional flood protection. Project proponents will coordinate with the appropriate agencies involved in flood system improvement and maintenance activities to ensure the proposed project will not interfere with their abilities to achieve their programs' goals and objectives, and to maintain flood neutrality during implementation of the proposed project."
- Page 6A-1: "The proposed project does not include a commitment to improve the current levee system except where the project explicitly includes levees in the project construction. . . . However, it would provide additional adaptability to catastrophic failure of Delta levees by providing a mechanism to continue making water deliveries to State Water Project (SWP) and Central Valley Project (CVP) contractors and local and In-Delta water users with conveyance interties even if the Delta were temporarily disrupted. . . . Any modifications to Delta levees and the flood control system, as a result of constructing the project, would be fully mitigated and under the responsibility of the project proponents. In some instances, levees modified by the project would be strengthened relative to existing conditions. Levees are an important public safety resource and the proposed project would not change levee policy or replace ongoing programs and grant projects aimed at facilitating and supporting levee improvements in or outside the Delta. It is recognized that levee maintenance and safety in the Delta is an important issue for the residents of the Delta and for statewide interests."
- Page 6A-12: "There is a statewide interest in levee maintenance in the Delta because the islands' levees maintain flow velocities in the sloughs and channels that combat saltwater intrusion. The [Delta Levees Maintenance Subvention Program] is authorized in the Water Code, Sections 12300–12315 and 12980–12995. In 1988, with the passage of the Delta Flood Protection Act, financial assistance was increased through the Delta Levees Subvention Program. The intent of the program is key to preserving the Delta physical characteristics of levees defining the waterways and producing the adjacent islands. Thus, funds necessary to maintain and improve the Delta's levees to protect the physical characteristics should be used. As of 2015, the subventions program has reimbursed more than \$175 million of eligible levee maintenance and rehabilitation work."

- Pages 6A-12 to 6A-13: "The Delta Levees Special Flood Control Projects provides financial assistance to local maintaining agencies for levee rehabilitation in the Delta. The program was established by the California Legislature under SB 34 in 1988. Since the inception of the program, more than \$200 million has been provided to local agencies in the Delta for flood management and related habitat projects."
- Pages 6A-13 to 6A-14: "The Water Supply, Reliability, and Environmental Improvement Act of 2004 (Public Law 108-361) authorizes the USACE to design and construct levee stability projects for purposes such as flood damage reduction, ecosystem restoration, water supply, water conveyance, and water quality objectives as outlined in the CALFED Bay-Delta Program, Programmatic Record of Decision (CALFED ROD) (CALFED Bay-Delta Program 2000). . . . The Act directed the USACE to identify and prioritize levee stability projects that could be carried out with federal funds. An initial amount of \$90 million was authorized, with another \$106 million authorized in the 2007 Water Resources Development Act of 2007. The USACE initially solicited proposals for various levee improvement projects and received 68 project proposals totaling more than \$1 billion. In the short-term, the USACE plans to proceed with implementation of high-priority improvements that can be constructed with the limited funds appropriated to date."
- Page 6A-14: "The USACE also is proceeding with a Delta Islands and Levees Feasibility Study to develop long-term plans for flood-risk management, water quality, water supply, and ecosystem restoration. In addition, the USACE is working on a Lower San Joaquin Feasibility Study to determine whether there is a federal interest in providing flood risk management and ecosystem restoration on the lower San Joaquin River. . . . Included in the Delta Plan are policies and recommendations to reduce flood risk and improve flood protection in the Delta. Policy RR P1, Prioritization of State Investments in Delta Levees and Risk Reduction covers any proposed action that involves discretionary state investments in Delta flood risk management, including levee funding. The Delta Stewardship Council, in consultation with DWR, the CVFPB, and the California Water Commission, developed priorities for interim funding that include emergency preparedness, response, and recovery, as well as Delta levees funding. This policy prioritizes localized flood protection for existing urban areas; protecting water quality and water supply conveyance in the Delta; and protecting existing and providing for a net increase in habitat."
- Pages 6A-16 to 6A-17: "Emergency preparedness and response is primarily a local responsibility, although state assistance is available after local entities have reached their capacity to respond. The federal government may also have an interest due to public safety, environmental and socioeconomic concerns. In the past several years, DWR, USACE, the Delta Protection Commission, and local agencies have worked to improve the response to an in-Delta flood emergency, such as a levee failure. As a result, DWR and local agencies are better prepared to respond effectively through improved planning and coordination and the stockpiling of materials. Thus, in the event of a threatened levee breach, local agencies will respond immediately and will notify the County Office of Emergency Services and DWR Flood Center of an event. If needed, additional supplies and support are available."
- Page 6A-17: "The Delta Flood Emergency Preparedness, Response and Recovery Program (Delta ER Program) was established under Proposition 1E, which made \$135 million available to DWR for essential emergency preparedness supplies and projects. The Legislature recognized the vital role that the Delta plays in California's water supply and the effects that a major flood event could have on that supply."

Draft Central Valley Flood Protection Plan, 2017 Update, December 2016
(<http://www.water.ca.gov/cvfmp/docs/CVFPP-2017-CVFPP-Update-Draft.pdf>):

- Page 4-11: "The Sacramento–San Joaquin Delta Reform Act of 2009 directed the Delta Stewardship Council to provide a Delta Plan that reduces risks to people, property, and outlines the State's interest in the Delta. The Delta Stewardship Council supported the Delta Plan through the draft Delta Levee Investment Strategy (DLIS), an updated prioritization of levee investments. The Delta is part of the overall system for which the Central Valley Flood Protection Plan (CVFPP) has guided the State's participation in managing flood risk in areas protected by the State Plan of Flood Control (SPFC) as directed by the Central Valley Flood Protection Act of 2008. Collaboration between the investment strategies supporting the Delta Plan and CVFPP is necessary to deliver effective improvements in integrated flood management to the Central Valley and Delta."
- Page 4-45: "The CVFPP planning process has brought together many stakeholders and flood management-related efforts in the Central Valley. Many of the planning efforts that informed this 2017 CVFPP Update were prepared in close coordination with State, federal, and regional partners and guided by a robust, multi-year stakeholder engagement process that began in 2012. As part of this process, the 2012 SSIA has been refined to develop the 2017 refined SSIA portfolio, which refines the set of actions associated with each physical and operational element in the 2012 SSIA."
- Page 4-9: "The CVFPP funding plan (included in the Draft CVFPP Investment Strategy TM) aligns the 2017 refined SSIA [State Systemwide Investment Approach] portfolio with appropriate funding mechanisms and implementation programs. The CVFPP funding plan also considers other influential factors affecting the timing of investments and provides a recommended approach to fully fund the 2017 refined SSIA portfolio. Actions needed at the local, State, and federal levels to support the fully funded 2017 refined SSIA portfolio are included in the recommended CVFPP funding plan."
- Page 4-14: "The CVFPP investment strategy considers priorities, complexity and variety of management actions, availability and applicability of funding mechanisms, and other influential factors to optimize the timing of investments. The finance model varied these factors to analyze several possible investment scenarios. These influential factors included: historical expenditures, political sentiment, cost-share agreements, project benefits, project magnitude and scope, maintenance needs, and ability and willingness to pay."
- Page 4-17: "To implement the CVFPP over the next 30 years, much larger contributions would be required from all entities. Figure 4-8 outlines recommended funding and phasing of funding for each cost share partner to support the CVFPP funding plan. The information is presented this way to demonstrate when funding mechanisms could be available and how much would be needed. The recommended CVFPP funding plan would take advantage of existing revenues sources and needed increases in revenue-generation capacity."
- Page 4-22: "The responsibility of [the Flood Emergency Response] program is to prepare for floods, effectively respond to flood events, and support quick recovery when flooding occurs. This program will implement flood emergency response enhancements formulated in the CVFPP, including the provision of technical and funding assistance to local agencies to improve local flood emergency response. The State covers the cost of operation and administration of all of these programs under the ongoing investment category of State operations, planning, and performance tracking as described in Section 4.1.4 to the extent funding is available."
- Page 4-29: "The flood management policy discussions in this update have included a brief introduction to each issue in Chapter 1, partner and stakeholder perspectives relative to these

issues in Chapter 2, strategies for addressing these issues in Chapter 3, and, finally, recommended actions addressing these issues presented here. By articulating these policy recommendations and the associated achievement strategies described in Chapter 3, the 2017 CVFPP Update provides broad guidance for an important shift in approach—one that will lead to more resilient and long-lasting flood risk management, and which can reconcile flood risk management with other economic, social, and environmental values. All flood management policy issues discussions under the following recommendations are structured to support the creation of work plans to collectively and consistently address these issues.”

- Page 4-40: “It is recommended that appropriations from the State general fund for Central Valley flood management increase from the \$40M currently expected to \$160M annually. General obligation bonds could be used to fund some of the more critical flood risk reduction projects, including the completion of the Yolo Bypass expansion. The CVFPP funding plan recommends pursuing flood management funding in three bond issues. The first issue of \$3 billion would be targeted for the 2020 election, the second issue of \$3 billion approximately a decade later, and the third issue of \$4.5 billion a decade after that. . . . DWR will provide the necessary annual budget information regarding flood system ongoing and capital investments to the California Department of Finance for incorporation into the California’s Five-year Infrastructure Plan, which compiles all infrastructure needs, including water, flood, transportation, and others, across the State. Incorporate infrastructure life-cycle analysis per California Executive Order B-30-15.”

Delta Stewardship Council October 12, 2015 Delta Levees Investment Strategy Council Work Session - Managing Flood Risk with a Delta Levees Investment Strategy Fact Sheet
[\(<http://deltacouncil.ca.gov/docs/delta-stewardship-council-october-12-2015-delta-levees-investment-strategy-council-work-session-0>\)](http://deltacouncil.ca.gov/docs/delta-stewardship-council-october-12-2015-delta-levees-investment-strategy-council-work-session-0)

- “The Delta Stewardship Council (Council) is tasked with developing and recommending priorities for State investments in the Delta levees to reduce flood risk to people, property, and State interests. State interests in the Delta include advancing the coequal goals of water supply reliability and restoring the Delta habitat in a manner that protects and enhances the Delta as an evolving place. The Council is developing a Delta Levees Investment Strategy (DLIS) to evaluate and guide future State investments to reduce both the likelihood and consequences of levee failures. This comprehensive, long-term strategy is based on a decision-making process that is fully transparent to stakeholders and the public. At the core of the DLIS is an analysis of flood risks in the Delta.”

October 2014 Frequently Asked Questions

[\(\[http://deltacouncil.ca.gov/sites/default/files/2014/10/DLIS_FAQ_Final_10-31-14%28rev0%29.pdf\]\(http://deltacouncil.ca.gov/sites/default/files/2014/10/DLIS_FAQ_Final_10-31-14%28rev0%29.pdf\)\)](http://deltacouncil.ca.gov/sites/default/files/2014/10/DLIS_FAQ_Final_10-31-14%28rev0%29.pdf)

- “The Delta Reform Act of 2009 called on the Delta Stewardship Council to lead a multi-agency effort to establish priorities for State investments in the Delta levee system. The Council is collaborating with State agencies, local reclamation districts, Delta landowners, and many other involved stakeholders to prepare a Delta Levees Investment Strategy. . . . The Delta Levees Investment Strategy is an extensive, inclusive stakeholder research project that will identify State funding priorities and provide direction to assemble them into a comprehensive investment strategy for the Delta levees—based on the best available data, research, local knowledge, and lessons learned from other State and local programs and planning efforts. . . . Since the 1970s, the State has committed more than \$700 million to operate, maintain, and improve Delta levees and reduce risks in the Delta. However, the State does not have a longterm strategy to guide future investments, and funding is limited. . . . The Delta Levees Investment

Strategy will build on previous levee planning work and provide a long-term strategy for future State investments based on current conditions, information, and technologies. This strategy will use a comprehensive methodology that considers the Delta levee assets, threats and consequences, types of beneficiaries, costs, stakeholder input, and various risk-reduction measures. . . . The funding for the Delta Levees Investment Strategy is provided by Proposition 1E bond funds (2006). . . . Future funding for levee improvements and other risk-reduction strategies would likely come from a mix of sources, including the State and the landowners, businesses, and water users who benefit from the levees. The Delta Levees Investment Strategy will consider how costs should be allocated to the various beneficiaries. . . . This project will result in a report that outlines a suite of investments that best address the State's many goals and priorities. The strategy will recommend risk reduction actions for each island, tiered priorities for State investment, and a method for allocating costs to beneficiaries. Study results will include a computer-based tool that can be used in the future for investment planning as new information becomes available. The strategy will be submitted to the California Legislature. The Delta Stewardship Council will use these results to update its regulations and recommendations that guide risk reduction in the Delta."

State Investments in Delta Levees, Key Issues for Updating Priorities, January 2015

<http://deltacouncil.ca.gov/docs/august-12-2016-joint-meeting-delta-stewardship-council-and-central-valley-flood-protection-0>

- Page 13: "DWR guides many flood management activities across the State. Its broad view, engineering and environmental science skills, multiple programs, and size contribute to its role as the leading State flood management agency. For project levees, DWR develops and recommends the Central Valley Flood Protection Plan to the CVFPB. Pursuant to State law, on the Sacramento River DWR maintains at its expense many bypasses and a few levees of the State Plan of Flood Control, including in the Delta the west levee of the Yolo Bypass above Putah Creek and Putah Creek's levees (Water Code section 8361). For non-project levees DWR administers two key programs. The first is the Delta Levee Maintenance Subvention Program, which cost shares local agencies' maintenance of Delta levees (Water Code sections 12980 through 12995). The other is the Delta Levees Special Flood Control Projects Program which funds improvements to levees and levee-related wildlife and fish habitats that have discrete and identifiable public benefits, including the protection of public highways and roads, utility lines and conduits, and other public facilities, and the protection of urbanized areas, water quality, recreation, navigation, fish and wildlife habitats, and other public benefits (Water Code sections 12300-12314). In the past, DWR has prepared plans for the Delta levee system (DWR 1975; DWR 1982; DWR 1992; DWR 2011a). It recommends criteria for maintenance and improvement of non-project levees to the CVFPB (Water Code section 12984), and inspects completed projects funded through the Delta Levee Maintenance Subventions Program, reporting its findings to the CVFPB (Water Code section 12988)."

Exhibit C

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March 9, 2017

Robin McGinnis, Attorney
Office of the Chief Counsel
Department of Water Resources

Robin.McGinnis@water.ca.gov

Re: WaterFix -- Depositions of Department of Water Resources' Persons Most Knowledgeable

Dear Ms. McGinnis:

The Department of Water Resources's proposal in your email transmission of March 8, 2017 to submit (1) the Final Environmental Impact Report, Environmental Impact Statement for the Bay-Delta Conservation Plan and California WaterFix, and (2) the Draft Central Valley Flood Protection Plan in the Record of the State Water Resources Control Board for determination of the issue whether harm will arise to legal users of water from the WaterFix plan, and whether or not conditions are necessary to be placed in that plan to reduce the risk or the duration of any such injury, we believe, is insufficient.

First, the issues presented by our proposed deposition testimony of Department of Water Resources witnesses continues to be:

1. DWR and Reclamation have submitted modeling of water quality changes based upon the continued existence of "Dual Path" delivery through cross-Delta flow during the months of July through September across the Delta to the CVP and SWP pumps. The Delta Risk Management Strategy I and II reports and the most knowledgeable persons at DWR can demonstrate the substantial investment that would be required to make this "Dual Path" reasonably reliable. Of course, perfect reliability is not often achieved regarding water facilities, but a reasonable plan for repair and correction of levee failures funding of those repairs is inferentially part of the WaterFix plan since there has been no testimony that DWR and Reclamation intend to abandon this second path under certain conditions of failure or extraordinary costs in the future.

To: Robin McGinnis, Attorney, Office of the Chief Counsel, California Department of Water Resources
Re: WaterFix - Depositions of Department of Water Resources' Persons Most Knowledgeable
Date: March 9, 2017

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None of these subjects are addressed or dealt with in the EIR/EIS or Central Valley Flood Protection Plan. The materials do not address the issue.

2. If it is the plan of Reclamation and DWR to provide for termination of the "Dual Path" delivery system and use because it is economically or physically infeasible to maintain that "Dual Path" delivery under certain circumstances because the CVP and SWP do not wish to fund the repair or preventative maintenance in part, the SWRCB and all participants in this proceeding should know that. What are the likely circumstances are from a water quality point of view in which it would be impossible because DWR and the CVP wish not to fund continued delivery of water through the "second path" proposed in the WaterFix Plan? The most knowledgeable persons of DWR can explain the likely measures required to prevent "Dual Path" interruption, and when it occurs, to reinstate its function. They can also explain how the WaterFix Tunnel operation would continue to function and who would receive water and who would not receive water that had formerly been provided through the "second path" during interruption.

3. The Tunnel project has been billed as a means of providing reliability for urban consumers. At the same time, the DRMS reports and supplemental reports make clear that in the case of extensive levee failures and long periods of time to mobilize repairs, the presence of organic carbon discharges from the failed levees and flooded islands may substantially disrupt the availability of water for urban use in those areas where treatment to remove carcinogenic precursors of organic carbon in the water is not economically feasible or physically available. The SWRCB and all parties are entitled to have knowledge of DWR's plan in regard to the operations of San Luis Reservoir and the Tunnels during periods in which organic carbon discharges make the water arriving at the pumps through the "second path" problematic in this regard. None of these procedures or outlines are contained within DWR's modeling, DWR's testing to date, or any of DWR's publications you have offered to incorporate within the Record.

You mention in your meet and confer letter the possibility of the DWR seeking a protective order. We strongly recommend the DWR not take that step, as it may become equated by the general public with "hiding the true plan." We would not presume to "think" for the DWR. However, there are many meritorious elements to the Tunnel project, and the better course of action is to collectively test those elements in an open forum. That is what the deposition of DWR's identified and most knowledgeable persons would propose to do. It would be a shame if a project that is meritorious in

To: Robin McGinnis, Attorney, Office of the Chief Counsel, California Department of Water Resources
Re: WaterFix - Depositions of Department of Water Resources' Persons Most Knowledgeable
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most respects cannot be improved with reasonable conditions and modifications to reflect how it will actually avoid harm to other legal users of water and instead becomes embroiled in accusations that the true plan is being hidden.

Very truly yours,

MINASIAN, MEITH, SOARES,
SEXTON & COOPER, LLP

By: 

PAUL R. MINASIAN, ESQ.

PRM:dd

cc: James Mizell, Senior Attorney, Office of the Chief Counsel, California Department of Water Resources
San Joaquin River Exchange Contractors Water Authority
WaterFix Parties
SJREC\WaterFix\McGinnis.DWR.3.9.17.wpd

Exhibit “9”

FILE COPY

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10 Attorneys for
11 SAN JOAQUIN RIVER EXCHANGE CONTRACTORS WATER AUTHORITY

12 BEFORE THE CALIFORNIA
13 STATE WATER RESOURCES CONTROL BOARD

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

21) REPLY MEMORANDUM OF
22) SJRECWA TO DWR MOTION FOR
23) PROTECTIVE ORDER
24) PREVENTING DEPOSITION OF
25) DAVID MRAZ AND/OR OTHER
26) MOST KNOWLEDGEABLE
27) WITNESSES TO APPEAR AT
28) DEPOSITION

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

33 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.

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

36 EXHIBIT 9

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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
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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, 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
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