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

9 **IN RE CALIFORNIA WATERFIX**  
10 **CALIFORNIA DEPARTMENT OF**  
11 **BUREAU OF RECLAMATION**  
12 **PETITION FOR CHANGES IN**  
13 **WATER RIGHTS, POINTS OF**  
14 **DIVERSION/RE-DIVERSION**

**PROTESTANT SAVE THE CALIFORNIA**  
**DELTA ALLIANCE'S MOTION TO STRIKE**  
**AND OPPOSITION TO DWR'S OBJECTIONS**  
**TO TESTIMONY AND EXHIBITS**  
**SUBMITTED BY SAVE THE CALIFORNIA**  
**DELTA ALLIANCE, ET AL. (GROUP 30) AND**  
**MOTION TO STRIKE.**

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2 Protestants Save the California Delta Alliance, Janet McCleery, Michael McCleery, Frank  
3 Morgan, and Captain Morgan’s Delta Adventures, LLC (“Delta Alliance”), hereby oppose and  
4 move to strike DWR’s LATE FILED AND DEFECTIVELY SERVED “Objections to Testimony  
5 and Exhibits Submitted by Save the California Delta Alliance, et al. (group 30) and Motion to  
6 Strike.” (“DWR Objections.”)

7 **I. Overview Of Delta Alliance’s Response To DWR’s Objections To Delta Alliance**  
8 **Presenting Testimony In Part 1B.**

9 DWR mischaracterizes the nature of Delta Alliance’s witness testimony, misstates the  
10 content of Delta Alliance’s witness testimony, misstates the law regarding admissibility of expert  
11 and percipient testimony, misstates the content of the Board’s prior rulings regarding the content of  
12 Part 1 testimony, and ignores large portions of Delta Alliance’s witness testimony that presents  
13 factual information from qualified witnesses directly on point to Part 1B issues.

14 At the CWF hearing on September 27, 2016, hearing officer Doduc initially indicated that  
15 the Board would immediately sustain at least some of DWR’s objections to a number of protestants’  
16 Part 1B case in chief evidence and testimony without hearing a response from protestants. Hearing  
17 Officer Doduc indicated that the Board would issue a ruling during the week of October 3, 2016,  
18 directing some protestants to revise their Part 1B testimony. Several parties objected, on due  
19 process grounds, to the Board issuing any ruling on DWR’s objections without allowing protestants  
20 the opportunity to respond to the objections. After consideration, Hearing Officer Doduc announced  
21 that responses to DWR objections that go to the proper scope of testimony and exhibits for Part 1B  
22 are due on Friday, September 30, 2016, at noon. Hearing officer Doduc indicated that the Board  
23 would consider petitioners’ responses before issuing any ruling. On September 28, 2016, the Board  
24 sent the parties an email stating that “responses to objections to Part 1B cases in chief that concern  
25 whether testimony or exhibits are within the scope of Part 1B” are due on September 30, 2016, at  
26 noon. The email further stated that the “hearing team will provide the parties clarification and  
27 direction the week of October 3, 2106, concerning any necessary revisions to testimony or exhibits  
28 consistent with the scope of part 1.” The email further clarified that responses to objections to

1 parties' Part 1B evidence that do not go to whether the evidence is within the scope of part 1B are  
2 not due at this time but may be submitted at any time “[b]efore any party’s presentation of Part 1B  
3 case in chief.”

4 In light of the Board’s direction, Delta Alliance focuses herein on responding to DWR’s  
5 objections to Delta Alliance’s case in chief evidence as to appropriateness for presentation in Part 1.  
6 Delta Alliance briefly touches on the qualifications of its experts and lay witnesses in the context of  
7 establishing the appropriateness of its evidence for Part 1B. However, a full response to all of  
8 DWR’s objections, including the qualifications of its experts and objections to the foundation for  
9 documentary evidence, will be submitted under separate cover later in these proceedings and before  
10 Delta Alliance is scheduled to present its Part 1B case in chief.

11 Delta Alliance believes DWR’s late-filed objections should not be considered because they  
12 were late and defectively served.<sup>1</sup> They are also without merit. Delta Alliance refutes each of  
13 DWR’s objections based on the law and facts. In some instances, Delta Alliance’s witnesses  
14 mention recreational activities in introducing themselves and establishing their long connection to,  
15 and familiarity with, the Delta and its watercourses. For example, Delta Alliance witness Michael  
16 Brodsky testifies that, “I have also spent extensive time boating and recreating throughout the Delta  
17 since I was 13 years old.” (SCDA-48, p.3:1–2.) This testimony is intended to establish familiarity  
18 with the Delta and its waterways. It is *not* a claim of injury to recreation or intended to lay the  
19 foundation for a claim to recreational injury. However, Delta Alliance will suggest below, where  
20 appropriate, how it will reduce witness references to background material that may touch on  
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23 <sup>1</sup> Delta Alliance is aware that DWR submitted a declaration from its paralegal attesting that the late-filed objections  
24 were actually prepared prior to the filing deadline. Objections to Delta Alliance’s evidence were not served until 4:40  
25 p.m., on September 21, 2016. (Brodsky Decl. Exh. B.) The statement of service is defective because it does not list the  
26 parties by name who are being served, but merely says that “specific objections relating to witnesses and exhibits  
27 submitted for the CA water Fix Water Rights Hearing Part 1B” have been served. (Brodsky Decl, Exh.C.) The  
28 statement of service does not indicate *which parties* are the subject of specific objections. Documenting what was  
served on whom is the basic requirement for a statement of service and that information must be self-contained within  
the statement of service. A late filing without a statement of service should be rejected. There are reasons for strictly  
enforcing filing deadlines; specifically to avoid the uncomfortable situation of requiring paralegals to testify as to when  
documents were prepared or why documents were accidentally not included in earlier emails. Strictly enforcing filing  
deadlines keeps things clean and simple for all parties and personnel. It also discourages subsequent late filings and  
plausible but unverifiable explanations by other parties.

1 recreation and not be strictly necessary to presenting its Part 1B case, which focuses on injury to  
2 human uses.

3 Delta Alliance notes that the Board promulgated the category of “human uses” mid-stream  
4 in these proceedings and has not provided any standards by which to determine what is a human use  
5 and when harm to a human use occurs. On this point, DWR agrees. (DWR’s Master Objections to  
6 Protestants Case-In-Chief, p.9:17–18.) The Board has further commented as to the distinction  
7 between Part 1 and Part 2 issues, that as to flood control and environmental justice “there is not a  
8 clear alignment with one or the other” so these issues would be placed in Part 1. No reasoning was  
9 provided as to why. The Board’s February 11, 2016, ruling states that “if a human use is associated  
10 with the health of a fishery or recreation, testimony on this matter should be presented in Part 2.”  
11 (February 11 Ruling at 10.) However, the environmental justice issue that prodded the Board to  
12 create the “human use” category and allow testimony in Part 1, was subsistence fishing. Subsistence  
13 fishing is clearly associated with the health of fishery. Ruling testimony out of Part 1 because of  
14 some connection with recreation would, therefore, be arbitrary, capricious, and constitutionally  
15 suspect.

16 DWR’s pervasive objection that parties’ evidence offered for Part 1B is related to one of the  
17 categories of Part 2, such as public trust resources, simply begs the question. A human use *has* to be  
18 within the categories of Part 2 in order to be considered in Part 1B. As the Board explained:

19 Several parties submitted revised NOIs by the March 16, 2016, deadline in which  
20 they now propose to call witnesses in Part 1B. In many cases, it is difficult to  
21 determine based on the brief description of the subject of the proposed testimony  
22 whether the parties seek to present testimony concerning human use impacts that *the*  
23 *parties otherwise could have presented during Part 2 of the hearing*, as permitted by  
24 our March 4, 2016, ruling, or whether the parties seek to expand their participation in  
25 Part 1B beyond what they previously submitted by adding witnesses to testify  
26 concerning injury to legal users of water. State Water Board staff will contact those  
27 parties whose revised NOI’s present this issue after this ruling is issued to confirm  
28 that new witness testimony *proposed to be presented in Part 1B is testimony that*  
*could have been presented in Part 2.*

(CWF April 25, 2016, Ruling, p.6, emphasis added.)

26 Due process requires that a party be allowed to present evidence at a meaningful time. “The  
27 fundamental requirement of due process is the opportunity to be heard at a meaningful time in a  
28 meaningful manner.” (*Mathews v. Eldridge* (1976) 424 U.S. 319, 333.) Delta Alliance members

1 own waterfront homes in a tight-knit Delta waterfront community. Their injuries are to their cultural  
2 identity, their financial security in their waterfront home equity, their means of water-based  
3 transportation, the health and safety of their children and pets threatened by toxic algae, and their  
4 water-based livelihoods. DWR’s characterization that testimony of a Discovery Bay waterfront  
5 homeowner is “the opinion of a concerned citizen, a policy statement” (DWR Objections, p.12:24–  
6 25) could not be further from the truth. All of Delta Alliance’s lay witnesses will suffer concrete,  
7 particularized injury from the operation of CWF not shared by the general public. Their injuries are  
8 not the generalized public policy concerns of environmental groups or the recreational concerns of  
9 fishermen and wake-boarders. As such, they are much more closely aligned with legal users of  
10 water. They do not belong in Part 2 and Part 2 does not allow them an effective forum to present  
11 their grievances.

12 In the absence of standards for determining “human use,” these due process concerns should  
13 be dispositive.

14 **I. Direct Relevance Of Testimony Of Tom Burke, Erik Ringelberg, Janet**  
15 **McCleery, Michael Guzzardo, Frank Morgan and Michael Brodsky To Part 1**  
16 **Issues.**

17 Expert testimony from Erik Ringelberg (“Ringelberg”) and Tom Burke (“Burke”) establishing water quality impacts lays the foundation for Delta Alliance’s following witnesses to  
18 present testimony on the injury to human uses in Discovery Bay and the Delta of water quality  
19 degradation and attendant explosive growth of aquatic weeds, other invasive species, and toxic  
20 algae.

21 These injuries to human uses include: (SCDA-22, p.3:1-8 [non-recreational health and safety  
22 injury from toxic algae proliferation]; SCDA-22, p.2:17–23 [non-recreational injury to water-based  
23 transportation]; SCDA-22, p.1:25–28; 2:1–8 [non-recreational injury to community commons,  
24 waterfront real estate values, and community identity]; SCDA-25, p.4:23–27 [injury to water-based  
25 educational activities concerning flood control and legal uses of water]; SCDA-25, p.4:23–27  
26 [eyewitness testimony as to the nature and extent of subsistence fishing in the Delta and  
27 environmental injustice]; SCDA-24 [expert testimony as to injury to waterfront real estate values  
28 and waterfront real estate industry]; SCDA-48, p.11–12 [eyewitness testimony to injury to human

1 health and safety (children entering water despite warnings), eyewitness testimony of injury to  
2 livestock watering, eyewitness testimony of injury flood control (witness observed flooding in  
3 Discovery Bay caused by invasive species).])

4           Although Delta Alliance presents experts to establish water quality impacts and lay the  
5 foundation for subsequent experienced lay witnesses to testify as the injury sustained by the water  
6 quality impacts, Delta Alliance’s lay witnesses are qualified to offer opinions on CWF’s effects on  
7 water quality in their own right. DWR is wrong in its objections that experienced lay witnesses  
8 cannot offers opinions on issues such as toxic algae and water quality. Experienced lay witnesses  
9 are allowed to offer opinions on matters within their special experience without the conventional  
10 qualifications of experts. (*See, e.g.,* Laird C. Kirkpatrick & Christopher B. Mueller, Federal Rules  
11 of Evidence § 7.6 Quasi-experts—Experienced Witnesses (4th ed.) (“Kirkpatrick & Mueller on  
12 Evidence”) [noting that “lay witnesses sometimes give testimony that resembles what is usually  
13 reserved for experts ... [s]uch witnesses sometimes testify like experts even though they are not  
14 included in the usual pretrial documentation listing expert witnesses [and] ... [s]ometimes such  
15 witnesses give opinions that most lay witnesses would not be permitted to give, and rely on sources  
16 usually reserved for experts, and deal with subjects that most lay witnesses could not approach.”])

17           An experienced, commercially licensed boat captain, such as Frank Morgan, is an example  
18 of an experienced lay witness who can give opinions on flow patterns in the Delta based on personal  
19 observation without a degree in hydrology. Likewise, waterfront homeowners can competently  
20 testify about the patterns of toxic algae—and association with high water temperatures-- that they  
21 have observed from their docks. Delta Alliance will fully brief this issue prior to the start of its case  
22 in chief for Part 1B

23           **A.       Expert Testimony Of Tom Burke.**

24           Delta Alliance first presents expert testimony of Tom Burke, who is a well-qualified  
25 hydrologist with a B.S. and M.S. in civil engineering, and extensive specialized experience in the  
26 hydrology of the Delta, a long list of scientific publications (including publications commissioned  
27 by Petitioner USBR), and is a licensed professional engineer. (SCDA-37). Mr. Burke performed  
28 modeling of the water quality impacts of CWF on Discovery Bay using CALSIM II and DSM2.

1 (SCDA-35, p.4:1–11.) Mr. Burke has specialized training in the use of one and two dimensional  
2 hydrologic models, and long experience in the application of hydrologic models, including “the  
3 design, development, and documentation of several large computer models for the U.S. Army Corps  
4 of Engineers” including “surface water flow” models. (SCDA-37, p.3.)

5 Mr. Burke offers his expert opinion that CWF “will result in frequent and sometimes very  
6 high increases in salinity at Discovery Bay.” (SCDA-35, p.5:16–17.) Mr. Burke also offers his  
7 expert opinion that operation of CWF “will result in higher nutrient loads for waters in and around  
8 Discovery Bay [and] ... higher nutrient loads can lead to algal blooms which reduce dissolved  
9 oxygen and lead to degradation of water quality.” (SCDA-35, p.2:23–25.). Mr. Burke has  
10 specialized experience in water quality, including “water quality assessments for a variety of large  
11 and small watersheds.” Mr. Burke has “[d]eveloped a water quality model to analyze eutrophication  
12 and water quality characteristics” among other water quality training and experience. (SCDA-37,  
13 p.3). Mr. Burke is well qualified as an expert to offer his opinions on the water quality impacts of  
14 CWF on Discovery Bay.

15 Mr. Burke also provides testimony exposing flaws in DWR’s modeling, which is a central  
16 issue of Part 1. (SCDA-35, p.2:27–28; 3:1–14; SCDA-56.)

17 **B. Expert Testimony Of Erik Ringelberg.**

18 Next, Delta Alliance offers expert testimony of Erik Ringelberg. Mr. Ringelberg holds a  
19 B.S. in microbiology and an M.S. in Environmental Science. (SCDA-32.) Mr. Ringelberg has  
20 specialized training in aquatic nuisance species and is a member of the California Invasive Plant  
21 Council. (SCDA-32.). Mr. Ringelberg is qualified to offer an expert opinion on the effects of CWF  
22 on invasive aquatic species in Discovery Bay. Mr. Ringelberg, an ecologist, builds on the  
23 hydrologic testimony of Mr. Burke. Mr. Ringelberg offers his expert opinion that:

24 [Due to CWF, the] nutrient load of waters in and around Discovery Bay will  
25 increase. These project-generated effects amplify conditions that are suitable for  
26 toxic and non-toxic invasive plants. Several weeds that could be, and are likely to be,  
27 increased by this project, such as Spongeplant (*Limnobrium laevigatum*), Tamarisk  
(*Tamarix spp.*), [and others] ... clearly also pose a potentially significant impact to  
28 water quality [in Discovery Bay].

(SCDA-33, p.2:16–21.)

1 Contrary to DWR’s objections, Delta Alliance’s assertions of water quality impacts on  
2 Discovery Bay are well-founded on expert testimony, *not* solely reliant on the opinions of  
3 Discovery Bay citizens, albeit citizens who have spent thousands of hours observing the rhythm of  
4 flows in the Delta from their waterfront homes and boats.

5 **C. Testimony Of Janet McCleery.**

6 **1. Substance Of Qualified Part 1 Testimony.**

7 *After* the testimony of experts Burke and Ringelberg, Discovery Bay citizen Janet McCleery  
8 will provide testimony on the effect of water quality impacts on human uses in Discovery Bay.  
9 Contrary to the objections of DWR, Ms. McCleery’s testimony does not stand alone to establish the  
10 scientific fact of water quality impacts. Experts Burke and Ringelberg provide a scientific basis for  
11 Ms. McCleery’s observations about water quality. Ms. McCleery’s testimony then goes on to  
12 establish the impact of water quality degradation on her community, a subject on which she is well-  
13 qualified to testify. Ms. McCleery explains the unique water-based cultural values of Discovery Bay  
14 and injury thereto:

15 The waterfront homes of Discovery Bay are set on a series of freshwater bays. Each  
16 bay has its own name and community identity. Our home fronts Marlin Bay. When  
17 we sit on our deck or dock we look out across the bay and see our neighbors. Marlin  
18 Bay is our community commons—it belongs to everyone and we all take care of it.  
19 The water is part of our culture, part of our community. Some communities have a  
20 big central commons, a grassy lawn area. Our “commons” are our bays. It is how we  
see our neighbors. . . . If the tunnels go into operation, depriving discovery Bay of  
freshwater and degrading the quality of water in our bays, our commons will be  
ruined and our entire culture and sense of community will be destroyed. Many of our  
neighbors will give up and move away. Home values will plummet. This goes  
beyond impacting recreation. It is the destruction of an entire community.

21 (SCDA-22, p.1:25–28; 2:1–8.) Ms. McCleery describes her community and the impact of CWF on  
22 community values—an impact to human uses that falls outside the definition of “recreation.” Ms.  
23 McCleery acknowledges that the water quality degradation will impact recreation as well, but notes  
24 that the impacts she describes are “beyond impacting recreation.”

25 Ms. McCleery also testifies to health and safety impacts, separate and apart from  
26 recreational impacts on swimming, which are in no way associated with recreation:

27 This summer we have also had an outbreak of blue-green algae. Blue-green algae not  
28 only makes water un-swimmable and unusable for domestic use, it is also highly  
toxic to pets. Our dog drinks out of our bays as do all of the dogs and cats that live in  
Discovery Bay. If the tunnels to into operation, water temperatures will increase in

1 Discovery Bay, circulation will decrease ,and conditions will cause blue-green algae  
2 to be a pervasive problem in Discovery Bay. Pets will die. It is difficult, if not  
3 impossible, to fence off the water—and doing so would destroy our community in  
4 any event. In addition to all the other community destroying effects of the tunnels,  
5 blue-green algae will give an additional incentive for pet lovers to move away from  
6 Discovery Bay.<sup>2</sup>

(SCDA-22, p.3:1–8.)

Ms. McCleery also testifies to the impacts on water-based transportation:

When we go to visit our friends and neighbors, we travel by boat—either across our bay to our close neighbors or through the interconnecting channels to visit friends who live on other bays. There have been times in the past when the bays were so choked with invasive weeds that it was not possible to navigate in many areas of Discovery Bay. We have begun to get a handle on this problem but if the tunnels go into operation they will deprive us of good quality fresh water and cause conditions that will make invasive weed growth explode. Our means of transportation and way of life will be destroyed.

(SCDA-22, p.2:17–23.) An impact on a waterway that interferes with water-based transportation is no more a “recreational” impact than a highway closure is a “recreational” impact, regardless of whether the traveler is using the highway or waterway to travel to the homes of friends and neighbors or to and from work.

## 2. Areas Of Testimony Of Janet McCleery That Will Be Reduced.

Ms. McCleery’s introduction explains how she and her husband arrived in Discovery Bay, their retirement plans, love of water skiing, and family enjoyment of the Delta. Like most of the lay witnesses of all the parties in these proceedings, Ms. McCleery wants to give the Board a sense of who she is as a person and her deep connection with the Delta. The California Constitution guarantees her this right in an administrative proceeding, regardless of whether these matters are directly relevant. (*See, e.g. Schultz v. Regents of University of California* (1984) 160 Cal. App. 3d 768, 782 n.8 [noting that the among “procedures that are constitutionally required are those that will, without unduly burdening the government” protect the “dignity interest” of individuals by “enabling them to present their side of the story.”] California’s dignity interest goes beyond what is required by the federal constitution and is designed to allow ordinary citizens to have their say in

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<sup>2</sup> “Our pets enrich our lives in more ways than we can count. They are members of the family. In turn, they depend on us for their safety and well-being. The best way to ensure the safety of your entire family is to be prepared with a disaster plan. If you are a pet owner, that plan includes your pets.” (American Red Cross, *Pet Safety*, available at <http://www.redcross.org/get-help/prepare-for-emergencies/types-of-emergencies/pet-safety#About.>)

1 their own words in proceedings such as these. Of course, this consideration is balanced by the need  
2 to keep proceedings moving without an undue consumption of time.

3 Delta Alliance is confident that the hearing officers and other Board members have, or will,  
4 read Delta Alliance's written testimony. Therefore Delta Alliance proposes to limit background  
5 introductory material, such as described above, to no more than one minute for each of its witnesses  
6 when giving oral testimony.

7 Delta Alliance points out that Ms. McCleery's written testimony is only 3 pages long and  
8 Delta Alliance has allocated only 15 minutes for her oral testimony. She will be brief and to the  
9 point.

10 **D. Testimony Of Expert Witness Michael Guzzardo.**

11 Expert witness Michael Guzzardo will then testify as to the impact of CWF's degradation of  
12 water quality on Discovery Bay real estate values. Mr. Guzzardo's testimony establishes his  
13 qualifications as an expert on real estate values in Discovery Bay:

14 I have been a licensed real estate broker for over 20 years. I live in Discovery Bay  
15 and my office is in Discovery Bay. I am very familiar with the Discovery Bay real  
16 estate market and have represented buyers and sellers in many transactions involving  
17 waterfront homes and other properties in Discovery Bay.

18 (SCDA-24.). California courts routinely accept expert testimony from licensed real estate agents as  
19 to property values. (*See, e.g., Douglas v. Ostermeier* (1991) 1 Cal. App. 4th 729, 737-738; *Waters*  
20 *v. Lanigan* (1955) 137 Cal. App. 2d 268, 274 [real estate broker qualified as expert where he has  
21 "familiarity with the state of the market and sales of similar property in the vicinity."]) Mr.

22 Guzzardo offers testimony as to the real estate market within his own knowledge and expertise:

23 If CWF is allowed to impact Discovery Bay water quality, home prices in Discovery  
24 Bay will drop dramatically. Real estate brokers conducting transactions in Discovery  
25 Bay are already concerned about the need to disclose to potential buyers the negative  
26 impact on home values that the tunnels would have.

27 (SCDA-24.) Mr Guzzardo offers evidence of impacts to human uses, living and working in a  
28 waterfront community and the equity in one's home, that fall outside the definition of recreation.

Mr. Guzzardo was disclosed as an expert in Delta Alliance's revised witness list. Mr.  
Guzzardo timely transmitted his statement of qualifications to the undersigned well before the filing  
deadline. (Brodsky Declaration filed concurrently herewith, ¶20.) Due to an oversight, Mr.

1 Guzzardo’s counsel did not upload the statement of qualifications to the FTP site with all the other  
2 exhibits. (Brodsky Declaration ¶21)Mr. Guzzardo’s statement of qualifications is attached to the  
3 Declaration of Michael Brodsky filed herewith. (Brodsky Declaration, Exhibit A.) Delta Alliance  
4 suggests that if DWR’s late-filed objections are to be considered, then Mr. Guzzardo’s late-filed  
5 statement of qualifications should also be accepted.

6 Delta Alliance points out that Mr. Guzzardo’s written testimony is only one page and that  
7 his oral testimony is allotted 15 minutes. He will be brief and to the point.

8 **E. Testimony Of Captain Frank Morgan.**

9 **1. Substance of Qualified Part 1 Testimony.**

10 Captain Frank Morgan operates a United States Coast Guard certified passenger vessel /  
11 charter boat business in the Delta. (SCDA-25:17–22.) DWR’s contention that Captain Morgan  
12 operates his vessel for “his personal leisure” (DWR Objections, p.17:3.) is false. Among other  
13 things, DWR misunderstood Captain Morgan’s testimony to say that he donated 87 out of 135 tours  
14 in 2015 to charity. (DWR Objections, p.16:24–27.) He donated 87 cruise packages, consisting of  
15 two to four tickets each package, that is two to four free seats on a boat carrying 37 passengers.  
16 (Declaration of Frank Morgan in Support of Delta Alliance’s Motion to Strike and Opposition to  
17 DWR’s Objections to Testimony and Exhibits Submitted by Save the California Delta Alliance, et  
18 al [“Morgan Declaration”] ¶10–12.) Since DWR apparently doubts his veracity, Captain Morgan  
19 has further provided true and correct copies of his Merchant Mariner Credential and U.S. Coast  
20 Guard Certificate of Inspection, both required to operate a vessel carrying paying passengers.  
21 (Morgan Declaration, Exhibits A and B.) Captain Morgan has also provided a true and correct copy  
22 of Captain Morgan’s Delta Adventures’ Contra Costa County Business License. (Morgan  
23 Declaration, Exhibit C.) Captain Morgan’s Delta Adventures’ gross receipts for 2015 were  
24 approximately \$180,000. (Morgan Declaration ¶ 13.) Rosemarie is a working passenger / tour  
25 vessel. (Morgan Declaration ¶ 14.)

26  
27 Captain Morgan provides detailed testimony establishing that his business operations are  
28 within the scope of Part 1:

1 A lot of our tour business focuses on educating the public about human uses of the  
2 Delta, including flood control, water supply in the Delta and for export, and the  
ethnic and cultural history of the Delta including environmental justice issues.

3 We educate the public about the Delta's levee system and from the deck of  
4 Rosemarie you can see how much farmland in the Delta has sunk below the level of  
5 the surface of the water. This shows how important it is for the levees to hold back  
6 the Delta's waters. We believe that these tours improve public understanding of  
7 flood control and can improve flood control by gaining public support for flood  
8 control public spending.

9 We educate the public about farming in the Delta and how Delta farms draw water  
10 from the Delta to irrigate their crops. We explain how problems with water quality in  
11 the Delta hurt our farmers.

12 We also explain how water is exported from the Delta to central and southern  
13 California and explain the conflicts between exporting water and maintaining the  
14 Delta.

15 (SCDA-25, p.2:26-28; p.3:1-10.)

16 Captain Morgan then provides testimony as to how CWF will injure his human use of the  
17 Delta:

18 If the tunnels go through and water is taken from the Sacramento River upstream  
19 according to the plan, then in times of drought these problems [salinity intrusion,  
20 water quality degradation] will be made worse by the tunnels, not better. We offer  
21 freshwater tours and keeping the Delta as fresh water is crucial to our business. If the  
22 Delta becomes salty it will hurt my business and fewer people will come to learn  
23 about the Delta on our tours.

24 (SCDA-25, p.4:23-27.)

25 Captain Morgan further provides valuable testimony about subsistence fishing and  
26 environmental justice:

27 Along the way, our passengers are able to observe the many ethnic fishermen and  
28 women who fish in the Delta as a source of daily food. I believe that the tunnels will  
make it much more difficult for these people to catch their daily food supply. I can  
say that there are many people who earn their daily food in this way. I see them. I  
hope that our educational efforts will help the public understand that the needs of  
subsistence fishing people should be considered when making decisions about the  
Delta.

(SCDA-25, p.3:26-28; p.4:1-3.) Captain Morgan offers factual testimony about the existence,  
frequency, and character of subsistence fishing in the Delta. His testimony is based on what he has  
personally observed with his own eyes. This is relevant, admissible testimony. DWR's objection

1 that Captain Morgan himself is not a subsistence fisherman and therefore he cannot testify about  
2 subsistence fishing is without merit. (DWR Objections, p.17:5–8.)

3 Captain Morgan further provides that:

4 The hour meters on the Rosemarie are currently reading 2,277 hours. That means  
5 that I have been cruising a lot over the past two years when I installed the hour  
6 meters. I cruise the Delta waters at all times of the day, night, and year and probably  
7 spend more actual time on the water than any other person in Discovery Bay.

8 (SCDA-25, p.5:1–4.) Captain Morgan has been operating his charter boat business since 2012.

9 (SCDA-25, p.2:13–14.) At over 1,000 hours per year cruising throughout the Delta, Captain  
10 Morgan may have more first-hand observational experience with Delta flow patterns and other  
11 issues relevant to Part 1 than any other witness in these proceedings.

## 12 **2. Areas Of Testimony That Will Be Reduced.**

13 Like Ms. McCleery, Captain Morgan provides a personal history of his connection with the  
14 Delta. Captain Morgan’s personal anecdotes are somewhat longer than Ms. McCleery’s. Delta  
15 Alliance proposes to limit Captain Morgan’s oral testimony relating his personal history (separate  
16 from his experience as a Delta Boat captain) to one minute.

### 17 **F. Testimony Of Michael Brodsky.**

#### 18 **1. DWR’s Overall Characterization Of Michael Brodsky’s Testimony Is Unfair.**

19 Delta Alliance will submit a subsequent brief answering DWR’s objections to Michael  
20 Brodsky’s (“Brodsky”) testimony that do not go to Part 1 scope. However, a brief expose on  
21 DWR’s unfair overall characterization of Brodsky’s testimony is in order.

22 The bulk of DWR’s objections to Brodsky’s testimony centers on its characterization of  
23 Brodsky’s testimony being the trick of an attorney seeking to take the stand to enlarge time for his  
24 opening statement and present oral argument from the stand. (DWR Objections, p.2:11–14  
25 [Brodsky “testimony as counsel for SCDA;”] p.2 n.2 [“intentional effort to circumvent [limit of] 20  
26 minutes for opening statements.”]) DWR ignores the fact that Brodsky, in addition to being counsel  
27 for SCDA, is well-qualified to, and does, give relevant factual testimony. Brodsky owns a  
28 waterfront home in Discovery Bay, has personally observed flooding in Discovery Bay caused by  
invasive species, has personally observed over many years invasive species and algae in the waters

1 of Discovery Bay in front of his dock (and throughout the Delta) and has observed their relationship  
2 to water temperature and circulation. ( SCDA-48; Brodsky Declaration ¶15–20.)

3 **2. DWR And Other Parties’ Contentions That Expert Testimony On Legal**  
4 **Issues Is Forbidden Are Wrong.**

5 DWR and other parties raise extensive objections to Michael Brodsky’s testimony on  
6 grounds that expert testimony on legal issues is not allowed. (DWR Objections, pp. 2–5; Objections  
7 of Tehama-Colusa Canal Authority (“Tehama”), et al., p.4, ¶2; Objections of San Luis & Delta-  
8 Mendota Water Authority (“SLDMWA”), p.81.) These objections do not go to the scope of Part 1  
9 and will be fully answered in subsequent briefing prior to the start of Part 1B. However, Delta  
10 Alliance notes at this time that these contentions are wrong, and confuse limitations on testimony  
11 before a jury with testimony before a judge or other expert hearing official. Trial judges frequently  
12 allow, and even require, expert testimony on issues of law. (*See, e.g., Popov v. Hayashi* (2002) 2002  
13 WL 31833731 at \* 3 [trial judge convened “four distinguished law professors ... in a forum to  
14 discuss the legal definition of possession” at official session of court to aid judge in determining  
15 legal issue.]) Tehama acknowledges that “the prohibition against admission of an expert’s opinion  
16 on a question of law” applies only where there is a “risk of prejudicing a jury.” (Tehama, p. 5:24–  
17 28.)

18 **3. Brodsky’s Testimony Makes Clear The Underlying Factual Foundations For**  
19 **His Opinions And Does Not Consist Of Conclusory Legal Assertions; BBID**  
20 **Requires That The Testimony Be Admitted And After Completion Of The**  
21 **Record The Board Can Disregard Any Unhelpful Portions.**

22 Tehama argues, however, that although “there is no risk of prejudicing a jury in this  
23 instance, legal conclusions should be disregarded because they do not aid the hearing officers in  
24 their fact-finding.” (Tehama, pp. 5–6, citing SWRCB BBID Ruling (“BBID”) at 5.)

25 BBID, however, stated that “A distinction must be made between testimony that is helpful to  
26 a clear understanding of the witness’s testimony and that which does no more than make conclusory  
27 statements as to what the law is.” (BBID, p. 4.) Delta Alliance agrees that an expert taking the stand  
28 to make a conclusory statement such as, “I am an expert and my conclusion is that CWF violates the  
Delta Reform Act” would be unhelpful to anyone. Brodsky’s testimony is much more complex and  
ambitious than sweep of the hand conclusory legal conclusions. Brodsky’s testimony does “make

1 clear the underlying factual foundations for the opinion offered.” (BBID, P.4.) Moreover, a legal  
2 opinion on the ultimate issue “in the form of an opinion that is otherwise admissible is not  
3 objectionable because it embraces the ultimate issue to be decided by the trier of fact.” (BBID, p.4.)

4 In BBID, the Board *did not exclude from evidence* the testimony of its own prosecution team  
5 that the Board acknowledged “appears to include conclusory legal assertions that will not assist us  
6 in making determinations of fact.” (BBID, p.4.) Rather, the Board *admitted* the testimony and stated  
7 that after review of the entire record, it would “simply disregard testimony that has no bearing on  
8 the facts to be determined, including conclusory” legal testimony. (BBID, p.4)

9 Considerations of fundamental fairness, then, require the Board to admit Brodsky’s  
10 testimony, which undoubtedly contains significant factual testimony and explication of the legal  
11 framework tied closely to the facts and that will aid the Board, and to disregard any portions that it  
12 ultimately finds unhelpful. Like BBID, the Board should not “attempt to formulate a line-by-line  
13 exclusion of that testimony.” (BBID, p.4.) Expert testimony touching on legal matters should be  
14 treated the same whether it comes from the Board’s prosecution team or witnesses for other parties.

15 The end point of Brodsky’s testimony is to make concrete factual suggestions, in the form of  
16 his opinion, as to what conditions should be placed on CWF in order to avoid injury to human uses,  
17 avoid injuries to legal users of water, and make CWF consistent with the Delta Reform Act.

18 First, he summarizes his opinion that “[b]ased on my experience and familiarity with the  
19 issues surrounding CWF, and referencing the expert testimony establishing specific water quality  
20 impacts, it is my opinion that injury to legal users of water and human uses is unavoidable if CWF  
21 is approved in its proposed form.” (SCDA-48, p.2:13–15.) Brodsky then supports his opinion with  
22 reference to and quotations from numerous scientific documents introduced into the record of these  
23 proceedings by SCDA, including the scientific conclusions of the United States Environmental  
24 Protection Agency (SCDA-26 & 34); The Delta Plan and Delta Challenges (a scientific report on  
25 the Delta commissioned by Petitioners but introduced only by SCDA) (SCDA-40); opinions and  
26 analysis of SCDA’s experts (SCDA-33 & 36); Analysis by a panel of scientists including Jeffry  
27 Mount, William Fleenor, Brian Gray, Bruce Herbold, and Wim Kimmerer, all recognized by the  
28 board as preeminent Delta scientists (SCDA-6 [not introduced by any other party]).

1 Brodsky then proposes a solution, in the form of an “infrastructure forcing” approach to  
2 conditions that may be placed on CWF by the Board:

3 [The] Board can impose performance conditions on approval of a new point of  
4 diversion that would act as “infrastructure forcing” standards, allowing DWR and  
5 Contractors to determine what portfolio elements are best to accompany the change  
6 in point of diversion for the benefit of water suppliers within and without the Delta.

7 (SCDA-48, p.7:6–9)

8 The problem is that we are stuck in a perpetual conflict between in-Delta needs, including  
9 environmental needs and the needs of in-Delta diverters, and the needs of upstream diverters and  
10 export contractors. We are stuck because all decisions are made based on the limits of existing  
11 infrastructure. The Board must balance public trust resources against beneficial uses. It can only set  
12 the water quality standards bar as high as can be met while at the same time balancing the beneficial  
13 use of diverters and exporters. Under this system, the Delta doesn’t get its needs met and the  
14 Contractors don’t get their needs met either. CWF, by itself, doesn’t solve (or attempt to solve) the  
15 problem; it crudely tips the balance in favor of exports at the expense of the Delta.

16 The idea is to think about the water quality objectives that would be achievable if much  
17 better infrastructure were in place and then impose those objectives now with a timetable for  
18 meeting them. That time table might be measured in decades. This forces DWR and Contractors to  
19 come to terms with a long term plan for fixing the system. Mr Leahigh’s testimony to the contrary  
20 notwithstanding, there is scientific unanimity and certainty that much more storage capacity is  
21 needed to allow for reasonable exports and in-stream needs to both be met. With substantial  
22 additional storage, and attendant smart conjunctive use and integrated water management, a new  
23 point of diversion could make sense. But it won’t happen unless the Board places performance  
24 conditions on any approval of CWF that requires it to happen.

25 Delta Alliance is asking the Board to think about permit conditions in a new way.

26 Brodsky’s testimony about the legal framework, particularly the new legal framework of the  
27 Delta Reform Act, is interwoven with proposing this radical new idea. The legal testimony is meant  
28 to show that the Board has the authority and duty to make a breakthrough in considering CWF,  
rather than conducting business as usual.

1 While the Board may not ultimately accepts Delta Alliance’s suggestions, Brodsky’s  
2 testimony is the farthest thing from an unimaginative effort to extend the allotted time for an  
3 opening statement by presenting a legal brief as testimony, as DWR alleges.

4 DWR also ignores the fact, as to expert legal opinion portions of Brodsky’s testimony, that  
5 DWR has called attorney-witnesses and non-attorney witnesses to give opinions as to legal  
6 conclusions on the ultimate question of legal injury. (*See* DWR-53 [testimony of engineer Maureen  
7 Sergant on legal questions]; DOI-4 [testimony of attorney Ray Salberg on legal questions].) To  
8 allow the government to call expert witnesses to provide legal opinions and deny that option to  
9 protestants would be a violation of fundamental fairness and constitutional due process.

#### 10 **4. Brodsky is Qualified To Offer Opinion Testimony**

11 DWR’s challenge to Brodsky’s qualifications to give expert opinion testimony touching on  
12 hydrology because it is the province of engineers not lawyers fails badly. First, every lawyer in  
13 these proceedings knows that when lawyers spend many years handling cases that deal with  
14 particular fields of expertise, and cross-examining witnesses in a particular field of expertise, the  
15 lawyer gains substantial expertise in that field as well. Brodsky has graduate level training in  
16 hydrology aimed precisely at providing the kind of expertise he offers here, although he does not  
17 possess a degree. (Brodsky Declaration ¶¶9–12) He has interacted substantially with hydrology  
18 experts in preparing cases. (Brodsky Declaration ¶¶11–12.) Lawyers with adequate practical  
19 experience may express opinions on engineering questions every bit as much as engineers with  
20 adequate practical experience in law may express opinions on legal questions. As the transcript of  
21 the August 12, 2016, CWF hearing discloses:

22 **MR. BERLINER:** I suspect we have a similar objection. Delving into these statutes  
23 calls for legal conclusions. The question that Mr. Herrick asked was a direct legal  
24 question. I object on that basis.

25 **MR. O’HANLON:** And I join in that objection. He’s essentially reading statutes and  
26 asking two engineers whether they agree with the reading of the statute. In addition  
27 to calling for a legal conclusion, I question what relevance that has.

28 **CO-HEARING OFFICER DODUC:** Well, as an engineer, I tend to have opinions  
on legal matters myself. So I don’t know to what extent I’m going to rule out the  
questioning based on that.

( Brodsky Declaration, Exh. D.)

1 With respect to Delta flows and water quality, Brodsky does not purport to have run  
2 modeling or performed laboratory water quality analysis that would require technical training that  
3 he does not have. Rather Brodsky’s testimony guides the Board through pertinent portions of a  
4 BDCP record that he has lived with for many years. Brodsky’s technical testimony also guides the  
5 Board through a wealth of scientific reports prepared by eminent scientists and expresses opinions  
6 based on the content of peer reviewed scientific literature. He is well-qualified to provide this kind  
7 of expert testimony. DWR’s statement that Brodsky provides “absolutely no reference to scientific  
8 studies or other authorities” is incorrect. (DWR Objections, p.6:15–17.) Brodsky’s written  
9 testimony references dozens of scientific and technical documents that have all been offered into  
10 evidence (SCDA-1; SCDA-6; SCDA-7; SCDA-8; SCDA-9; SCDA-26; SCDA-31; SCDA34;  
11 SCDA-36; SCDA-42 through SCDA-47; SCDA-50; and SCDA-52 through SCDA-56.)

12 Brodsky’s technical testimony is also informed by forty-seven years of experience  
13 navigating the Delta and observing Delta flows in relation to operation of the projects. (Brodsky  
14 Declaration ¶13–20.) Brodsky has observed flow patterns and water quality accessible to the sense,  
15 including turbidity, presence of algae, and water temperature. Brodsky has also monitored water  
16 temperature throughout the Delta with the temperature meter installed on his boat. Brodsky  
17 regularly accesses the CDEC and USBR websites and correlates web data capturing exports and  
18 flows with his observations. Brodsky regularly observes whether the cross Delta channel gates are  
19 open or closed and correlates that observation with his observations of water quality. (Brodsky  
20 Delcaration ¶ 13–20.)

21 Brodsky’s legal qualifications include long practical experience as an attorney dealing with  
22 matters at issue in these proceedings as stated in his statement of qualifications. His legal education  
23 includes a concentration in administrative law at Yale Law School, and he was appointed as an  
24 Adjunct Professor of Administrative Law at U.C. Berkeley’s Boalt Hall School of Law. As these  
25 proceedings concern the application of complex statutes, some of them brand new, by an  
26 administrative agency, these qualifications are directly relevant. Brodsky has also lectured in  
27 California Water Law and Politics at U.C. Santa Cruz, another relevant qualification. (Brodsky  
28 Declaration ¶6–8.)

1 As these proceedings are not bound by the technical rules of evidence or witness  
2 qualification, the hearing officers may also judge from their experience observing Brodsky’s cross-  
3 examination of DWR’s experts whether he has a grasp of the technical issues that extends beyond  
4 the average person and might be helpful to their determinations. An expert is simply a witness who  
5 may express an opinion based on special knowledge, including “his specialized knowledge, skill,  
6 training, experience, and education.” (Cal. Evidence Code § 801.) “[N]either a degree nor a title is  
7 essential, and a person with knowledge or skill born of practical experience may qualify as an  
8 expert.” (Mueller & Kirkpatrick on Evidence § 7:8.)

9 SLDMWA suggests that “Mr. Brodsky will have an opportunity to present his legal  
10 arguments and conclusions in future briefing.” (SLDMWA, p.81:26–27.) However, live testimony  
11 with robust cross-examination and the opportunity for the Hearing Officers to interpose questions is  
12 the best test of an opinion witnesses’ usefulness and qualification.

13 As the Board stated in BBID:

14 We are not bound in our proceedings by Evidence Code 720, which requires the  
15 court to qualify an expert prior to allowing him or her to testify. Rather we may  
16 determine based on our review of the record, after submission of all relevant  
17 evidence, whether the expert’s opinion is based on a matter (including the expert’s  
18 special knowledge, skill, experience, training, and education) perceived by or  
19 personally known to the witness or made known to him at or before the hearing,  
20 whether or not admissible, that is of a type that may be reasonably relied upon by an  
21 expert in forming an opinion upon which the testimony relates.

22 (BBID, p. 2.) Like BBID, the Board should “err on the side of admissibility, and consider whether  
23 the expert testimony is reliable, relevant, and comports with sections 801 through 805 of the  
24 Evidence Code upon our review of all the evidence.” (BBID, p.3.)

25 **2. DWR’s Claim That Brodsky’s Testimony Exceeds The Scope Of Part 1B  
26 Is Without Merit.**

27 DWR’s claim of testimony exceeding the scope of Part 1 by Brodsky is limited to injury to  
28 Brodsky’s use of his boat and dock in his law practice. (DWR Objections, p. 7–8.) DWR cites one  
29 passage in Brodsky’s testimony as exceeding the scope of Part 1. (DWR Objections, p.7:25–27  
30 [citing SCDA-48, p. 14:12–14.]) The passage, in context, reads as follows:

31 Harm to human uses due to salinity increases in Discovery Bay and the Delta is  
32 summarized in the testimony of Janet McCleery and Frank Morgan. In addition  
33 many of the docks in Discovery Bay are constructed with metal frames. Metal frame  
34 docks are suitable for use in fresh water. However, salt water quickly corrodes metal

1 docks. Many of the docks in Discovery Bay are used for commercial purposes. Salt  
2 water intrusions in Discovery Bay will cause millions of dollars of property damage  
3 to metal frame docks. I use my boat, which is kept at my metal frame dock, to visit  
clients in the Delta and to view Delta locations relevant to my law practice. My non-  
recreational human use will be injured by damage to my dock caused by CWF.

4 (SCDA-48, p. 14:7–14.) After citing this passage, DWR argues that “[r]ecreational impacts and  
5 impacts on public trust resources due to the proposed changes in the Petition are not within the  
6 scope of Part 1 of this proceeding.” (DWR Objections, p. 8:1–2.) The practice of law, however, is  
7 not a recreational activity. Brodsky’s dock is not a public trust resource; it is private property.  
8 In light of the Board’s lengthy exposition that the category of human uses *cannot* include legal use  
9 of water and Brodsky’s repeated use of “injury to human use” throughout his testimony, it is unclear  
10 why DWR states that “Mr. Brodsky does not identify any water right belonging to him or any other  
11 person” as an objection to Brodsky’s testimony. (DWR Objections, p.8:5–6.)

12 DWR poses no objection, and does not mention, Brodsky’s eyewitness testimony regarding  
13 flooding in Discovery Bay and CWF’s impacts on flood control. (SCDA-48, p.11–12.) DWR also  
14 poses no scope objection to Brodsky’s testimony about injury to pets, children, and livestock from  
15 toxic algae not associated with recreation. (SCDA-48, p.11:10–17.)

16 Brodsky’s injury to his law practice belongs in Part 1B as it is closely associated with legal  
17 users of water (the clients he is visiting and reconnaissance he conducts are to defend legal users of  
18 water from usurpation of their water rights).

### 19 **3. DWR Misstates The August 24, 2016, Ruling Regarding The Scope Of Delta** 20 **Alliance’s Participation.**

21 DWR argues that Delta Alliance may not touch on legal uses of water. (DWR Objections,  
22 p.8–9. DWR states that “Mr. Brodsky’s testimony concerns issues on injury to legal users of water.”  
23 (*Id.*) DWR does not cite *any* specific testimony.

24 Delta flows, water quality, application of the water code and Delta Reform Act all “concern  
25 issues on injury to legal users of water.” The issues in these proceedings are highly interrelated, and,  
26 as the Board is aware, the division between Parts 1 and 2 is somewhat arbitrary.

27 However, the Board’s August 24, 2016, Ruling specifically allows Delta Alliance to tread  
28 into issues on injury to legal users of water. “Delta Alliance et al. may present evidence of impacts

1 to human uses in Part1 of the hearing, and they may argue based on any evidence that is admitted  
2 into evidence that the WaterFix petition will cause injury to legal users of water.” (August 24, 2016,  
3 Ruling, p. 2.) The Board’s prohibition and concern related to specific evidence regarding riparian  
4 rights of Discovery Bay homeowners:

5 In particular, Delta Alliance et al. may not present testimony or evidence in support  
6 of their claim, set forth in their proposed protest amendment, that Michael and Janet  
7 McCleery, Frank Morgan, and other members of Delta Alliance hold valid riparian  
8 rights. As indicated in the Department of Water Resources’ response to Delta  
9 Alliance et al.’s renewed motion, whether these parties and other property owners in  
10 Discovery Bay have valid riparian rights is a contested issue of fact. Resolving issues  
concerning the validity of claimed riparian rights can be complex and time-  
consuming. Accordingly, allowing Delta Alliance et al. to present testimony  
concerning this issue could add a significant amount of time to Part 1B of the  
hearing, especially if other parties were to seek to expand their participation in Part  
1B in a similar manner.

11 (August 26, 2016, Ruling, p.2.) Delta Alliance has not offered any evidence, opinion, or argument  
12 concerning Discovery Bay riparian rights and DWR has not argued otherwise.

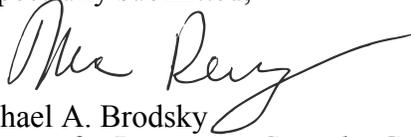
13 Where Brodsky’s testimony concerns issues on injury to legal users, it does so in a general  
14 way broadly applicable to water quality and Delta flows, such as Brodsky’s opinion that D-1641  
15 compliance stations must be re-evaluated due to CWF’s dramatic alteration of Delta  
16 hydrodynamics. (SCDA-48, p.9–10 [“It is not reasonable to assume, as DWR does, that after CWF  
17 existing D-1641 compliance points will capture Delta water quality.”]) Likewise, Brodsky’s  
18 testimony regarding the interaction of factual effects of CWF with the Delta Reform Act is broadly  
19 applicable. (SCDA-48, p.10:7–10 [“However, DWR is doing more than moving their water in a  
20 different way. They are making major changes in the hydrodynamics of the entire Delta system in a  
21 way that degrades the quality of water supply from the Delta for in-Delta users, in contravention of  
22 water Code § 85001(c).”])

23 Delta Alliance believes this testimony falls outside the prohibition intended by the Board’s  
24 August 24, 2016, Ruling. It certainly does not involve any claim to Discovery Bay riparian rights  
25 and does not involve any contest over water rights that could consume undue time or invite  
26 additional parties to join the proceedings.

27 **II. Conclusion.**

1 Delta Alliance respectfully urges the Board to allow Delta Alliance's evidence, as outlined  
2 above, to be offered into the evidence. Upon conclusion of all testimony and on a complete record,  
3 the Board can decide what portions of Delta Alliance's evidence are helpful and what, if any,  
4 portions should be disregarded. This is in keeping with the Board's past practices in matters of this  
5 kind as illustrated by the quotations above from the BBID proceedings.

6  
7 Respectfully submitted,

8 

9 Michael A. Brodsky  
10 Attorney for Protestants Save the California Delta Alliance, et al.

11 Dated: September 30, 2016.  
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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 to the State Water Resources Control Board and caused a true and correct copy of the following document(s):

PROTESTANT SAVE THE CALIFORNIA DELTA ALLIANCE'S MOTION TO STRIKE AND OPPOSITION TO DWR'S OBJECTIONS TO TESTIMONY AND EXHIBITS SUBMITTED BY SAVE THE CALIFORNIA DELTA ALLIANCE, ET AL. (GROUP 30) AND MOTION TO STRIKE.

DECLARATION OF FRANK MORGAN IN SUPPORT OF PROTESTANT SAVE THE CALIFORNIA DELTA ALLIANCE'S MOTION TO STRIKE AND OPPOSITION TO DWR'S OBJECTIONS TO TESTIMONY AND EXHIBITS SUBMITTED BY SAVE THE CALIFORNIA DELTA ALLIANCE, ET AL. (GROUP 30) AND MOTION TO STRIKE.

DECLARATION OF MICHAEL BRODSKY IN SUPPORT OF PROTESTANT SAVE THE CALIFORNIA DELTA ALLIANCE'S MOTION TO STRIKE AND OPPOSITION TO DWR'S OBJECTIONS TO TESTIMONY AND EXHIBITS SUBMITTED BY SAVE THE CALIFORNIA DELTA ALLIANCE, ET AL. (GROUP 30) AND MOTION TO STRIKE.

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 September 20, 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](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 September 30, 2016.

Signature: 

Name: Michael A. Brodsky

Title: Attorney

Party/Affiliation:

Save the California Delta Alliance, et al.

Address:

Law Offices of Michael A. Brodsky

201 Esplanade, Upper Suite

Capitola, CA 95010

1 Michael A. Brodsky  
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2 201 Esplanade, Upper Suite  
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3 Telephone: (831) 469-3514  
4 Facsimile: (831) 471-9705  
Email: michael@brodskylaw.net  
5 SBN 219073

6 Attorney for Protestants Save the California Delta Alliance, et al.

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

9 **IN RE CALIFORNIA WATERFIX**  
10 **CALIFORNIA DEPARTMENT OF**  
11 **WATER RESOURCES AND U.S.**  
12 **BUREAU OF RECLAMATION**  
13 **PETITION FOR CHANGES IN**  
14 **WATER RIGHTS, POINTS OF**  
15 **DIVERSION/RE-DIVERSION**

**DECLARATION OF MICHAEL A. BRODSKY**  
**IN SUPPORT OF PROTESTANT SAVE THE**  
**CALIFORNIA DELTA ALLIANCE'S**  
**MOTION TO STRIKE AND OPPOSITION TO**  
**DWR'S OBJECTIONS TO TESTIMONY AND**  
**EXHIBITS SUBMITTED BY SAVE THE**  
**CALIFORNIA DELTA ALLIANCE, ET AL.**  
**(GROUP 30) AND MOTION TO STRIKE.**

- 1 1) My name is Michael A. Brodsky
- 2 2) My business address is 201 Esplanade, Upper Suite, Capitola, CA 95010.
- 3 3) I make this declaration of my own personal knowledge, and if called as a witness could,
- 4 and would, competently testify to the matters asserted herein.
- 5 4) I am counsel of record for Protestants Save the California Delta Alliance, et al. in the
- 6 CWF proceedings
- 7 5) I also submitted written testimony for use in Part 1B of the CWF hearings as a witness.
- 8 6) My legal education includes a concentration in administrative law at Yale Law School
- 9 7) I received an appointment as an adjunct professor from U.C. Berkeley Boalt Hall School
- 10 of Law and taught administrative law there in the fall of 2003.
- 11 8) I have also lectured in California Water Law and Politics at U.C. Santa Cruz.
- 12 9) My education also includes completion of a graduate level course at U.C. Berkeley
- 13 entitled Hydrology for Planners.
- 14 10) Hydrology for Planners is designed to qualify non-engineers to understand, interpret,
- 15 and critically analyze technical and scientific hydrological documents.
- 16 11) After completing Hydrology for Planners, I have interacted with hydrologists whom I
- 17 have hired as experts in my law practice in interpreting, assessing, and critically analyzing
- 18 technical and scientific documents.
- 19 12) I have spent many hundreds of hours applying my knowledge of hydrology to Delta
- 20 hydrodynamics and the technical and scientific documents related to the BDCP and CWF.
- 21 13) I have been an avid boater in Delta waters for 47 years.
- 22 14) I routinely observe flow patterns and water quality.
- 23 15) Many parameters of water quality are readily accessible to the senses, such as turbidity,
- 24 the presence of algae and water temperature.
- 25 16) I also observe water temperature throughout the Delta and how it changes with the water
- 26 temperature meter that is installed on my boat.
- 27 17) I regularly access the CDEC website and USBR's daily web data disclosing export
- 28 volumes.
- 18) I am able to correlate CDEC and USBR web data with my observations.
- 19) I regularly observe whether the Walnut Grove Cross Delta Channel gate is open or
- closed and correlate my observation of the gate with my observations of water quality.
- 20) I regularly correlate my observations in paragraphs 15–19 with the presence or absence
- of algae throughout the Delta and adjacent to my dock.
- 20) Delta Alliance expert witness Michael Guzzardo emailed his statement of qualifications
- to me prior to the noon September 2, 2016, filing deadline.

1 21) Due to my oversight, Mr. Guzzardo's statement of qualifications was not uploaded to  
the FTP site.

2  
3 22) Exhibit A hereto is a true and correct copy of Mr. Guzzardo's statement of  
qualifications.

4 23) Exhibit B hereto is a true and correct copy of the email from DWR transmitting DWR's  
Objections to Evidence to SCDA.

5  
6 24) Exhibit C hereto is a true and correct copy of the statement of service transmitted with  
Exhibit B.

7 24) Exhibit D hereto is a true and correct copy of pages 98 and 99 of the August 12, 2016,  
transcript of CWF Hearings.

8  
9 I declare under penalty of perjury that the foregoing is true and correct.  
Executed September 29, 2016, at Santa Cruz, California.

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# EXHIBIT A

**From:** Mike Guzzardo mike@guzzardohomes.com  
**Subject:** Re: statement of qualifications  
**Date:** August 30, 2016 at 6:35 PM  
**To:** Michael A. Brodsky michael@brodskylaw.net

MG

### Why choose Mike & Jules GUZZARDO?

Mike has been a Real Estate Broker for over 20 years

Voted BEST of Discovery Bay in the Delta Sun Times Reader's Poll each of the past 7 years.

Call us and find out why hundreds of clients and friends refer us to people they care about the most! We will be happy to provide all the information you need to buy or sell real estate in Discovery Bay, Brentwood, Oakley, Byron and surrounding areas. As the premier real estate team in Discovery Bay, we look forward to serving you and will be happy to help at any time.

Past Board Member Delta Association of Realtors Local Government Relations

Staff Commodore of the Discovery Bay Yacht Club

2010 Discovery Bay Citizen of the Year

Check out [www.DeltaLifestyle.com](http://www.DeltaLifestyle.com) for more about Discovery Bay and the Delta.

EMAIL ME AT [MIKE@GUZZARDOHOMES.COM](mailto:MIKE@GUZZARDOHOMES.COM)

VISIT OUR NEW WEBSITE AT [WWW.GUZZARDOHOMES.COM](http://WWW.GUZZARDOHOMES.COM)

CHECK OUT THE DELTA AT [WWW.DELTALIFESTYLE.COM](http://WWW.DELTALIFESTYLE.COM)

### MIKE & JULES GUZZARDO

Direct Line [925-864-5757](tel:925-864-5757)

**INTERO EXECUTIVE LEVEL - TOP 5% NATIONWIDE SALES VOLUME LEADER**

**VOTED BEST OF DISCOVERY BAY 7 YEARS IN A ROW(2009-2015) - DELTA SUN TIMES READER'S POLL**

### INTERO REAL ESTATE SERVICES

[1540 Discovery Bay Blvd Suite B Discovery Bay, CA 94505](http://1540DiscoveryBayBlvdSuiteBDiscoveryBay,CA94505)

FAX [1-866-444-8421](tel:1-866-444-8421)

CalBRE LICENSE # 01066846

On Aug 30, 2016, at 5:11 PM, Michael A. Brodsky <[michael@brodskylaw.net](mailto:michael@brodskylaw.net)> wrote:

Mike,

Since you are testifying as an expert on home values in DB, I need to submit a statement of qualifications for you as a separate document.

Do you have a cv or resume or something about your education and experience laying around that we could use?

Michael Brodsky  
Law Offices of Michael A. Brodsky  
201 Esplanade, Uppr Suite  
Capitola, CA 95010  
831-469-3514  
[michael@brodskylaw.net](mailto:michael@brodskylaw.net)

CONFIDENTIALITY NOTICE: This communication with its contents may contain confidential and/or legally privileged information. It is solely for the use of the intended recipient(s). Unauthorized interception, review, use or disclosure is prohibited and may violate applicable laws including the Electronic Communications Privacy Act. If you are not the intended recipient, please contact the sender and destroy all copies of the communication.



# EXHIBIT B

**From:** German, Valentina@DWR Valentina.German@water.ca.gov  
**Subject:** Correction to the email sent earlier today regarding master objection and specific objections to testimony and exhibits  
**Date:** September 21, 2016 at 4:49 PM

**To:** CWFhearing CWFhearing@waterboards.ca.gov, Doduc, Tam@Waterboards Tam.Doduc@waterboards.ca.gov, Marcus, Felicia@Waterboards Felicia.Marcus@waterboards.ca.gov  
**Cc:** abl@bkslawfirm.com, aferguson@somachlaw.com, ahitchings@somachlaw.com, ajr@bkslawfirm.com, amy.aufdemberge@sol.doi.gov, apeltzer@prlawcorp.com, awarn@nrdc.org, barbara@restoredelta.org, barbarav@aqualliance.net, barry@solagra.com, bdalymn@citlink.net, bjohnson@tu.org, blancapaloma@msn.com, bobker@bay.org, bradpappa@gmail.com, brettgbaker@gmail.com, bwright@friendsoftheriver.org, caroleekrieger7@gmail.com, colin@ejcw.org, connere@gmail.com, daladjem@downeybrand.com, Dan Kelly dkelly@pcwa.net, daniel@kaydix.com, dcooper@minasianlaw.com, ddj@cah2oresearch.com, dean@hprlaw.net, deltakeep@me.com, dobegi@nrdc.org, dorth@davidorthconsulting.com, Douglas E. Coty dcoty@bpmnj.com, Emily E. LaMoe elamoe@minasianlaw.com, empappa@gmail.com, Esperanza Vielma (evielma@cafecoop.org) evielma@cafecoop.org, Femlen, William@solanocounty.com wfemlen@solanocounty.com, fetherid@ebmud.com, fmorrissey@orangecoveid.org, friendsofsfestuary@gmail.com, gadams@fclaw.com, Herrick, John @aol.com jherrlaw@aol.com, Ian Wren ian@baykeeper.org, info@californiadelta.org, Jamey M.B. Volker jvolker@volkerlaw.com, Jeffrey Conway jconway@rd800.org, jennifer@spalettalaw.com, John Fox jfox@awattorneys.com, john.luebberke@stocktonca.gov, jph@tulareid.org, jrobinson@cityofsacramento.org, jsalmon@ebmud.com, jtb@bkslawfirm.com, June Ailin jailin@awattorneys.com, kelweg1@aol.com, kharrigfeld@herumcraabtree.com, kpoole@nrdc.org, Kristian C Corby kcorby@somachlaw.com, ktaber@somachlaw.com, kyle.jones@sierraclub.org, lcaster@fclaw.com, M. Benjamin Eichenberg mbeichenberg@volkerlaw.com, Marie Young myoung@awattorneys.com, matlas@jmatlaslaw.com, Matthew Emrick matthew@mlelaw.com, mbently@countyofcolusa.org, Melissa Poole, Esq melissa.poole@wonderful.com, Meserve, Osha@semlawyers.com osha@semlawyers.com, mhagman@lindmoreid.com, michael@brodskylaw.net, Minton, Jonas jminton@pcl.org, Mizell, James@DWR James.Mizell@water.ca.gov, mjatty@sbcglobal.net, mkropf@countyofcolusa.com, mlarsen@kdwcd.com, mnikkel@downeybrand.com, North Delta C.A.R.E.S. deltaactioncommittee@gmail.com, office@ecosacramento.net, O'Hanlon & Rebecca dohanlon@kmtg.com, Meserve, Osha@semlawyers.com osha@semlawyers.com, Patrick Porgans & Associates (pp@planetarysolutionaries.org) pp@planetarysolutionaries.org, pminasian@minasianlaw.com, Pogledich, Philip@yolocounty philip.pogledich@yolocounty.org, Miljanich, Peter@solanocounty prmiljanich@solanocounty.com, psimmons@somachlaw.com, pwilliams@westlandswater.org, Akroyd, Rebecca@KMTG rakroyd@kmtg.com, Randy Reck randy@ejcw.org, rbernal@ci.antioch.ca.us, rdenton06@comcast.net, red@eslawfirm.com, rmburness@comcast.net, Robert Maddow rmaddow@bpmnj.com, Robin Adams robin.adam@sen.ca.gov, roland@ssjmd.org, rsb@bkslawfirm.com, Rubin, Jon@sldmwa.org Jon.Rubin@sldmwa.org, Hernandez, Ryan@dcd ryan.hernandez@dcd.cccounty.us, rzwillinger@defenders.org, sae16@lsid.org, sdalke@kern-tulare.com, sgeivet@ocsnet.net, sgrady@eslawfirm.com, Shannon Chaffin schaffin@awattorneys.com, smorris@swc.org, Sophie Froelich, Esq Sophie.Froelich@Roll.com, srothert@americanrivers.org, ssaxton@downeybrand.com, ssdwaterfix@somachlaw.com, Staff Bob Alvarez bob.alvarez@sen.ca.gov, Stephen R Onstot sonstot@awattorneys.com, stephen.siptroth@cc.cccounty.us, sunshine@snugharbor.net, Suzanne Womack jsagwomack@gmail.com, svolker@volkerlaw.com, tara.mazzanti@stocktonca.gov, tgoehring@waterforum.org, Thomas H. Keeling tkeeling@freemanfirm.com, thomas.esqueda@fresno.gov, tim@restoredelta.org, torr@earthjustice.org, towater@olaughlinparis.com, trobancho@freemanfirm.com, Van Zandt, Michael@hansonbridgett.com mvanzandt@hansonbridgett.com, vkincaid@olaughlinparis.com, Wesley A. Miliband wes.miliband@stoel.com, Wilcox, Carl@Wildlife Carl.Wilcox@wildlife.ca.gov, wirthsoscranes@yahoo.com, Yana Garcia ygarcia@earthjustice.org

Dear Hearing Officers Doduc and Marcus,

Attached are the documents that DWR intended to include in the email that was sent earlier today.

These documents were listed in Proof of Service and Attachment B but were inadvertently omitted.

Respectfully

Tina German  
Legal Analyst  
Office of the Chief Counsel  
Department of Water Resources  
(916) 653-5966  
[Valentina.German@water.ca.gov](mailto:Valentina.German@water.ca.gov)





DWR'S OBJECTIONS  
TO SAVE C...HMENT.pdf



DWR's Objections to  
Sac\_Suburban\_WD.pdf



DWR's Objection to  
LAND et al... and 20.pdf



DWR's Objections to  
Stockton P...1B CIC.pdf



DWR's Objections to  
CSPA (Gro...B - CIC.pdf



DWR's Objections to  
PCFFA at a...1B CIC.pdf



# EXHIBIT C

**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):

DEPARTMENT OF WATER RESOURCES (PETITIONERS) MASTER OBJECTIONS AND SPECIFIC OBJECTIONS RELATING TO WITNESSES AND EXHIBITS SUBMITTED FOR THE CA WATER FIX WATER RIGHTS HEARING PART 1B

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 SEPTEMBER 21, 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](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.*

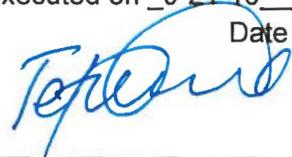
**For Petitioners Only:**

	I caused a true and correct <b>hard copy</b> 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:
--	---

	<b>Method of Service:</b> _____ U.S. POSTAL AND ELECTRONIC SERVICE _____
--	--

I certify that the foregoing is true and correct and that this document was executed on 9-21-16

Date



Signature: \_\_\_\_\_

Name: Valentina Germa

Title: Legal Analyst

Party/Affiliation: DWR

Address: 1416 Ninth Street,

Sacramento, CA 95814

# EXHIBIT D

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BEFORE THE  
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

CALIFORNIA WATERFIX WATER )  
RIGHT CHANGE PETITION )  
HEARING )

JOE SERNA, JR. BUILDING  
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY  
BYRON SHER AUDITORIUM  
1001 I STREET  
SECOND FLOOR  
SACRAMENTO CALIFORNIA  
PART 1A

Friday, August 12, 2016  
9:00 A.M.

VOLUME 10  
Pages 1 - 243

Reported By: Deborah Fuqua, CSR No. 1248

Computerized Transcription by ProCAT

1 MR. HERRICK: So that is -- that's the federal  
2 law approving the COA agreement and directing the  
3 Bureau to do something, right?

4 WITNESS MILLIGAN: Yes, amongst other things  
5 within the subsequent sections as well. The entire Act  
6 is longer than one page.

7 MR. HERRICK: Absolutely.

8 WITNESS MILLIGAN: Okay.

9 MR. HERRICK: I'm sorry. I'm not trying to --

10 WITNESS MILLIGAN: This is an excerpt from  
11 there.

12 MR. HERRICK: This is only the first page,  
13 yes.

14 So according to this, it appears there is a  
15 process by which the Secretary of Interior could decide  
16 that compliance with State-mandated water quality  
17 objectives is not within the project purposes and then  
18 object to it somehow; is that correct?

19 CO-HEARING OFFICER DODUC: Hold on a second.

20 Mr. Berliner, go ahead.

21 MR. BERLINER: I suspect we have a similar  
22 objection. Delving into these statutes calls for legal  
23 conclusions. The question that Mr. Herrick asked was a  
24 direct legal question. I object on that basis.

25 MR. O'HANLON: And I join in that objection.

1 He's essentially reading statutes and asking two  
2 engineers whether they agree with the reading of the  
3 statute. In addition to calling for a legal  
4 conclusion, I question what relevance that has.

5 CO-HEARING OFFICER DODUC: Well, as an  
6 engineer, I tend to have opinions on legal matters  
7 myself. So I don't know to what extent I'm going to  
8 rule out the questioning based on that.

9 But recognizing that these witnesses are not  
10 attorneys, we'll note the objections, and we'll  
11 consider that in weighing the evidence before us.

12 Mr. Herrick?

13 MR. HERRICK: And I will try to not make it  
14 sound --

15 CO-HEARING OFFICER DODUC: I understand where  
16 you're going, but let's be careful how you frame your  
17 questions.

18 MR. HERRICK: Thank you.

19 Mr. Milligan, do you understand this federal  
20 law to be directing the Bureau to operate the project  
21 in conformity to standards directed by the State of  
22 California?

23 WITNESS MILLIGAN: Give me just a minute to  
24 reread the paragraph given your question.

25 In the -- I would read this that the

1 STATE OF CALIFORNIA )  
2 COUNTY OF MARIN ) ss.

3 I, DEBORAH FUQUA, a Certified Shorthand  
4 Reporter of the State of California, do hereby certify  
5 that the foregoing proceedings were reported by me, a  
6 disinterested person, and thereafter transcribed under  
7 my direction into typewriting and is a true and correct  
8 transcription of said proceedings.

9 I further certify that I am not of counsel or  
10 attorney for either or any of the parties in the  
11 foregoing proceeding and caption named, nor in any way  
12 interested in the outcome of the cause named in said  
13 caption.

14 Dated the 19th day of August, 2016.

15

16

17

DEBORAH FUQUA

18

CSR NO. 12948

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25

## 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):

PROTESTANT SAVE THE CALIFORNIA DELTA ALLIANCE'S MOTION TO STRIKE AND OPPOSITION TO DWR'S OBJECTIONS TO TESTIMONY AND EXHIBITS SUBMITTED BY SAVE THE CALIFORNIA DELTA ALLIANCE, ET AL. (GROUP 30) AND MOTION TO STRIKE.

DECLARATION OF FRANK MORGAN IN SUPPORT OF PROTESTANT SAVE THE CALIFORNIA DELTA ALLIANCE'S MOTION TO STRIKE AND OPPOSITION TO DWR'S OBJECTIONS TO TESTIMONY AND EXHIBITS SUBMITTED BY SAVE THE CALIFORNIA DELTA ALLIANCE, ET AL. (GROUP 30) AND MOTION TO STRIKE.

DECLARATION OF MICHAEL BRODSKY IN SUPPORT OF PROTESTANT SAVE THE CALIFORNIA DELTA ALLIANCE'S MOTION TO STRIKE AND OPPOSITION TO DWR'S OBJECTIONS TO TESTIMONY AND EXHIBITS SUBMITTED BY SAVE THE CALIFORNIA DELTA ALLIANCE, ET AL. (GROUP 30) AND MOTION TO STRIKE.

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 September 20, 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](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 September 30, 2016.



Signature: \_\_\_\_\_

Name: Michael A. Brodsky

Title: Attorney

Party/Affiliation:

Save the California Delta Alliance, et al.

Address:

Law Offices of Michael A. Brodsky

201 Esplanade, Upper Suite

Capitola, CA 95010

1 Michael A. Brodsky  
Law Offices of Michael A. Brodsky  
2 201 Esplanade, Upper Suite  
Capitola, CA 95010  
3 Telephone: (831) 469-3514  
4 Facsimile: (831) 471-9705  
Email: michael@brodskylaw.net  
5 SBN 219073

6 Attorney for Protestants Save the California Delta Alliance, et al.

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

9 **IN RE CALIFORNIA WATERFIX**  
10 **CALIFORNIA DEPARTMENT OF**  
11 **WATER RESOURCES AND U.S.**  
12 **BUREAU OF RECLAMATION**  
13 **PETITION FOR CHANGES IN**  
14 **WATER RIGHTS, POINTS OF**  
15 **DIVERSION/RE-DIVERSION**

**DECLARATION OF FRANK MORGAN IN**  
**SUPPORT OF PROTESTANT SAVE THE**  
**CALIFORNIA DELTA ALLIANCE'S**  
**MOTION TO STRIKE AND OPPOSITION TO**  
**DWR'S OBJECTIONS TO TESTIMONY AND**  
**EXHIBITS SUBMITTED BY SAVE THE**  
**CALIFORNIA DELTA ALLIANCE, ET AL.**  
**(GROUP 30) AND MOTION TO STRIKE.**

- 1 1) My name is Frank Morgan.
- 2 2) My address is 1700 Riverlake Road, Discovery Bay, California 94505.
- 3 3) I make this declaration of my own personal knowledge, and if called as a witness could,  
4 and would, competently testify to the matters asserted herein.
- 5 4) I am a protestant to the water rights change petition for the CWF along with Save the  
6 California Delta Alliance and others.
- 7 5) I submitted written testimony for use in Part 1B of the CWF hearings.
- 8 6) My attorney, Michael Brodsky, provided me a copy of the California Department of  
9 Water Resources objections ("DWR Objections") to my testimony.
- 10 7) I have reviewed the DWR Objections.
- 11 8) At page 16 of their Objections, DWR states that "the vast majority, almost two thirds, of  
12 the tours he provided in 2015 were free of charge."
- 13 9) At page 16 of their Objections, DWR states that "he claims to have donated 87 free tours,  
14 out of the 135 tours he provided in total in 2015."
- 15 10) DWR misunderstood my testimony. I said that "I donated 87 free cruise packages (\$320  
16 value each)." (SCDA-25, p.4:5.)
- 17 11) A cruise package consists of two to four tickets, that is free passage for two to four  
18 passengers.
- 19 12) The capacity of Rosemarie is 37 passengers.
- 20 13) In 2015, my gross receipts from cruises was approximately \$180,000.
- 21 14) Rosemarie is a working passenger / tour vessel.
- 22 15) Captain Morgan's Delta Adventures, LLC is a business.
- 23 16) Exhibit A attached hereto is a true and correct copy of my Merchant Mariner Credential,  
24 which is required by the United States Coast Guard to be eligible to Captain a vessel that  
25 takes paying passengers.
- 26 17) Exhibit B attached hereto is my current U.S. Coast Guard Certificate of Inspection for  
27 Rosemarie, which is required for vessels carrying paying passengers.
- 28 18) Exhibit C attached hereto is the current Contra Costa County Business License for  
Captain Morgan's Delta Adventures.

I declare under penalty of perjury that the foregoing is true and correct.  
Executed September 29, 2016, at Discovery Bay, California.

26 X



# EXHIBIT A



# EXHIBIT B



United States of America  
Department of Homeland Security  
United States Coast Guard

Certification Date: 12 Oct 2012  
Expiration Date: 12 Oct 2017  
IMO Number:

# Certificate of Inspection

For ships on international voyages this certificate fulfills the requirements of SOLAS 74 as amended, regulation V/14, for a SAFE MANNING DOCUMENT.

Ex. Name CF8181TA

Vessel Name ROSEMARIE	Official Number 1241261	Call Sign	Service Passenger (Inspected)
Hailing Port DISCOVERY BAY CA	Hull Material Aluminum	Horsepower 240	Propulsion Inboard/Outboard
Place Built MUNCIE, IN UNITED STATES	Delivery Date 01Jun1991	Date Keel Laid 01Jan1991	Gross Tons R-62 Net Tons R-50 DWT I- Length R-55 I-
Owner FRANK MORGAN 1700 RIVERLAKE ROAD DISCOVERY BAY, CA 94505 UNITED STATES	Operator FRANK ALBERT MORGAN 1700 RIVERLAKE ROAD DISCOVERY BAY, CA 94505 UNITED STATES		

This vessel must be manned with the following licensed and unlicensed personnel. Included in which there must be 0 certified lifeboatmen, 0 certified tankermen, 0 HSC type rating, and 0 GMDSS Operators.

1 Master	0 Master & 1st Class Pilot	0 Radio Officer(s)	0 Chief Engineer	0 QMED/Rating
0 Chief Mate	0 Mate & 1st Class Pilot	0 Able Seamen/ROANW	0 1st Asst. Engr/2nd Engr.	0 Oilers
0 2nd Mate/OICNW	0 Lic. Mate/OICNW	0 Ordinary Seamen	0 2nd Asst. Engr/3rd Engr.	
0 3rd Mate/OICNW	0 1st Class Pilot	1 Deckhands	0 3rd Asst. Engr.	
			0 Lic. Engr.	

In addition, this vessel may carry 37 passengers, 0 other persons in crew, 0 persons in addition to crew, and no others.  
Total persons allowed: 39

Route Permitted and Conditions of Operation:

---Rivers---

THE SACRAMENTO RIVER AND THE SAN JOAQUIN RIVER AND THE TRIBUTARIES THEREOF, EAST OF THE CARQUINEZ BRIDGE, LIMITED TO NOT MORE THAN 1000 FEET FROM SHORE.

VESSEL HAS SPECIAL CONSIDERATION APPROVAL FOR FUEL TANK THICKNESS AND MEANS OF ESCAPE IN THE SECTOR SAN FRANCISCO MARINE INSPECTION ZONE ONLY. SEE SECTOR SAN FRANCISCO LETTER 16710/12-163 DATED OCTOBER 11, 2012.

WHEN THE VESSEL IS AWAY FROM A SHORESIDE DOCK, OR HAS PASSENGERS ON BOARD, OR BOTH, FOR MORE THAN 12 HOURS IN ANY 24-HOUR PERIOD, AN ALTERNATE CREW SHALL BE PROVIDED.

\*\*\*SEE NEXT PAGE FOR ADDITIONAL CERTIFICATE INFORMATION\*\*\*

With this Inspection for Certification having been completed at Discovery Bay, UNITED STATES, the Officer in Charge, Marine Inspection, Sector San Francisco certified the vessel, in all respects, is in conformity with the applicable vessel inspection laws and the rules and regulations prescribed thereunder.

Annual/Periodic/Quarterly Reinspections				This certificate issued by:  C. L. STOWE CAPT, USCG
Date	Zone	A/P/Q	Signature	
08 JAN 14	SEC SF	- A		
13 JAN 15	- SEC SF	- A	-	
02 MAR 16	- SEC SF	- A	-	
-	-	-	-	
Officer in Charge, Marine Inspection: Sector San Francisco				Inspection Zone

# EXHIBIT C

**BUSINESS LICENSE****COUNTY OF CONTRA COSTA**

The holder of this Business License is not entitled to carry on any business which does not comply with other applicable laws, nor to carry on any business in any building or on any premises situated in a zone or locality in violation of any law. For more information contact the Application and Permit Center.

**BUSINESS NAME:** CAPTAIN MORGANS DELTA ADVE

**BUSINESS LOCATION:** 1700 RIVERLAKE RD  
DISCOVERY BAY, CA 94505-9260

**BUSINESS OWNER(s):** FRANK A. MORGAN

CAPTAIN MORGANS DELTA ADVENTURES  
1700 RIVERLAKE RD  
DISCOVERY BAY, CA 94505-9260

TO BE POSTED IN A CONSPICUOUS PLACE

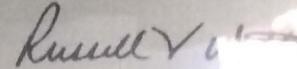
**Business License Number:** 027068

**Start Date:** 1/24/2012

**Effective Date:** 7/1/2016

**Expiration Date:** 6/30/2017

TREASURER - TAX COLLECTOR



Chief Deputy

NOT TRANSFERABLE

## 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):

PROTESTANT SAVE THE CALIFORNIA DELTA ALLIANCE'S MOTION TO STRIKE AND OPPOSITION TO DWR'S OBJECTIONS TO TESTIMONY AND EXHIBITS SUBMITTED BY SAVE THE CALIFORNIA DELTA ALLIANCE, ET AL. (GROUP 30) AND MOTION TO STRIKE.

DECLARATION OF FRANK MORGAN IN SUPPORT OF PROTESTANT SAVE THE CALIFORNIA DELTA ALLIANCE'S MOTION TO STRIKE AND OPPOSITION TO DWR'S OBJECTIONS TO TESTIMONY AND EXHIBITS SUBMITTED BY SAVE THE CALIFORNIA DELTA ALLIANCE, ET AL. (GROUP 30) AND MOTION TO STRIKE.

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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 September 20, 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](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 September 30, 2016.

Signature: 

Name: Michael A. Brodsky

Title: Attorney

Party/Affiliation:

Save the California Delta Alliance, et al.

Address:

Law Offices of Michael A. Brodsky

201 Esplanade, Upper Suite

Capitola, CA 95010

## STATEMENT OF SERVICE

### **CALIFORNIA WATERFIX PETITION HEARING Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)**

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PROTESTANT SAVE THE CALIFORNIA DELTA ALLIANCE'S MOTION TO STRIKE AND OPPOSITION TO DWR'S OBJECTIONS TO TESTIMONY AND EXHIBITS SUBMITTED BY SAVE THE CALIFORNIA DELTA ALLIANCE, ET AL. (GROUP 30) AND MOTION TO STRIKE.

DECLARATION OF FRANK MORGAN IN SUPPORT OF PROTESTANT SAVE THE CALIFORNIA DELTA ALLIANCE'S MOTION TO STRIKE AND OPPOSITION TO DWR'S OBJECTIONS TO TESTIMONY AND EXHIBITS SUBMITTED BY SAVE THE CALIFORNIA DELTA ALLIANCE, ET AL. (GROUP 30) AND MOTION TO STRIKE.

DECLARATION OF MICHAEL BRODSKY IN SUPPORT OF PROTESTANT SAVE THE CALIFORNIA DELTA ALLIANCE'S MOTION TO STRIKE AND OPPOSITION TO DWR'S OBJECTIONS TO TESTIMONY AND EXHIBITS SUBMITTED BY SAVE THE CALIFORNIA DELTA ALLIANCE, ET AL. (GROUP 30) AND MOTION TO STRIKE.

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 September 20, 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](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 September 30, 2016.



Signature: \_\_\_\_\_

Name: Michael A. Brodsky

Title: Attorney

Party/Affiliation:

Save the California Delta Alliance, et al.

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