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

8

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**

PROTESTANT SAVE THE CALIFORNIA
DELTA ALLIANCE'S RENEWED MOTION
TO AMEND PROTEST

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1 Protestants Save the California Delta Alliance, Janet McCleery, Michael McCleery, Frank
2 Morgan, and Captain Morgan’s Delta Adventures, LLC (“Delta Alliance”), hereby renew their
3 motion to amend their Protest to make clear that they are alleging injury to legal users of water
4 within the meaning of Water Code section 1702 in addition to the public interest considerations
5 stated in the Protest.

6 On March 16, 2016, Delta Alliance filed a motion seeking to 1) add Michael Brodsky as a
7 party to the Protest; and 2) amend the Protest to make clear that that Delta Alliance was alleging
8 injury within the meaning of section 1702. On June 10, 2016, the Board issued a ruling addressing
9 numerous matters, including Delta Alliance’s motion (“June 10 Ruling”). The June 10 Ruling
10 denied Delta Alliance’s request to add Mr. Brodsky as a party “because Delta Alliance has not
11 provided an adequate justification for Mr. Brodsky’s failure to submit a NOI by the original
12 deadline indicating his intent to appear and participate in the hearing as a party.” (June 10 Ruling, p.
13 4.) The June 10 Ruling also denied Delta Alliance’s request to amend the Protest with regard to
14 legal injury because “Delta Alliance has not shown adequate justification for its failure to indicate
15 on its original NOI that it plans to participate in Part 1 of the hearing by calling witnesses to testify
16 on the issue of injury to legal users of water.” (June 10 Ruling, p.4.)

17 Delta Alliance believes that it did show adequate justification for both requests and
18 moreover that new facts and the Board’ subsequent conduct of the proceedings, allowing Petitioners
19 to change the project description at will, would make it fundamentally unfair not to grant this
20 renewed motion to amend the protest. This motion is to amend the Protest only and is separate and
21 severable from Delta Alliance’s request to add Michael Brodsky as a party.¹

22 Delta Alliance does not seek to call new or additional witnesses or prolong the proceedings
23 in any way. Allowing the amendment will not prejudice any party. Delta Alliance here only seeks to
24 amend its Protest to assert a cause of action pursuant to Water Code section 1702. Amending a
25 Protest to assert injury under section 1702 is equivalent to amending a pleading in state court to

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28 ¹ To emphasize that Delta Alliance’s requests to 1) amend the Protest; and 2) add Michael Brodsky as a party are
separate and severable, this motion seeks only to amend the protest. A separate renewed motion to add Michael Brodsky

1 assert an additional or alternative cause of action. “And it is a rare case in which a court will be
2 justified in refusing a party leave to amend his pleadings so that he may properly present his case ...
3 [doing so] is not only error but an abuse of discretion.” (*Morgan v. Superior Court* (1959) 172 Cal.
4 App. 2d 527, 530.) There is “great liberality in permitting amendments to the complaint at any stage
5 of the proceedings, up to and including trial” (California Practice Guide Civil Procedure Before
6 Trial (Rutter 2016) § 6:652, citation and quotation marks omitted.)

7 In addition to the liberal policy allowing amendment as a matter of course, here the Board
8 accepted and proceeded upon the Petition although the Petition failed to comply with 23 CCR §
9 794. On the Board’s own assessment, the Petition did not provide “a satisfactory project
10 description,” (February 11, 2016, California WaterFix Project Pre-Hearing Conference Ruling, p.6)
11 (“Pre-Hearing Conference Ruling”) that is necessary to “assess whether the proposed change would
12 cause injury.” (Pre-Hearing Conference Ruling, p.7.) Petitioners’ case-in-chief (not available at the
13 time protests were due) puts forward an entirely new and different approach, forcing water rights
14 holders to defend against a “boundary analysis” that includes elimination of Fall X2 and a
15 redefinition of the Export to Inflow Ratio (“EI”) in D-1641. (DWR-1, p.15; DWR-324, p.1, Draft
16 BA, p. 3-80 [Exhibit A to Brodsky Declaration filed herewith].) These changes cause “substantial
17 changes in Delta flows,” (Draft BA, p.3-74,) and “substantial changes in the aquatic environment of
18 the ...Delta, and downstream estuarine areas.” (Exhibit C to Brodsky Declaration, p.3.) These
19 changes were not ascertainable from the Board’s October 30, 2015, Notice of Petition (“Notice”).
20 “A party may discover the need to amend after all pleadings are completed (the case is “at issue”)
21 and new information requires a change in the nature of the claims or defenses previously pleaded.”
22 (Civil Procedure Before Trial § 6:636.)

23 For these reasons, elaborated in more detail below, Delta Alliance respectfully urges the
24 Board to **Grant** this motion to amend its Protest to allege injury to legal users of water within the
25 meaning of Water Code section 1702.

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I. Delta Alliance Should Be Allowed To Amend The Protest To Make Clear That It Is Alleging Injury To Legal Users Of Water Pursuant To Water Code Section 1702.

A. No Delay Or Prejudice To Any Party Will Result.

No delay or prejudice to any party will result from granting Delta Alliance’s motion to amend the Protest. The Board’s March 4, 2016, Ruling (“March 4 Ruling”) allowed parties participating in Part 2 of the hearing to submit revised NOIs and to “present testimony on impacts to human uses” in Part 1 of the hearings. (June 10 Ruling, p.4.) Delta Alliance does not propose to call any witnesses additional to those who are already slated to appear in Part 1 with regard to human uses. The testimony, going to water quality and other impacts, applies to both human uses and injury to legal users and testimony will not be prolonged.

Prior to its March 16, 2016, Revised NOI, Delta Alliance’s witness list was not yet due as it had indicated it would call witness is Part 2 of the hearing and Part 2 witness list deadlines had not been established. The Pre-Hearing Conference Ruling allowed that parties “should submit a revised NOI by February 26, 2016, clearly indicating how they wish to participate in [Part 1 of] the hearing.” (Pre-Hearing Conference Ruling, p.10.). The focus of the Pre-Hearing Conference Ruling as to revised NOIs was on parties who had indicated participation in Part 2 only but wanted to add cross-examination in Part 1. However, the Board extended the Revised NOI deadline to March 16, 2016, and further clarified that “Revised NOIs from Part 2 parties who wish to call witnesses in Part 1 will be accepted” as long as submitted by the deadline. Delta Alliance submitted its revised NOI with witness list by the March 16 deadline. Numerous revised NOIs from Part 2 parties (other than Delta Alliance), newly listing witnesses for Part 1 were accepted by the board. (*See generally* revised NOIs, available at [http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/noi_protests/.](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/noi_protests/))

To the extent that the Board’s June 10 denial of Delta Alliance’s request to amend its petition was based on the Board’s statement that the ruling “did not authorize parties to add new

1 witnesses” (June 10 Ruling, p.4) the Board is requested to note that Delta Alliance was disclosing
2 witnesses at the first required juncture of the hearings and was not adding new witnesses.²

3 The question presented is not whether Delta Alliance should be allowed new or additional
4 witnesses, but whether Delta Alliance should be allowed to assert a cause of action for injury to
5 legal users under Water Code section 1702. The witness list will not change whether or not the
6 motion is granted. If the motion is granted, the facts established by the testimony may entitle Delta
7 Alliance to relief under Water Code section 1702, as well as the other grounds asserted in Delta
8 Alliance’s Protest.

9 No prolongation, delay, or prejudice will result from granting the request to amend the
10 Protest to allow relief pursuant to Water Code section 1702 if witness testimony establishes facts
11 sufficient to support such relief.

12 The Board has, in fact, acknowledged that Delta Alliance’s requests would not prejudice any
13 party. The Board referred to MWD’s request to become a party and stated that “the hearing officers
14 agreed with MWD’s assertion that its participation was unlikely to significantly delay the hearing,
15 but pointed out that if MWD’s request were granted, other people or entities were likely to seek to
16 participate as parties or add witnesses, which could delay the hearing significantly.” (June 10
17 Ruling, p.4.) However, this reasoning does not apply to Delta Alliance’s request to amend the
18 Protest as to existing parties, which is separate and severable from its request to add Michael
19 Brodsky as a party and involves no added witnesses.

20 **B. Delta Alliance Apprised The Board Early On That Allowing Petitioners To**
21 **Proceed With An Incomplete Project Description, Contrary to 23 CCR § 794,**
22 **Would Necessitate Amendments To The Protest When Petitioners Provided**
23 **More Information.**

24 Numerous parties, including Delta Alliance, pointed out that the original Petition was
25 incomplete (and indecipherable) and should be dismissed for failure to comply with 23 CCR § 794,

26 ² Unlike MWD, Delta Alliance’s original NOI indicated it was a party to these hearings and indicated that Delta
27 Alliance would call witnesses and present a case-in-chief. The Board denied MWD’s request to amend its protest to add
28 witnesses because MWD “filed a request to amend its NOI, seeking for the first time to participate as a party in the
hearing ... MWD’s original NOI, filed by the January 5, 2016 deadline, indicated that MWD intended only to present
policy statements in Parts 1 and 2.” (April 25, 2016, Board Ruling, p.5.). Delta Alliance’s motion to amend its protest
(without adding any parties) is distinguishable from MWD’s denied request to make a non-party a party.

1 which requires water rights change petitions to include specific information. Numerous parties
2 suggested that Petitioners should complete their federal Endangered Species Act (“ESA”) and
3 California Endangered Species Act (“CESA”) processes before proceeding with hearings because
4 those processes would determine the actual description of the project. (Pre-Hearing Conference
5 Ruling, p.1.) The Board acknowledged that DWR “has not clearly explained why the hearing
6 process should begin now, notwithstanding the arguments of other parties,” regarding the need to
7 complete the ESA processes first. (Pre-Hearing Conference Ruling, p.1.) However, the Board
8 determined not to dismiss the Petition and to move forward.

9 The Board acknowledged that the project application did not contain the information
10 required by 23 CCR § 794 and that at “a minimum, however, petitioners should provide the
11 information required by section 794, subdivision (a) of our regulations.” (Pre-Hearing Conference
12 Ruling, p. 6.) The Board further acknowledged that the Petition had a “lack of information
13 concerning project operations and potential effects” due to the accelerated schedule requested by
14 Petitioners. (*Id.*)

15 The Board further acknowledged that legal users of water would not be able to assess
16 whether the proposed changes would cause them legal injury until Petitioners presented the
17 information required by 23 CCR § 794. “We also agree that an adequate project description is
18 necessary for parties to prepare a case in chief in Part 1.” (Pre-Hearing Conference Ruling, p.5.)
19 The Board then allowed the information that its regulations require to be complete upon submission
20 of a petition to be delayed until Petitioners present their case-in-chief:

21 The Petitioners’ cases in chief must, to the extent possible, contain the information
22 required by section 794 of our regulations in a succinct and easily identifiable
23 format. The other parties will then be able to more accurately assess whether the
24 proposed change would cause injury.

25 (Pre-Hearing Conference Ruling, p.7.)

26 The Board further noted that Petitioners pointed to ongoing development of the project and
27 documents outside those submitted to the Board and acknowledged “the difficulty parties face
28 sorting through voluminous documents to decipher relevant details necessary to assess whether the

1 petition will cause injury,” and that “uncertainties need to be resolved for a satisfactory project
2 description.” (Pre-Hearing Conference Ruling, p. 6.)

3 Because Delta Alliance’s Protest was due on January 5, 2015, and there was no adequate
4 description of the project available at that time, Delta Alliance included a section in its Protest titled
5 “Reservation Of Rights To Amend Protest And Request For Board To Allow For Consideration Of
6 Amendments To Protest At The Appropriate Time.” (Delta Alliance Protest, p. 18.) Delta Alliance
7 further explained in its Protest that:

8 Because the description of the project is incomplete and environmental documents
9 are inadequate, it is impossible for Protestants to know the full nature, scope, or
10 extent of the effects of the project. However, failure to file this protest by the due
11 date would forfeit important rights to protest. Therefore Protestants have done the
12 best they could, under the circumstances, to provide a complete and accurate protest.

11 ***

12 Under these circumstances, Protestants believe it is reasonable to allow amendment,
13 supplementation, and revision of this Protest in response to fuller information about
14 the project when such information becomes available.

(Delta Alliance Protest, pp. 18–19.)

15 **C. The Board Has Permitted Petitioners To Radically Alter The Description Of
16 The Project To Cause Injury To Legal Users Not Ascertainable From The
17 Original Change Petition.**

18 The Change Petition filed by Petitioners, dated August 25, 2015, identifies the proposed
19 project as that “identified by Alternative 4A (California WaterFix) of the Bay Delta Conservation
20 Plan/California Water Fix Partially Recirculated Draft Environmental Impact Report / Supplemental
21 Draft Environmental Impact Statement.” (SWRCB-1, pdf page 6.)³ The Petition refers the reader to
22 the RDEIR/S for a description of the project, including its operations. (*Id.*) The operations scenario
23 of Alternative 4A is defined as “H-3–H-4.” (DWR-1, p.7). The operations scenario determines the
24 timing and quantity of water diverted at the new proposed North Delta Intakes. This is in turn
25 determines all downstream flows in the Delta and consequently how downstream legal users of
26 water are impacted by operations of the North Delta Intakes.

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28 ³ SWRCB-1 contains the Change Petition, cover letter, and attachments. The pages are not bates stamped and contain multiple numberings. Delta Alliance refers to SWRCB-1 page references by the pdf format numbering of the pages of this document.

1 For the first time, upon submission of their case in chief on May 31, 2016, five months after
2 the deadline for protestants to submit protests to the petition, Petitioners described project
3 operations as a range occurring anywhere between what is now described as “Boundary 1” and
4 “Boundary 2.” (DWR-1, p.7.) Boundary 1 operations radically alter downstream flow regimes and
5 include substantially less downstream flow than Alternative 4A H3–H4. (DWR-1, p.10.)

6 As of May 31, 2016, Petitioners have admitted that they still do not know what the
7 description of their project is and have therefore still not met the requirements of 23 CCR § 794.
8 (DWR-51, 10: 8–9 [“DWR and Reclamation do not know the initial operating criteria”].) It is
9 remarkable that the Board has not dismissed the Petition for failure to comply with 23 CCR § 794,
10 but has instead decided to allow the hearings to proceed based on a “boundary analysis.” In this
11 boundary analysis Petitioners argue that they will show there can be no injury to legal users of water
12 in any operating scenario that is ultimately decided upon, so long as that scenario is somewhere
13 between Boundary 1 and Boundary 2, inclusive. Petitioners have thus for the first time put legal
14 users of water on notice that they must in these proceedings defend their water rights against
15 operations of the North Delta Intakes at Boundary 1.

16 DWR describes its determination of how these hearings will be conducted under the
17 boundary analysis as follows:

18 The boundary analysis will provide a broad range of operational criteria and the
19 initial operating criteria will fall within this range. These boundaries are sufficiently
20 broad so as to assure the State Water board that any operations considered within this
change petition proceeding have been evaluated with regard to effects on legal users
of water. These boundaries are described below as boundary 1 and boundary 2.

21 (DWR-51, 10: 10–14.)

22 Operations at boundary 1 include elimination of Fall X2. (DWR-1, p.15.) All operations
23 within Boundary 1 and Boundary 2 (including those between H3 and H4) also include re-definition
24 of the export to inflow ratio (“E/I Ratio”) that substantially eliminates constraints on exports and
25 radically alters downstream flows. The operations for Boundary 1–Boundary 2 include “the range
26 of effects analyzed and authorized under the CWF BiOp” as well as other BiOps. (DWR-51,16:18.)
27 The Forthcoming CWF BiOP includes the range of operations included in the Draft BA. Petitioners
28 have provided the Draft BA to the Board as a part of their response to the Board’s requirement that

1 Petitioners provide the information required “by section 794 of our regulations in a succinct and
2 easily identifiable format.” (Pre-Hearing Conference Ruling, p.7.) DWR-324 is Petitioners’
3 response. It references the Draft BA as part of the “additional information [that] has been released.”
4 (DWR-324, p.1). The Draft BA, in turn, explains that:

5 The D-1641 export/inflow (E/I) ratio calculation was largely designed to protect fish
6 from south Delta entrainment. For the PA, Reclamation and DWR propose that the
7 NDD be excluded from the E/I ratio calculation. In other words, Sacramento River
8 inflow is defined as flows downstream of the NDD and only south Delta exports are
9 included for the export component of the criteria.

10 (Draft BA, p. 3-80.)

11 Petitioners proffer to the Board and rely upon new modeling done for the Draft BA for the
12 description of operations proposed by the Change Petition. (*See* DWR’s Written Response to March
13 4 Requirement to Address Information Requests from California Water Research and Sacramento
14 Valley Water Users [Attachment B to Brodsky Declaration filed herewith, showing modeling for
15 change petition “same as BA”].) This is the “CalSim/DSM2 modeling and Reclamation’s January
16 2016 Draft Biological Assessment (BA).” (DWR-324, p.1) The analysis of impacts on legal users
17 has shifted from the original Change Petition’s reference to Alternative 4A of the RDEIR/SDEIS to
18 a “Boundary 1–Boundary 2 scenario” based on the Draft BA (which did not exist at the time the
19 Change Petition was filed).

20 That new Draft BA modeling is based on the redefined D-1641 E/I Ratio. The Draft BA
21 provides for “D-1641 E-I Ratio Computation” and explains that “[i]n computing the E-I Ratio in the
22 CalSim II model, the North Delta Diversion is not included in the export term, and the Sacramento
23 River inflow is as modeled downstream of the North Delta Intakes.” (Draft BA, p. 3-87).

24 This redefinition of The E/I ratio eliminates important constraints on exports from the North
25 Delta Points of Diversion and radically alters the requirements of D-1641. It also radically alters
26 downstream flows and impacts on downstream legal users of water, including Delta Alliance. As
27 described by the Draft BA, “[o]perations under the PA may result in substantial change in Delta
28 flows, compared to the expected flows under the existing Delta configuration” (Draft BA, p. 3-
74; *see also* Simenstad, et al., Independent Review Panel Report for the 2016 California WaterFix
Aquatic Science Peer Review, p. 3 [Attachment C to Brodsky Declaration, stating that “[t]he new

1 dual conveyance facilities proposed as part of the CA WaterFix (WaterFix or CWF) project would
2 create substantial changes in the aquatic environment of the lower San Joaquin and Sacramento
3 Rivers, the Delta, and downstream estuarine areas”].)

4 Legal users of water are put to a new and different test outside the scope included in the
5 Board’s October 30, 2015, Notice of Petition Requesting Changes in Water Rights of the
6 Department of Water Resources and U.S. Bureau of Reclamation for the California WaterFix
7 Project (“Notice”). That notice describes the project as “described in the Petition and
8 RDEIR/SDEIS, is identified as Alternative 4A, the CEQA preferred alternative.” (Notice, p.4.) The
9 Notice and Petition are inadequate to put legal users of water on notice that they would be subject to
10 Boundary 1–Boundary 2 analysis and a redefined EI ratio, which are not a part of Alternative 4A as
11 described in the RDEIR/SDEIS.

12 Delta Alliance emphasizes that Petitioners seek to show that no legal user of water will be
13 injured by operations anywhere within Boundary 1 and Boundary 2:

14 The boundary analysis will provide a broad range of operational criteria and the
15 initial operating criteria will fall within this range. These boundaries are sufficiently
16 broad so as to assure the State Water Board that any operations considered within
this change petition proceeding have been evaluated with regard to effects on legal
users of water.

17 (DWR-51, p.10:10–14.). And to further emphasize that by Petitioners admission operations at
18 Boundary 1 include substantially less downstream flow than Alternative 4A as noticed in the
19 Boards October 30, 2015, Notice of Change Petition. Petitioners suggest that initial operational
20 criteria will fall within “scenarios H3 and H4,” however they state that “[t]hese criteria may change
21 based on adaptive management.” (DWR-51, 10:5–8.) Petitioners further state that “[t]he boundaries
22 described in my testimony analyze possible adjustments that may be made to initial CWF
23 operational criteria through the adaptive management framework.” (DWR-51, p.12:14–16.)

24 In its June 10 denial of Delta Alliance’s previous request to amend the Protest, the Board
25 stated that “Delta Alliance has not shown adequate justification for its failure to indicate on its
26 original NOI that it plans to participate in Part 1 of the hearing by calling witnesses to testify on the
27 issue of injury to legal users of water.” (June 10 Ruling, p.4.) As shown immediately below, Delta
28 Alliance believes that it is not incumbent upon it to show why it did not allege a cause of action

1 under section 1702. Rather, the rule is that in order to justify denial of the motion to amend
2 *Petitioners* must show that prejudice would result from allowing the amendment and absent
3 prejudice amendment is liberally allowed as a matter of course. However, the changed project
4 description and changed nature of the proceedings under the “boundary analysis method” invoked
5 by *Petitioners* was not available to Delta Alliance at the time it filed its original NOI and it had no
6 way to know that the proceedings would be so radically altered at that time.

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8 **D. It Would Be Fundamentally Unfair And An Abuse Of Discretion To Deny Delta Alliance’s Motion To Amend The Protest.**

9 In the quasi-judicial administrative context, the Protest serves as a pleading in the same way
10 that a complaint serves as a party’s initial pleading in the judicial context. Denying leave to amend a
11 pleading is abnormal and would only be justified in rare circumstances not present here. Delta
12 Alliance is seeking to assert a meritorious cause of action, as it is well recognized that legal injury
13 under Water Code section 1702 is a critical issue in these proceedings.

14 And it is a rare case in which ‘a court will be justified in refusing a party leave to
15 amend his pleadings so that he may properly present his case.’ *Guidery v. Green*, 95
16 Cal. 630, 633, 30 P. 786, 787; *Marr v. Rhodes*, 131 Cal. 267, 270, 63 P. 364. If the
17 motion to amend is timely made and the granting of the motion will not prejudice the
18 opposing party, it is error to refuse permission to amend and where the refusal also
19 results in a party being deprived of the right to assert a meritorious cause of action or
20 a meritorious defense, it is not only error but an abuse of discretion. *Nelson v.*
21 *Superior Court*, 97 Cal.App.2d 78, 217 P.2d 119; *In re Estate of Herbst*, 26
22 Cal.App.2d 249, 79 P.2d 139; *Norton v. Bassett*, 158 Cal. 425, 427, 111 P. 253.

19 (*Morgan v. Superior Court of Cal. In and For Los Angeles County* (1959) 172 Cal.App.2d 527,
20 530.) Although Delta Alliance does not view it as a mistake, the Board’s regulations provide that it
21 will “allow reasonable opportunity to correct a protest” in order to state a “valid ground of protest”
22 that was not stated originally. (23 CCR § 749.)⁴

23 The “policy of favoring amendments to pleadings should be applied with extreme
24 liberality.” (*Eldridge v. Block* (9th Cir. 1987) 832 F.2d 1132, 1135.) The “court’s discretion will
25 usually be exercised liberally to permit amendment of the pleadings.” (California Practice Guide
26 Civil Procedure Before Trial (Rutter 2016) §6:638.) The “policy favoring amendment is so strong

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28 ⁴ Section 749 occurs in the context of a rejected protest. However, it establishes that the Board allows protests to be amended where reasonable.

1 that denial of leave to amend can rarely be justified.” (*Id.*) In California courts, a plaintiff can
2 amend a complaint without leave of court at any time before the defendant’s answer is filed. Here,
3 Delta Alliance sought to amend its Protest *before* Petitioners filed their case-in-chief. The situations
4 are analogous and Delta Alliance’s original request to amend should have been granted.

5 In addition to the basic right to amend regardless of new information, as explained above
6 substantial new information and substantial changes in Petitioners’ proposed project have occurred
7 since Delta Alliance’s initial request to amend. “A party may discover the need to amend after all
8 pleadings are completed (the case is “at issue”) and new information requires a change in the nature
9 of the claims or defenses previously pleaded.” (*Id.* at § 6:636.)

10 **E. The Renewed Motion Is Timely And Petitioners Can Claim No Prejudice.**

11 Tribunals “are bound to apply a policy of great liberality in permitting amendments to the
12 complaint ‘at any stage of the proceedings, up to and including trial,’ absent prejudice to an adverse
13 party.” (Civil Procedure Before Trial § 6:652, quoting *Atkinson v. Elk Corp.* (2003) 109 Cal. App.
14 4th 739, 761.) There would not be, and the Board has so acknowledged, prejudice to any party in
15 allowing the amendment. Speculation that some other party might also seek to make an amendment
16 has never been, in any tribunal anywhere, grounds to deny leave to amend. To this day, Petitioners
17 have failed to comply with 23 CCR § 794 and have not complied with the Board’s direction that
18 “Petitioners’ cases in chief must, to the extent possible, contain the information required by section
19 794 of our regulations in a succinct and easily identifiable format.” (Pre-Hearing Conference
20 Ruling, p.7.)

21 Indeed, Petitioners’ response to the Board’s order is a study in dissembling. Petitioners’
22 response states that “[t]here will be some changes in the streamflow regime within the Delta due to
23 the new NDD.” (DWR-325, p.5.) However, Petitioners prepared the Draft BA, which states
24 “substantial change in Delta flows” due to the project. (Draft BA, p. 3-74.) While literally true that
25 there will be “some changes,” the description is intended to hide the magnitude of potential
26 changes, which are buried in an ancillary document that parties to these proceedings are left to
27 unearth. Petitioners’ response also includes the statement that they “will continue to meet all
28 existing Delta Water quality and flow criteria and any other regulatory requirements applicable to

1 the SWP/SVP facilities.” DWR-324, p.5. D-1641 is mentioned several times within DWR-324.
2 However DWR-324 does not disclose that Petitioners propose to amend D-1641 to exclude exports
3 from the North Delta Intakes from the E/I ratio.

4 Although there is no prejudice to Petitioners from Delta Alliance’s proposed amendment,
5 Petitioners could not assert prejudice in any event as they come to these proceedings with unclean
6 hands.

7 “If delay in seeking the amendment has not misled or prejudiced the other side, the liberal
8 policy of allowing amendments prevails. Indeed, it is an abuse of discretion to deny leave in such a
9 case, even if sought as late as the time of trial.”⁵ (Civil Procedure Before Trial § 6:653, citing
10 *Higgins v. Del Faro* (1981) 123 Cal. App. 3d 558, 564–565.).

11 The “fact that the amendment involves a change in legal theory that would make admissible
12 evidence damaging to the opposing party is *not* the kind of prejudice the court will consider.” (Civil
13 Procedure Before Trial § 6:656, citing *Hirsa v. Sup. Ct.* (1981) 118 Cal. App. 3d 486, 490.) Delta
14 Alliance seeks only a change in (addition of) a legal theory, a cause of action under section 1702.

15 II. Delta Alliance’s Proposed Amendments To Its Protest.

16 Protestants therefore seek to amend their Protest by adding the following supplement to the
17 Protest:

18 1) In addition to public interest considerations the Protest is based on injury to legal users of
19 water within the meaning of Water Code section 1702.

20 2) In addition to public interest considerations, the Protest is based on injury to human uses,
21 within the meaning of the Board’s clarification of that term.

22 4) Frank Morgan, Michael and Janet McCleery, and riparian members of Save the California
23 Delta Alliance will suffer injury as legal users of water within the meaning of Water Code
24 section 1702.

25 5) **Protest based on INJURY TO PRIOR RIGHTS** is added as follows:

26 **To the best of my (our) information and belief the proposed change or transfer will
27 result in injury as follows:** Water quality in the bays of Discovery Bay will be significantly
28 degraded. Invasive weeds (*Egeria Densa*, Curly Leaf Pond Plant, Hyacinth, and others) will
increase. Circulation will be diminished and sedimentation will increase. All of these, and

⁵ Delta Alliance’s written case-in-chief is due to be submitted September 1, 2016, and presentation does not begin until October 20, 2016, so Delta Alliance’s motion is made well ahead of trial.

1 other impacts, will interfere with Protestants ability to put waters of the bays of Discovery
2 Bay to beneficial use.

3 **Protestant claims a right to the use of water from the source from which petitioner is**
4 **diverting, or proposes to divert, which right is based on (identify type of right**
5 **protestant claims, such as permit, license, pre-1914 appropriative or riparian right):**
6 **RIPARIAN RIGHT.**

7 **Where is the point of diversion located:** Michael and Janet McCleery: 5672 Drakes Drive,
8 Discovery Bay, CA 94505, APN 004-402-001-1 00, 37.906514 N. Lat. 121.592089 W
9 Long. Frank Morgan: 1700 Riverlake Rd., Discovery Bay, CA. Other members of Save the
10 California Delta Alliance: throughout the bays of Discovery Bay.

11 **If new point of diversion is being requested, is your point of diversion downstream**
12 **from petitioner’s proposed point of diversion.** McCleerys’ and Morgan’s points of
13 diversion are downstream from Petitioner’s proposed new point of diversion at north Delta
14 intakes. McCleerys’ and Morgan’s points of diversion are downstream from Petitioner’s
15 existing points of diversion (Jones and Banks). In addition to requesting a new point of
16 diversion, the change Petition includes changes in operations of Jones and Banks that will
17 injure McCleery’s, Morgan and other Delta Alliance legal users of water throughout the
18 bays of Discovery Bay. Although naturally upstream of Discovery Bay, reverse OMR flows
19 make Jones and Banks “downstream” of Discovery Bay at times.

20 **The extent of present and past use of water by protestant or his predecessors in interest**
21 **is as follows:**

- 22 **a. Source:** McCleery’s: Marina Bay fed by Indian Slough. See attached copy of
23 Statement of Diversion (filed under separate cover with the Division of Water
24 Rights) (Attachment 1) for map, upstream and downstream view, point of diversion
25 and place of use, and details of use. Morgan: Sand Bay fed by Kellogg Creek. Other
26 Riparian members of Delta Alliance: throughout the bays of Discovery Bay.
- 27 **b. Approximate date first use made:** McCleery’s current use approximately 2008.
28 Prior use uncertain. Morgan uncertain. Riparian right runs from first federal land
patent. Other Riparian members of Delta Alliance uncertain.
- c. Amount used (list units):** McCleery’s and Morgan: less than 35 gallons per day
each.
- d. Diversion season:** year round.
- e. Purpose(s) of use:** Irrigation of ornamental plants, outdoor supply, and other lawful
uses.
- f. Under what conditions may this protest be disregarded and dismissed?** See
original Protest, filed January 5, 2016.

Delta Alliance provides the above information and the McCleery’s specific past usage and
point of diversion information and the attached statement of diversion in accordance with the
Board’s formatting conventions. However, as stated in Delta Alliance’s Protest, “[o]ur members
retain their riparian legal rights to put Delta waters to beneficial use by individually diverting small

1 quantities of water for irrigation of gardens and other household uses.” (Delta Alliance Protest, p.1.)
2 The Protest further stated that named Protestants, “[t]he Mcleery’s and Mr. Morgan retain their
3 riparian legal rights to put Delta waters to beneficial use by individually diverting small quantities
4 of water for irrigation of gardens and other domestic uses.” (Delta Alliance Protest, p.2.) The
5 Protest also describes that: “Janet and Michael McCleery own and reside at 5672 Drakes Drive,
6 Discovery Bay, CA 94505, which is a waterfront parcel with an attached dock abutting Marlin Bay.
7 Marlin Bay is fed by the waters of Indian Slough.” (Delta Alliance Protest, p.1) The Protest further
8 describes that “Frank Morgan owns and resides at 1700 Riverlake Rd., Discovery Bay, CA 94505,
9 which is a waterfront parcel with an attached dock abutting Sand Bay. Sand Bay is fed by the waters
10 of Kellogg Creek.” (Delta Alliance Protest, p.2.)

11 As the Petition alleges the McCleery’s and Mr. Morgan’s riparian rights (as well as other
12 members of Delta Alliance) to put Delta waters to beneficial use, it establishes their right to oppose
13 a change in the point of diversion pursuant to Water Code section 1702, regardless of any past use
14 or registration with the Board:

15 Accordingly, we must conclude that section 16 of the Water Commission Act
16 allowed anyone who had a *legal right to use water* to oppose a change in the point of
17 diversion of an appropriation on the ground the change would interfere with his or
18 her legal right to sue the water involved.

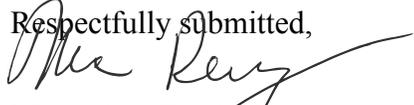
19 (*State Water Res. Control Bd. Cases* (2006) 136 Cal. App. 4th 674, 803, emphasis added.)⁶

20 **III. Conclusion.**

21 For the foregoing reasons, Delta Alliance respectfully urges the Board to **GRANT** this
22 motion to amend Delta Alliance’s Protest to make clear that Delta Alliance is alleging injury to
23 legal users of water pursuant to Water Code section 1702 in addition to other grounds stated in the
24 Protest.
25
26
27

28 ⁶ Riparian rights “are not lost if the water is not diverted or used.” (*See, e.g.,*
[http://www.waterboards.ca.gov/about_us/performance_report_0809/allocate.](http://www.waterboards.ca.gov/about_us/performance_report_0809/allocate))

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Respectfully submitted,


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

Dated July 19, 2016

ATTACHMENT 1

State Water Resources Control Board
DIVISION OF WATER RIGHTS

INITIAL STATEMENT OF WATER DIVERSION AND USE

A STATEMENT SHALL NOT ESTABLISH OR CONSTITUTE EVIDENCE OF A WATER RIGHT
 READ THE ATTACHED INFORMATION AND INSTRUCTION SHEET BEFORE COMPLETING THIS FORM
 FURTHER INFORMATION CAN BE FOUND IN WATER CODE, SECTIONS 5100-5107

Page 1 of 3: INITIAL STATEMENT OF WATER DIVERSION AND USE
 SOURCE/TRIBUTARY Marina Bay fed by Indian Slough

DIVERTER NAME Michael and Janet McCleery
 DIVERSION WORKS NAME unnamed

A. Diverter Information			
Diverter Name(s) Michael and Janet McCleery			
Mailing Address 5672 Drakes Drive	City Discovery Bay	State CA	Zip 94505
Phone Number 925-240-8501	Email Address (if available) janmccleery@yahoo.com		
Person Filing Statement (If Different From Diverter)			
Mailing Address			
City			
State			
Zip			
Phone Number			
Email Address (if available)			
Land Owner Name Michael and Janet McCleery, Trustees			
Mailing Address 5672 Drakes Drive	City Discovery Bay	State CA	Zip 94505
Mail Receiver <input checked="" type="radio"/> Diverter <input type="radio"/> Person Filing			
B. Signature and Important Information			
DATE: <u>June 29, 2016</u>			
SIGNATURE: <u></u>			
PRINTED NAME: <u>Janet</u> <u>M.</u> <u>McCleery</u>			
(first name)		(middle name)	
(last name)			
I declare that the information in this report is true to the best of my knowledge and belief.			
Submit Form Electronically			
THE STATE WATER RESOURCES CONTROL BOARD MAY RELY ON THE NAMES AND ADDRESSES ON THIS DOCUMENT FOR MAILING NOTICES REGARDING PROCEEDINGS BEFORE THE BOARD. (Wat. Code, § 5106, subd. (b)(1).)			
SUPPLEMENTAL STATEMENTS OF WATER DIVERSION AND USE MUST BE FILED AT THREE-YEAR INTERVALS OR IF THERE IS A CHANGE IN THE NAME OR ADDRESS OF THE DIVERTER. (Wat. Code, § 5104.)			
THE MAKING OF A WILLFUL MISSTATEMENT ON A STATEMENT OF WATER DIVERSION AND USE IS A MISDEMEANOR PUNISHABLE BY A FINE NOT EXCEEDING \$1,000 OR BY IMPRISONMENT IN THE COUNTY JAIL FOR UP TO SIX MONTHS, OR BOTH. THE BOARD MAY IMPOSE CIVIL LIABILITY UPON A PERSON WHO KNOWINGLY MAKES A MATERIAL MISSTATEMENT ON THIS FORM. (Wat. Code, § 5107.)			

UPON COMPLETION OF THIS STATEMENT, ATTACH ALL SUPPORTING DOCUMENTATION AND MAPS AND MAIL TO:

State Water Resources Control Board
 Division of Water Rights
 PO Box 2000
 Sacramento, CA 95812-2000

Additional copies of this form, instructions on how to complete this form and water right information can be obtained at
http://www.waterboards.ca.gov/waterrights/water_issues/programs/diversion_use/. Revised January 2014.

State Water Resources Control Board
DIVISION OF WATER RIGHTS

INITIAL STATEMENT OF WATER DIVERSION AND USE

A STATEMENT SHALL NOT ESTABLISH OR CONSTITUTE EVIDENCE OF A WATER RIGHT
READ THE ATTACHED INFORMATION AND INSTRUCTION SHEET BEFORE COMPLETING THIS FORM
FURTHER INFORMATION CAN BE FOUND IN WATER CODE, SECTIONS 5100-5107

PAGE 2 OF 3: INITIAL STATEMENT OF WATER DIVERSION AND USE DIVERTER NAME Michael and Janet McCleery
SOURCE/TRIBUTARY Marina Bay fed by Indian Slough DIVERSION WORKS NAME unnamed

1. Type of Claim													
Check the box(s) which describe the type of claim(s) under which you are diverting water.													
<input checked="" type="checkbox"/> Riparian	<input type="checkbox"/> Pre-1914	<input type="checkbox"/> Court Decree	<input type="checkbox"/> Pending Appropriative Application	<input type="checkbox"/> Pueblo	<input type="checkbox"/> Other: _____								
If you checked yes for Court Decree, Pending Appropriative Application or other, list the decree number, application ID or explanation:													
2. Water Course Description													
Water Course Name at the point of diversion Marina Bay							Water Course is tributary to Fed by Indian Slough/Delta						
3. Legal Land Description													
Provide the location of the Point of Diversion using one of the following methods (check one box and enter coordinates, if applicable)													
<input checked="" type="checkbox"/> Latitude/Longitude Measurements: 37.906514 : -121.592089													
<input type="checkbox"/> California Coordinate System (NAD 1983): _____													
<input type="checkbox"/> USGS Topographic Map with point of diversion labeled on map (if checked yes, please attach map)													
Assessor's Parcel Number(s), if assigned: APN 004-402-001-1 00							County _____						
Provide Public Land Description to nearest 40 acres (if assigned)													
_____ 1/4 of the _____ 1/4 of Section _____, Township _____, Range _____, B&M _____													
4. Place of Use Description													
Provide a general description of the area in which the water was used single family waterfront residence - attached dock													
Identify the location of the place of use on a specific United States Geological Survey (USGS) topographic map and on any other maps with identifiable landmarks. If assigned, provide the public land description to the nearest 40-acre subdivision and the assessor's parcel number. (check box indicating each map attached)													
<input type="checkbox"/> USGS Topographic Map	<input checked="" type="checkbox"/> County Assessor's parcel map												
5. Purpose of Use Description (Please select all that apply below)													
<input checked="" type="checkbox"/> Irrigation Number of Acres :	<input checked="" type="checkbox"/> Domestic Persons Served :	<input type="checkbox"/> Stock watering Number of stock and type:	<input type="checkbox"/> Other Please Explain:										
Garden + Potted Plants 2													
6. Diversion Works Description													
Name of Diversion Works, if named _____							Year in which diversion commenced (or specify nearest known year) 2008						
List any related existing water rights, if applicable (for example, an appropriative right using the same diversion works)													
Type of Diversion Facility (select one)													
<input type="checkbox"/> Gravity	<input type="checkbox"/> Water Course Pump	<input type="checkbox"/> Well Pump	<input checked="" type="checkbox"/> Other (please specify) Hand Bucket										
Do you directly divert water? Capacity of Direct Diversion Works (specify unit and amount) _____							Do you divert water to storage?						
<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Cubic feet per second	<input type="checkbox"/> Gallons per minute	<input checked="" type="checkbox"/> Gallons per day	<input type="checkbox"/> On-stream storage (Complete Section B)	<input type="checkbox"/> Off-stream storage (Complete Sections A & B)								
A. Capacity of Storage Diversion Works (specify unit and amount) _____							B. Capacity of Storage Tank or Reservoir (specify unit and amount)						
<input type="checkbox"/> Cubic feet per second	<input type="checkbox"/> Gallons per minute	<input type="checkbox"/> Gallons per day	<input type="checkbox"/> Gallons	<input type="checkbox"/> Acre-feet									
7. Quantity of Water Diverted Note: Measurements must be made using best available technologies and best professional practices as listed in Section 8a unless documentation is provided to the State Water Resources Control Board that the implementation of those practices is not locally cost effective.													
Provide the quantity of water diverted each month in the table below as a measured in (check one box) <input checked="" type="checkbox"/> Gallons <input type="checkbox"/> Acre-feet													
Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Total
2016	5	5	5	10	20	20	30	30	30	10	5	5	175

8. Measurement Device Description

Method used to measure water diverted (select one)

Water directly diverted and/or diverted to storage was measured with a measuring device. (if checked, proceed to section 8a and skip section 8b)

Direct measurement using a device listed in Section 8a is not locally cost effective for water directly diverted and/or diverted to storage. (If checked, skip section 8a and proceed to section 8b).

8a. Measuring Device

Indicate the types of measuring devices used (check all that apply):

Propeller Meter Sluice/Slide Gate Acoustic Meter Weir

Staff gage and storage capacity curve Staff gage and floodable acreage

Pressure transducer and storage capacity curve Other: _____

Indicate any additional technology used (check all that apply and explain below):

Flow totalizer Data Logger Telemetry Other: _____

Indicate who installed your measuring device(s) (check all that apply):

Representative using manufacturer's recommendations Licensed Civil or Agricultural Engineer

Representative who is American Water Works Association (AWWA)-certified Hydrographer

Representative using United States Geological Survey (USGS) techniques Other/Unknown: _____

List the make, model number, and last calibration date of your measuring device(s), if available:

8b. Explanation of why use of a measuring device is "not locally cost effective"

Indicate why you concluded that direct measurement using a device listed in Section 8a is not locally cost effective (check all that apply)

Diversion is small or minimal in size Diversions are infrequent Ungauged Siphon

No power at diversion point Other: _____

Indicate method(s) used as an alternative to direct measurement in order to complete this report (check all that apply)

Electricity records dedicated to the pump Total facility electricity records minus estimated non-pump electricity

Engine fuel use or hour meter records Crop duty estimates/consumptive use estimates

Power generation estimates Other water duty estimates other than for crops

Modeled/estimated flows Remote satellite imaging

Pipe/trajectory method Bucket and stopwatch

Float and stopwatch Other: estimate number of buckets

Explain your measurement alternatives:

9. Maximum Rate of Diversion (if available)

Provide the maximum rate of diversion achieved in each month as measured in (check one box) cfs gpm gpd

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
2015	5	5	5	5	5	5	5	5	5	5	5	5

10. Recent Water Use

Provide the annual water use in recent years:

Maximum	660	<input checked="" type="checkbox"/> Gallons	<input type="checkbox"/> Acre Feet
Minimum	100	<input checked="" type="checkbox"/> Gallons	<input type="checkbox"/> Acre Feet

11. Water Conservation Efforts (answer only sections applicable to your diversion)

Water Conservation: Are you currently employing any methods of water conservation? Yes No

If yes, describe any water conservation efforts in use:
drip system, curtail use of garden during drought times

Water Quality and Wastewater Reclamation: Are you now or have you been using reclaimed water from a wastewater treatment facility, desalination facility or water polluted by waste to a degree that unreasonably affects such water for other beneficial uses? Yes No

Conjunctive use of surface water and groundwater: Are you using groundwater in lieu of surface water? Yes No

END OF INITIAL STATEMENT FORM

Sign and Submit Form

Save Form (submit later)

ATTACHMENT TO INITIAL STATEMENT OF DIVERSION AND USE
MICHAEL W. AND JANET M. MCCLEERY
5072 DRAKES DRIVE
DISCOVERY BAY, CA 94505
APN 004-402-007-1 00

We have diverted water using a bucket and/or small pump in minimal quantities over the last several years. Use of all water was curtailed recently due to years of drought emergency. We are using Delta water now for vegetables because we believe the excess minerals in our well water is adversely affecting our vegetables.

We used a similar setup, a water pump on our dock for irrigation, for our prior house on Sandmound Slough in Oakley. There, having a water pump for irrigation was a requirement due to well water concerns. We are also wanting a water pump in case of well water shortages in Discovery Bay and, due of a lack of Fire Service in our area (ECCFPD), in case of a house or boat fire.

We were unaware of the reporting requirement and learned of it due to participation in the California WaterFix proceedings. When we learned of the requirement, we accessed the forms available online. We are making a good faith effort to comply with all reporting requirements.

We plan to upgrade our diversion method to use a small electric pump and connection to a drip irrigation system and faucet. The smallest pump available has a 6gpm capacity. We expect to complete our new diversion system in time for planting season next year.

July 12, 2016

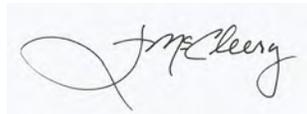
A handwritten signature in black ink, appearing to read "M. McCleery", is written on a light blue rectangular background.

EXHIBIT 1 - POINT OF DIVERSION USE
5672 Drakes Drive
Discovery Bay, CA 94505
APN 004-402-007-1 00

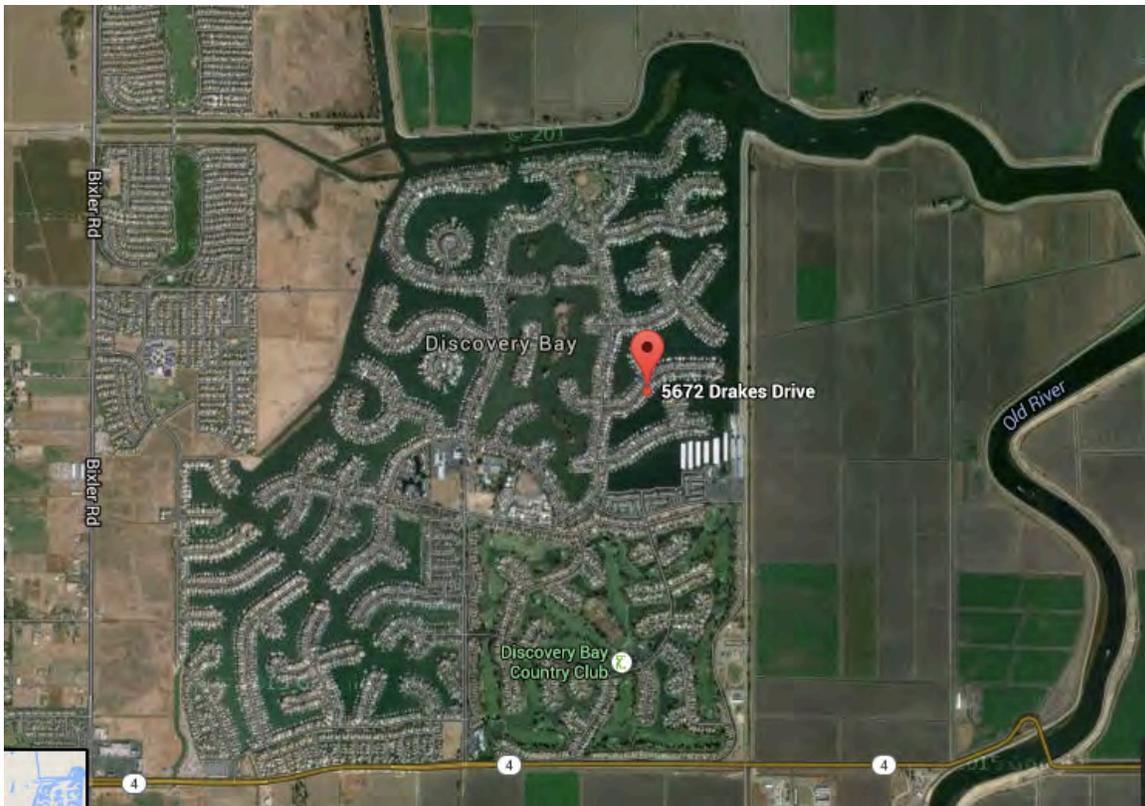
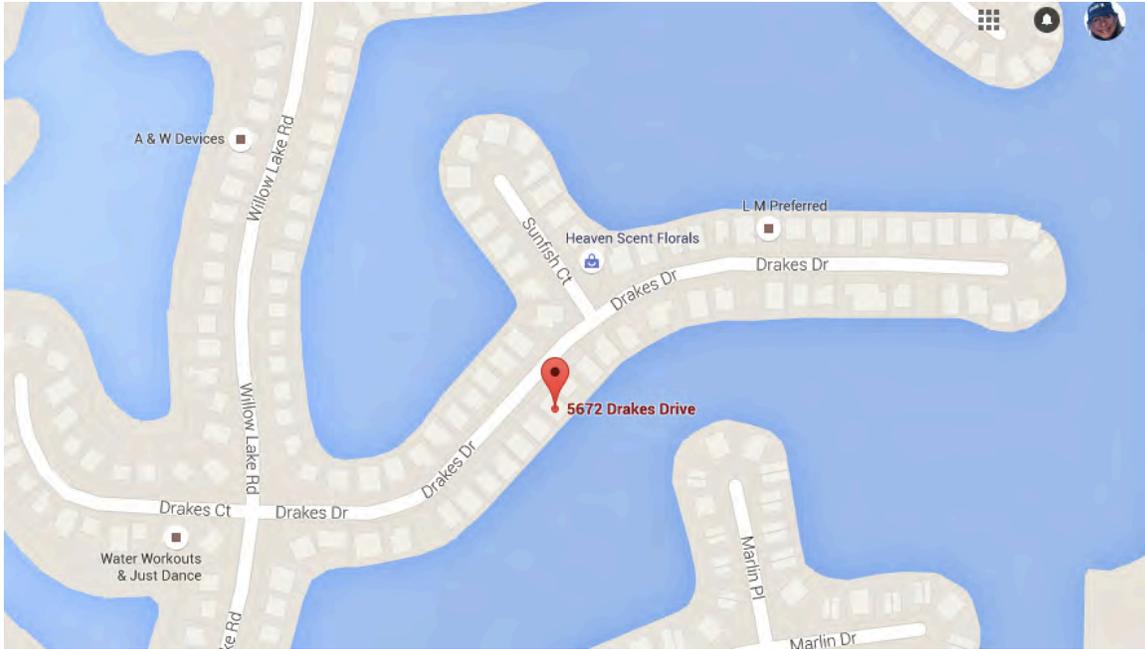




EXHIBIT 2 - POINT OF DIVERSION USE - PLOT MAP
 5672 Drakes Drive
 Discovery Bay, CA 94505
 APN 004-402-007-1 00



EXHIBIT 3 - PROPOSED POINT OF DIVERSION USE
TRANSFER PUMP
5672 Drakes Drive
Discovery Bay, CA 94505
APN 004-402-007-1 00



Little Giant 360S Pony Pump Non-Submersible Self-Priming Transfer Pump with 6-Foot Cord

by Little Giant Outdoor Living

★★★★★ 10 customer reviews

Note: This item is only available from third-party sellers ([see all offers](#)).

Available from these sellers.



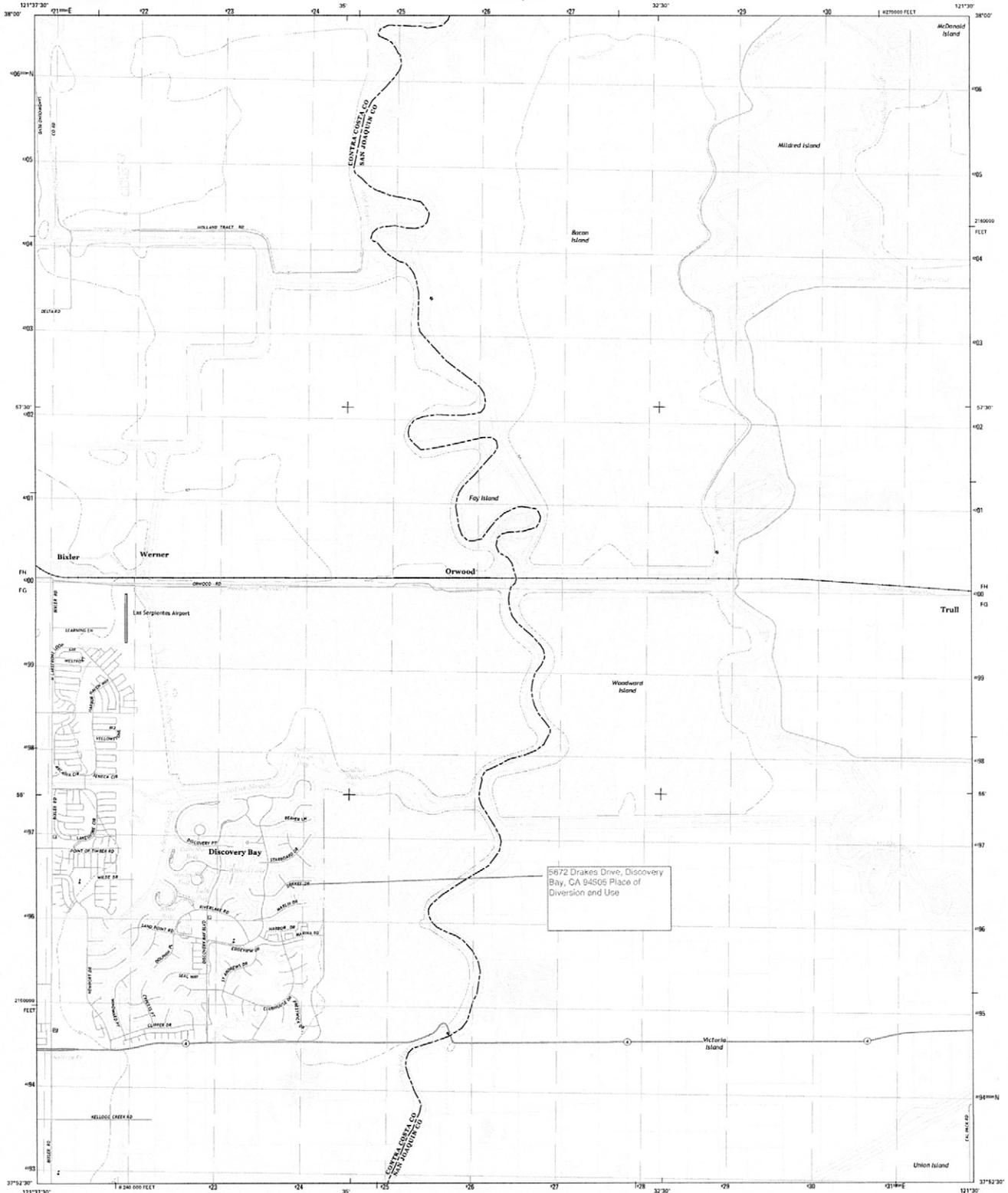
\$40 CASH BACK on installation. Applies to services \$75 or more,

Prime members only. [Details](#)

Book a top-rated pro directly on Amazon. Backed by our Happiness Guarantee.

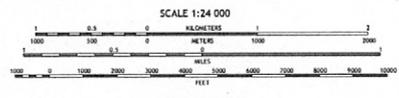
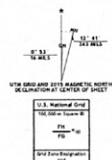
From **\$350.00**

- Self priming for instant delivery or de-watering up to 6 feet
- Non-submersible stainless steel pump body
- Rugged metallic handle for easy portability
- Dual threaded intake and discharge with both 3/4-inch male garden hose thread and 3/8-inch FNPT
- Intermittent duty is 15 minutes ON and 45 minutes OFF



Produced by the United States Geological Survey
North American Datum of 1983 (NAD83)
World Geodetic System of 1984 (WGS84), Projection and
1:250,000-meter and Universal Transverse Mercator, Zone 10S
to 800-foot ticks, California Coordinate System of 1983 (Zone 3)
This map is not a legal document. Boundaries may be
generalized for this map scale. Please check with your government
representations may not be shown. Obtain permission before
making printed copies.

Imagery: NADP, May 2012
Shade: SRTM3, 2014
Name: GNIS, 2010
Hydrography: Hydrography Database, 2012
Elevation: Elevation Database, 2010
Boundaries: Multiple sources, see metadata file 1972-2015
Public Land Survey System: BLM, 2011



ROAD CLASSIFICATION

Expressway	Local Connector
Secondary Hwy	Local Road
Ramp	MSD
Interstate Route	US Route
	State Road

1	2	3
1	2	3
4	5	6
7	8	9

1. Jarry Island
2. Shalun Island
3. Fennwood
4. Borewood
5. Bays
6. Bays
7. Bays
8. Bays
9. Bays

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 RENEWED MOTION TO AMEND PROTEST

DECLARATION OF MICHAEL A. BRODSKY IN SUPPORT OF PROTESTANT SAVE THE CALIFORNIA DELTA ALLIANCE'S RENEWED MOTION TO AMEND PROTEST

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 July 11, 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 July 19, 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