

1 Michael A. Brodsky (SBN 219073)
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

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

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

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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, ET AL.'s REPLY TO
CALIFORNIA DEPARTMENT OF WATER
RESOURCES' RESPONSE TO DELTA
ALLIANCE'S MOTION TO ADOPT CROSS
EXAMINATION PROCEDURE
PROHIBITING WITNESSES FROM
CONSULTING WITH COUNSEL DURING
CROSS EXAMINATION

1 DWR argues that ordinary rules governing cross-examination should not apply to these
2 proceedings because Board hearings are not “the adversarial system of justice found in the criminal
3 and civil trial courts.” (DWR’s Response, at 1: 26–27.)

4 However, the Board’s description of these hearings is the essence of an adversarial
5 proceeding and the Board itself refers to the parties as “opposing” and “adverse” to each other:

6 [E]ach party may make an opening statement, call and examine witnesses, introduce
7 exhibits, cross-examine opposing witnesses on any matter relevant to the issues even
8 if that matter was not covered in the direct examination, impeach any witness, rebut
adverse evidence, and subpoena, call and examine an adverse party or witness as if
under cross-examination.

9 (October 30, 2016, Notice of Petition Requesting Changes in Water Rights (“Notice”), Enclosure
10 D, at 31.) The facts here are disputed. DWR contends that CWF will not injure legal users of water.
11 Dozens of parties have filed protests contending the opposite and disputing every detail of DWR’s
12 factual assertions in support of the tunnels. These hearings can only be described as “an adversarial
13 process in which the agency resolves disputed facts after affording interested parties an opportunity
14 to present evidence.” (300 DeHaro St. Investors v. Department of Housing & Community Develop.
15 (2008) 161 Cal. App. 4th 1240, 1251.) Black’s Law Dictionary defines “impeach” as “[t]o discredit
16 the veracity of (a witness).” Impeachment does not inure in non-adversarial proceedings.

17 The proceedings are an administrative adjudication. The Notice provides that the
18 proceedings are to be conducted pursuant to 23 CCR § 648 (Notice, Enclosure D at 31.) Section 648
19 is entitled “Laws Governing Adjudicative Proceedings,” and provides that the proceedings shall be
20 governed by “chapter 4.5 of the Administrative Procedure Act.” (23 CCR § 648(b).) Chapter 4.5 is
21 entitled “Administrative Adjudication,” and provides that it contains “administrative adjudication
22 provisions of the Administrative Procedure Act.” (Gov’t Code § 11400(a).)

23 In an administrative adjudication, the parties have a *constitutional due process* right to
24 cross-examination. “The federal and state Due Process Clauses impose significant procedural
25 limitations on federal, state and local adjudicating agencies.” (California Practice Guide—
26 Administrative Law (Rutter 2016) § 3:4.) “Normally, due process requires a right to confront and
27 cross-examine one’s adversaries.” (California Practice Guide--Administrative Law § 3:325.) The
28 due process right to cross-examination means that there is a right to *effective* cross-examination.

1 Petitioners have been granted the ability to present their witnesses in panels, to conduct
2 redirect examination, and to radically alter the description of the project from that disclosed in their
3 Petition. Petitioners have had a full decade to prepare their proposal for the tunnels and have spent
4 hundreds of millions of dollars in support of their proposal. DWR staff should know, of their own
5 personal knowledge, what they need to say by now. There is nothing unfair or unusual in the
6 commonplace procedure requested by Delta Alliance. Petitioners possess the might and resources of
7 the State of California and the United States of America combined. Delta Alliance is a small
8 citizens group with meager resources and one attorney. To take away Delta Alliance’s ability to
9 effectively cross-examine by allowing witnesses a hallway huddle with DWR’s legal team *and* the
10 State Water Contractors’ legal team would rise to the level of a constitutional violation.

11 The test for constitutionally required procedures in an administrative setting is articulated in
12 *Mathews v. Eldridge* (1976) 424 U.S. 319, 334–335. As summarized by the Ninth Circuit, “courts
13 should balance the costs and benefits of procedural safeguards to determine whether the due process
14 clause requires them.” (*Paladin Assoc., Inc. v. Montana Power Co.* (2003) 328 F.3d 1145, 1164,
15 citing *Mathews v. Eldridge*, 424 U.S. at 334–335.) Here, the cost to the Board is nil. No additional
16 hearings, staff time, or procedures are needed. Once the order is issued, counsel for DWR will
17 comply with it. The benefit, on the other hand, is substantial. It is well-settled that isolating a
18 witness from mid-testimony coaching increases the accuracy and efficiency of the fact-finding
19 process. That is why the procedure is so commonly used in state and federal court. A consensus of
20 state and federal judges applying the procedure in order to increase the veracity of the fact-finding
21 process in their courtrooms is strong evidence in favor of applying it here.

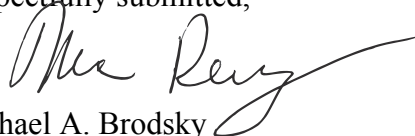
22 Finally, Delta Alliance notes that if DWR would prefer a non-adversarial path forward, it is
23 entirely within its power to steer that course. DWR may withdraw the Petition and many of the
24 issues being contested can be worked out in a collaborative process through updating the Water
25 Quality Control Plan and determining Appropriate Delta Flow Criteria within that process before re-
26 commencing any adjudicative proceeding on a change in the point of diversion.

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Respectfully submitted,

Dated: August 2, 2016



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

STATEMENT OF SERVICE

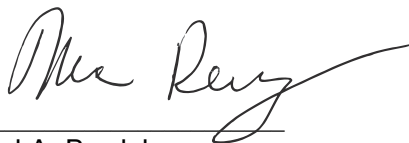
**CALIFORNIA WATERFIX PETITION HEARING
Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)**

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, ET AL.'s REPLY TO CALIFORNIA DEPARTMENT OF WATER RESOURCES' RESPONSE TO DELTA ALLIANCE'S MOTION TO ADOPT CROSS EXAMINATION PROCEDURE PROHIBITING WITNESSES FROM CONSULTING WITH COUNSEL DURING CROSS EXAMINATION

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 25, 2016, posted by the State Water Resources Control Board at
http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml

I certify that the foregoing is true and correct and that this document was executed on August 2, 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