

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 North Delta Cares / Barbara Daly.

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**

PROTESTANT NORTH DELTA CARES
RESPONSE TO DWR'S DECEMBER 30, 2016,
OBJECTIONS TO EXHIBITS SUBMITTED IN
SUPPORT OF PROTESTANTS' CASES-IN-
CHIEF and SAN LOUIS AND DELTA-
MENDOTA'S OBJECTIONS TO EXHIBITS.

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NDC-30–NDC-37

DWR objects to NDC-30–NDC-37 as new exhibits that violate “established hearing procedures as new evidence that Petitioners are unable to review.” DWR objects that these exhibits were listed on North Delta Cares’ exhibit list but not uploaded to the FTP site. (DWR December 30, 2016, Objections, p.24: 7–13.)

All of these exhibits are portions of the 2015 Draft EIR/S which has been offered into evidence by Petitioners as SWRCB 3. It is North Delta Cares’ understanding that the status of these exhibits was resolved at the hearing on December 13, 2016, as follows. Hearing Officer Doduc considered DWR’s objections to these exhibits as new surprise testimony at that time. After hearing the testimony and objections to the exhibits, Hearing Officer Doduc decided that, although the new exhibits did come as surprise testimony to Petitioners, the fact that Protestants were pro se at the time they submitted their written testimony and exhibits coupled with the probative value of the exhibits outweighed any delay or prejudice to Petitioners. Hearing officer Doduc resolved the issue by offering Petitioners the opportunity to review the new exhibits and to continue their cross examination of North Delta Cares’ witnesses on December 15, 2016—after adequate time to review the exhibits and prepare cross examination. DWR ultimately declined the offer and decided that further review of the exhibits and recalling the witnesses for further cross examination was not necessary.

Discussion of these exhibits at the December 13, 2016, hearing took place as follows:

MR. MIZELL: the Department is not objecting to the statement as Mr. Brodsky has read it. What we are objecting to is the fact that her testimony is wholly absent of any citation and to now through the course of cross – er – direct testimony questioning by Mr. Brodsky we are just now learning about the connections between the documents that she apparently relied upon for the assertions that she provided no citations for so we would believe that this constitutes fairly substantial surprise testimony at this point as we were unable to – uh – know of the train of thought and the logic behind the statements made—um-- that were just summarized in her written testimony.

(Video recording of December 13, 2016, CWF hearing at timestamp 6:08 and following.)

Mr. Brodsky acknowledged that Ms. Daly’s written testimony does not contain formal citations to the EIR/S but noted that N. Delta Cares was appearing pro se at the time its exhibits were prepared and submitted and that Ms. Daly had attempted to make a connection between her

1 written testimony and the EIR/S discussion of the impacts of construction de-watering on her well
2 in submitted exhibit NDC-11, which is a map Ms. Daly produced from an agglomeration of
3 materials taken from the EIR/S that shows Ms. Daly's home directly across the river from the
4 major construction site at intake #2. (Video recording of December 13, 2016, CWF hearing at
5 timestamp 6:08:50 and following.)

6 Hearing Officer Doduc then made the following ruling:

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8 HEARING OFFICER DODUC: Thank you Mr. Brodsky. I recognize that the
9 linkage was not expressly made but the linkage is there. I will allow the testimony,
10 however I will allow Petitioners also the option of requesting Ms. Daly's return on
11 the 15th for cross-examination if you feel you need additional time to prepare for
12 what you have described as surprise testimony.

13 MR. MIZELL: Thank you very much.

14 (Video recording of December 13, 2016, CWF Hearing at timestamp 6:10:00 and following.)

15 Following the procedure established by Hearing Officer Doduc, Petitioner later commented
16 on one of the exhibits:

17 MR. MIZELL: Since this is the first time we have been made aware that this
18 document is also linked to the testimony we would like to also be allowed to call
19 back Mr. Pruner if it becomes necessary on Friday for further cross examination.

20 (Video recording of December 13, 2016, CWF Hearing at timestamp 6:25:50 and following.)

21 At the conclusion of North Delta Cares' direct examination of its witnesses, Hearing Officer
22 Doduc informed Mr. Mizell that:

23 HEARING OFFICER DODUC: Given the extensive detour upon which Mr.
24 Pruner and Ms. Daly took us I will grant your request if necessary to – uh – continue
25 your cross examination of these two witnesses on Thursday just based on the new
26 exhibits that they pulled up today as part of their direct.

27 MR. MIZELL: Thank you very much.

28 (Video recording of December 13, 2016, CWF hearing at timestamp 6:42:40 and following.)

After conducting cross examination, Petitioners ultimately declined to recall North Delta
Cares witnesses for further cross examination based on the new exhibits:

MR. MIZELL: That concludes our cross examination of these
witnesses and at this point in time I do not foresee needing to have them return.

(Video recording of December 13, 2016, CWF hearing at timestamp 7:04:08.)

1 Based on the foregoing, it is North Delta Cares understanding that the issue of North Delta
2 Cares exhibits NDC-30, NDC-31, NDC-32, NDC-33, NDC-343, NDC-35, NDC-36, and NDC-37
3 has been resolved and the exhibits were properly offered into evidence by North Delta Cares in its
4 December 20, 2016 exhibit list and movement into evidence.

5 DWR also objects that these exhibits were listed on North Delta Cares exhibit list not
6 uploaded to the FTP site and therefore DWR could not review them. All of these exhibits are part of
7 SWRCB-3. It is North Delta Cares understanding that staff exhibits, in particular SWRCB-3, may
8 be introduced by reference in order to avoid multiple duplicative up-loadings of the same
9 documents. Each of NDC-30–37 is identified by its SWRCB-3 reference so it can easily be
10 reviewed by DWR and other parties. For example, NDC-30 is described on North Delta Cares
11 exhibit index as “SWRCB-3, Appendix A, Figure 7-27.”

12 **NDC-12, NDC-13, NDC-14, NDC25, and NDC-29.**

13 DWR objects that these exhibits were not reference in either oral or written testimony.
14 Although not explicitly referenced, As Hearing Officer Doduc observed, “I recognize that the
15 linkage was not expressly made but the linkage is there.” (Video recording of December 13, 2016,
16 CWF hearing at timestamp 6:10 and following.) For example, NDC-12 is a simulation of BDCP
17 impacts of Delta communities that depicts the impacts of construction activities on the towns of
18 Hood and Clarksburg, Ms Daly testified extensively about the impacts depicted in the exhibit. The
19 other exhibits are similarly linked to Ms. Daly’s testimony.

20 **San Louis and Delta Mendota’s Objections.**

21 San Louis objects that North Delta Cares exhibits were submitted without an itemized
22 explanation of the purpose of the exhibits. (San Louis Objections, p.2: 26–2,) North Delta Cares
23 exhibit list is in the format prescribed by the Hearing Officers and is in the format followed by all
24 other petitioners. The exhibit index is not supposed to contain argument as to the relevance of
25 exhibis.

26 San Louis also objects that North Delta Cares exhibits are hearsay. (San Louis Objections,
27 p.4: 1–3.) San Louis includes the written testimony of Mark Pruner. Mr. Pruner signed his written
28 testimony, appeared and testified under oath that his written testimony was true, and was cross

1 examined on his written testimony. There is no hearsay. Likewise the documentary evidence cited
2 by San Louis was authenticated by Ms. Daly on the stand and evidence such as NDC-11, objected
3 to by San Louis, is a portion of the EIR/S, which is an official document of a government agency
4 that is self-authenticated and may be admitted for the truth of the matter under the rules of evidence
5 and common practice. It is not hearsay.

6 San Louis also objects to NDC-26. However, NDC-26 was withdrawn and is shown in
7 ~~strikeout on North Delta Cares submitted exhibit index.~~

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9 Respectfully submitted,
10 s/Michael A. Brodsky
11 Michael A. Brodsky
12 Attorney for Protestant North Delta Cares / Barbara Daly.

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14 Dated: January 6, 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 NORTH DELTA CARES RESPONSE TO DWR'S DECEMBER 30, 2016, OBJECTIONS TO EXHIBITS SUBMITTED IN SUPPORT OF PROTESTANTS' CASES-IN-CHIEF and SAN LOUIS AND DELTA-MENDOTA'S OBJECTIONS TO EXHIBITS.

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 November 15, 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 January 6, 2017, at Santa Cruz, California.

Signature: _____

Name: Michael A. Brodsky

Title: Attorney

Party/Affiliation:

North Delta Cares / Barbara Daly

Address:

Law Offices of Michael A. Brodsky

201 Esplanade, Upper Suite

Capitola, CA 95010