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Central Delta Water Agency

11  
12 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

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14 PUBLIC HEARING TO DETERMINE  
WHETHER TO IMPOSE  
15 ADMINISTRATIVE CIVIL LIABILITY  
AGAINST BYRON-BETHANY  
16 IRRIGATION DISTRICT

**CENTRAL DELTA WATER AGENCY'S  
NOTICE OF INTENT TO APPEAR,  
REQUEST FOR EXTENSION OF TIME  
AND NOTICE OF INTENT TO CONDUCT  
DISCOVERY**

17  
18 Pre-hearing conference date: September 25, 2015  
Time: 9:00 a.m.  
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28 **CENTRAL DELTA WATER AGENCY'S NOTICE OF INTENT TO APPEAR, REQUEST FOR  
EXTENSION OF TIME, AND NOTICE OF INTENT TO CONDUCT DISCOVERY**

1 Central Delta Water Agency (“CDWA”) respectfully submits this Notice of Intent to  
2 Appear in the Byron-Bethany Irrigation District (“BBID”) Administrative Civil Liability Hearing  
3 proceeding (“ACL”) and raises objections to the current scheduling for this matter that cannot be  
4 timely addressed by waiting for the September 25<sup>th</sup> pre-hearing conference.

5 **1. CDWA Intends to Appear in the BBID ACL Hearing**

6 The State Water Resources Control Board (“Board”) has scheduled the public hearing in  
7 this matter two months after issuing the notice of public hearing. The purpose of the hearing is to  
8 determine whether civil penalties should be imposed on Byron-Bethany Irrigation District  
9 (“BBID”), a diverter from Delta channels, for diverting water in 2015 during a time that the  
10 Board’s prosecution staff alleges such diversions were unlawful.

11 CDWA intends to participate in the hearing because a fundamental issue in the hearing  
12 will be the Board’s determination of water availability in Delta channels. The CDWA Notice of  
13 Intent to Appear is attached hereto as **Exhibit A**. The water availability issue is critically  
14 important to landowners within CDWA. Any determinations made as part of the BBID ACL  
15 proceeding could have impacts for CDWA landowners. CDWA’s participation in this proceeding  
16 is not a waiver of CDWA’s position that the Board lacks jurisdiction to regulate BBID’s diversion  
17 in the first place.

18 **2. Extensions of Time are Warranted to Allow for Discovery**

19 A determination of water availability, or unavailability, requires factual testimony. The  
20 Board prosecution team will have an initial burden to prove water was unavailable for diversion  
21 by BBID. Participating parties may then present their own evidence on this issue. The Parties  
22 cannot meaningfully prepare for and participate in a hearing involving these complex factual  
23 issues without first conducting discovery to learn the complete factual basis for the prosecution  
24 team’s conclusions. Parties are expressly entitled to conduct discovery before the hearing for this  
25 purpose. (See, e.g., Wat. Code, §§ 1080, 1100 [“The board or any party to a proceeding before it  
26 may, in any investigation or hearing, cause the deposition of witnesses residing within or without  
27 the state to be taken in the manner prescribed by law for depositions in civil actions in the  
28 superior courts of this state.”]; 23 C.C.R. § 649.6; see also Gov. Code, §§ 11450.10, 11450.20,  
11450.50.)

1 As currently scheduled, there is no time available to conduct discovery before the  
2 identification of witnesses (two weeks after notice of hearing), filing of proposed testimony (two  
3 months after notice of hearing), or the hearing (2.5 months after notice of hearing). Preparing  
4 expert testimony and completing discovery takes time. CDWA, for example, must provide an  
5 individual at least 20 days to produce records requested in a deposition subpoena. (Code of Civ.  
6 Proc., § 2020.410(b).) Initial discovery often leads to further discovery, requiring additional  
7 time.

8 Requiring the parties to proceed on such a tight time schedule, without a full and fair  
9 opportunity to conduct discovery, would be a violation of due process. (See, e.g., *People v.*  
10 *Alexander* (2010) 49 Cal.4th 846, 934, *as modified on denial of reh'g* (Sept. 29, 2010) [“ ‘To  
11 effectuate the constitutional rights to counsel and to due process of law, an accused must . . . have  
12 a reasonable opportunity to prepare a defense and respond to the charges.’ ”] [citation omitted];  
13 *Sallas v. Municipal Court* (1978) 86 Cal.App.3d 737, 742 [“due process of law requires that an  
14 accused . . . have a reasonable opportunity to prepare and present his defense. . . .”].)

### 15 **3. The ACL Should be Stayed Pending Resolution of Pending Litigation on the** 16 **Same Issues**

17 CDWA also objects to the Board’s decision to proceed with an ACL hearing against  
18 BBID given the already pending litigation filed by BBID and others, including CDWA, over the  
19 factual accuracy of the Board’s water availability determinations during 2015. The Board and  
20 Courts have concurrent jurisdiction to address certain water rights issues. (See *National Audubon*  
21 *Society v. Superior Court* (1983) 33 Cal.3d 419, 451 [discussing Water Code statutes that  
22 “necessarily imply that the superior court has concurrent original jurisdiction in suits to determine  
23 water rights”].) BBID sued the Board over its water availability determinations and curtailment  
24 notices before the Board decided to proceed with an ACL Complaint against BBID, raising the  
25 same factual and legal issues. It would be improper for the Board to try to race to decide (as a  
26 quasi-judicial tribunal) the same disputed factual and legal issues in this ACL hearing which are  
27 already pending in litigation in a trial court against the Board (as a party).

28 It is also unnecessary and a waste of party resources. Any remaining ACL issues can be  
decided, if necessary, at the conclusion of the pending litigation.


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For these reasons, CDWA urges the Board to place the BBID ACL proceeding on hold, or alternatively, at a minimum, continue the hearing date and deadlines related to the proceeding for at least one year to allow adequate time for the discovery.

Respectfully submitted,

Dated: September 2, 2015

SPALETTA LAW PC

By:   
\_\_\_\_\_  
JENNIFER L. SPALETTA  
Attorney for Central Delta Water Agency

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# EXHIBIT A

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**NOTICE OF INTENT TO APPEAR**

Central Delta Water Agency plans to participate in the water right hearing regarding  
 (name of party or participant) Public Hearing to determine whether to impose Administrative Civil Liability  
 against Byron-Bethany Irrigation District

**scheduled to commence**  
Pre-hearing conference on 9/25/15; Hearing to commence 10/28/15

**Check all that apply:**

- I/we intend to present a policy statement only.
- I/we intend to participate by cross-examination or rebuttal only.
- I/we decline electronic service of hearing-related materials.
- I/we plan to call the following witnesses to testify at the hearing.

| NAME | SUBJECT OF PROPOSED TESTIMONY  | ESTIMATED LENGTH OF DIRECT TESTIMONY | EXPERT WITNESS (YES/NO) |
|------|--|--------------------------------------|-------------------------|
|      | CDWA is unable to list its witnesses at this time because it must first conduct discovery. CDWA's witnesses are likely to be primarily rebuttal witnesses which cannot be identified at this time. |                                      |                         |
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(If more space is required, please add additional pages or use reverse side.)

Name, Address, Phone Number and Fax Number of Attorney or Other Representative:

Signature: Jennifer Spaletta Dated: 9/1/15

Name (Print): Jennifer Spaletta of Spaletta Law; Dante Nomellini and Dante Nomellini, Jr. of  
 Nomellini, Grilli & McDaniel

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