

---

## State Water Resources Control Board

November 25, 2015

### VIA ELECTRONIC EMAIL

To: Enclosed Service List of Participants:

### **Hearing Officer's Ruling on Motion by Byron-Bethany Irrigation District to Quash the Prosecution Team's Subpoena Duces Tecum, or Alternatively, Motion for Protective Order to Limit the Scope of Further Discovery**

#### **Background**

On October 29, 2015, the Division of Water Rights Prosecution Team (Prosecution Team) served a subpoena duces tecum on Byron-Bethany Irrigation District (BBID). The subpoena describes eleven categories of documents to be produced related to the diversion and delivery of water by BBID during the period from June 1 to September 30, 2015, and related to agreements or contracts between BBID and other parties to supply or wheel water during the period from June 1 to September 30, 2015. On November 9, 2015, BBID filed a motion to quash subpoena, or alternatively motion for protective order. BBID objected that the subpoena is: (1) overly broad and not reasonably calculated to lead to the discovery of admissible evidence; (2) unduly burdensome and harassing; and (3) seeks irrelevant personal information.

BBID's motion is granted in part, and the scope of documents to be produced by BBID is hereby limited. In every instance in which the date range "June 1 through September 30, 2015," appears in the eleven categories of documents described in the subpoena, the date range "June 1 through June 30" is substituted. This ruling is made without prejudice to any party filing a subsequent motion based on information not previously offered.

#### **Legal Analysis**

A party seeking a protective order bears the burden of demonstrating good cause for the order sought. (*Nativi v. Deutsche Bank National Trust Co.* (2014) 223 Cal.App.4th 261, 318.) The Administrative Procedure Act authorizes the presiding officer in an adjudicative proceeding to issue an order that is appropriate to protect the parties or witness from unreasonable or oppressive demands pursuant to a subpoena or subpoena duces tecum, including violations of the right to privacy. (Gov. Code, § 11450.30.) The Civil Discovery Act directs that the scope of discovery shall be limited if the burden, expense, and intrusiveness of that discovery is outweighed by the likelihood of discovering admissible evidence. (Cal. Civ. Code Proc. § 2017.020.) A method of discovery shall be restricted if the discovery sought would be

unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive. (*Id.*, § 2019.030, subds. (a) & (b).)

1. *Relevancy of the requested documents.*

BBID first argues that the subpoena should be quashed because the Prosecution Team has not made a prima facie showing that the requested documents are both relevant and necessary to prove a material element of its claims. (Motion at p. 5.) The Civil Discovery Act allows discovery of information that is "relevant to the subject matter involved in the pending actions" and "appears reasonably calculated to lead to the discovery of admissible evidence." (Code Civ. Pro., § 2017.010.) BBID provides no support for its proposed heightened standard, but seems to apply the balancing test for the discovery of confidential proprietary information in civil actions. (*Hofmann Corp. v. Sup. Ct.* (1985) 172 Cal.App.3d 357, 357-58.) Requiring a discovering party to demonstrate the necessity of obtaining certain information to prove its case may be appropriate when a party seeks confidential information. But BBID has not alleged with particularity the confidential nature of the documents sought by the Prosecution Team. The documents seem to include only public records that would be available to any member of the public pursuant to a request under the Public Records Act, Government Code § 6250 *et seq.* Therefore, I decline to require the Prosecution Team to make a showing of necessity.

Secondly, BBID asserts that the subpoena is overly broad because it includes documents related to dates other than those of the alleged unauthorized diversions. The subpoena requires the production of documents related to the diversion of water by BBID between June 1, 2015 and September 30, 2015. BBID does not dispute that documents relating to the dates of the alleged unauthorized diversions between June 13, 2015, and June 25, 2015 are relevant and pertinent to the underlying enforcement action. (Motion, p. 3.)

The Prosecution Team asserts in support of the scope of its request that:

The amount and timing of BBID's diversions immediately preceding the State Water Board staff's June 12 notice of unavailability are relevant as they may shed light on the purposes and extent of BBID's diversions on June 13 and thereafter. Likewise, BBID's pattern of diversions during and after the alleged violations period, as compared to its water supply contracts, will also be relevant to test any claims BBID may make as to the purpose of its June 13-25 diversions.

(Prosecution Team's Response to Motion, p. 3.)

Information about BBID's diversions both before and after the period of alleged unauthorized diversions is relevant to the subject matter of this action. If BBID is found to have made unauthorized diversions or use of water in violation of section 1052, the board must consider all relevant circumstances in determining the amount of civil liability, including, but not limited to, the extent of the harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation

occurred, and any corrective action taken by the violator. (Wat. Code, § 1055.3.) The complaint and as a result, this proceeding, are limited to allegedly unauthorized diversions by BBID that occurred from June 13 to June 25. The Prosecution Team may not compel the production of information that is *only* relevant to diversions outside of this time period. But information about diversions that occurred before and after June 13 through June 25, 2015, including information about delivery and water supply contracts, is relevant to the factors to be considered under Water Code section 1055.3 and reasonably likely to lead to the discovery of admissible evidence respecting these factors.

*2. Burden of producing the documents.*

The likelihood of discovering admissible evidence must, however, be weighed against the burden, expense, and intrusiveness of producing the documents and the ability of the propounding party to obtain the same information through a less burdensome or less costly means. (Code Civ. Pro., §§ 2017.020 & 2019.030.) BBID declares that “BBID will need to commit significant man-hours and monetary expenditure to comply with SWRCB’s broad request for documents in the Subpoena unless it is modified as requested.” (Declaration in Support of Motion, p. 2.) BBID does not provide any specific factual information about the burden of responding to the subpoena, for example, an estimate of the number of documents that would need to be reviewed. Absent more specific information, it is difficult to assess and weigh the burden that would be imposed by the production. (*Goodman v. Citizens Life & Cas. Ins. Co.* (1967) 253 Cal.App.2d 807, 819.) But I also disagree with the Prosecution Team’s claim that “there is no reason to believe that producing diversion-related information for additional days will impose any additional burden on BBID.” (Response to Motion, p. 4.) It is reasonable to assume that the broader the temporal scope of the subpoena, the more documents will be identified as potentially responsive and require review.

The Prosecution Team notes that BBID has imposed a much more substantial burden of production on the State Water Resources Control Board (State Water Board) by requesting, through its counsel, broad categories of documents in both time and subject matter pursuant to the Public Records Act, Government Code § 6250 *et seq.* (Response to Motion, p. 2.) But the comparison is somewhat inapt. The State Water Board is subject to obligations pursuant to the Public Records Act independent from this proceeding. I have no authority to commute the burden imposed by requests for public documents under the Act. And to the extent BBID requested the same documents in this proceeding, that request imposes no additional burden because the Prosecution Team was already under an obligation to produce the documents.<sup>1</sup> In contrast, BBID is under no preexisting obligation to produce the documents sought by the Prosecution Team. Therefore, my consideration of the burden imposed includes the entire burden of producing the documents relating to diversions before and after the alleged violations.

---

<sup>1</sup> In my ruling of October 30, 2015, I directed that the Prosecution Team is not required to produce documents at a more accelerated schedule pursuant to a request in this proceeding if the same documents are already required to be produced by the Prosecution Team within a reasonable time pursuant to the Public Records Act. (Hearing Officer’s Ruling, October 30, 2015, p. 2.)

Some of the information sought by the Prosecution Team is likely obtainable from other sources that are more convenient and less burdensome. BBID is required to disclose all of the evidence on which it will rely to present its case-in-chief in advance of the hearing. The Prosecution Team will have the opportunity to cross-examine BBID's witnesses during the hearing, and such cross-examination is not limited to the scope of the witnesses' direct testimony. The Prosecution Team may seek relevant information from these other sources. There is also a likelihood that the Prosecution Team could obtain the same information from a more focused production of relevant documents. As the temporal scope of the subpoena is broadened, there is a risk of producing only duplicative or cumulative information. In weighing the relative burden of production against the likelihood that relevant evidence can be obtained by the Prosecution Team, based on the information before me, I find a limitation on the scope of the subpoena to be justified.

*3. Personal information related to purveyors, customers, and other entities.*

BBID's final objection to the scope of the subpoena is that the documents sought include personal information relating to purveyors, customers, and entities irrelevant to the underlying adjudicative proceeding.

The subpoena directs production of water supply agreements or contracts and documents related to the delivery of water by BBID. Insofar as these documents relate to the delivery of water during the period of alleged unauthorized diversions from June 13 to June 25, and to diversions that occurred shortly before and after these dates, the documents are relevant to the subject matter of this proceeding and are reasonably calculated to lead to the discovery of admissible evidence. Information about BBID's delivery and water supply contracts in place leading up to and immediately after the period of alleged unauthorized diversions may be relevant to determining the source of water for BBID's diversions from June 13 through June 25, the purposes for which the water was diverted, and other factors to be considered under Water Code section 1055.3.

BBID does not identify the types of personal information that may be found in the potentially responsive documents and whether concerns about privacy can be addressed through redaction. If the responsive documents include contracts or agreements with natural persons, such documents may contain personal information, here defined as information that identifies or describes a natural person, including but not limited to the individual's name, home address, and home telephone number. The disclosure of personal information is not necessary for purposes of this proceeding, nor does the Prosecution Team appear to seek this information. (See Response to Motion, p. 5.) To the extent that responsive documents contain personal information, that information need not be disclosed by BBID. Information about quantities of water delivered or to be delivered in a document otherwise responsive to the subpoena as limited by this ruling, is not personal information.

## Conclusion

The State Water Board's hearing procedures require disclosure of evidence in advance, allow cross-examination of witnesses not limited to the scope of their direct testimony, and do not strictly follow the rules of evidence applicable to civil actions. Therefore, the burden and cost of pre-hearing discovery, and the likelihood that the same information could be obtained through other, less expensive means, typically outweigh the expected benefit to the discovering party. The State Water Board's prior approval is not required for a party to conduct discovery pursuant to Water Code section 1110 and sections 11450.10 and 11450.20 of the Government Code, but affected parties or witnesses may seek a protective order or file a motion to quash with the hearing officer. As a result, adjudicative proceedings before the State Water Board rarely involve pre-hearing discovery.

The parties to this proceeding have allowed for some discovery by consent because the Prosecution Team and the Department of Water Resources have not objected to the deposition of their witnesses.<sup>2</sup> Whether such discovery would be appropriate over the objection of the burdened party is a question for another proceeding. But given that extensive discovery is already occurring, and the parties have thus far been unable to reach any stipulation as to undisputed facts, I find that allowing some discovery by the Prosecution Team is appropriate.

I am limiting the scope of documents to be produced in response to the subpoena as follows: In every instance in which the date range "June 1 through September 30, 2015," appears in the eleven categories of documents described in the subpoena, the date range "June 1 through June 30, 2015" shall be substituted. This limitation is based on the information offered by the parties respecting the burden of BBID producing documents in addition to those related to the allegedly unauthorized diversions, and the ability of the Prosecution Team to obtain the relevant information through this narrowed production or by other available means. Personal information in otherwise responsive documents may be redacted. The documents must be produced to the Prosecution Team within twenty calendar days from the date of this ruling.

This ruling is made without prejudice to any party filing a subsequent motion based on information not previously offered.

Sincerely,



Tam M. Doduc  
Hearing Officer

Cc:  
Enclosure: Service List

---

<sup>2</sup> The Prosecution Team objected only to the timing of the depositions. (Prosecution Team's Motion for Protective Order, October 15, 2015.)

**SERVICE LIST OF PARTICIPANTS**  
**BYRON-BETHANY IRRIGATION DISTRICT**  
**ADMINISTRATIVE CIVIL LIABILITY HEARING**  
**(09/02/15; Revised: 09/10/15; Revised 10/06/15; Revised 10/22/15)**

<b>PARTIES</b>	
<p>THE FOLLOWING <b><u>MUST BE SERVED</u></b> WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (All have AGREED TO ACCEPT electronic service, pursuant to the rules specified in the hearing notice.)</p>	
<p><b>Division of Water Rights</b> Prosecution Team Andrew Tauriainen, Attorney III SWRCB Office of Enforcement 1001 I Street, 16th Floor Sacramento, CA 95814 <a href="mailto:andrew.tauriainen@waterboards.ca.gov">andrew.tauriainen@waterboards.ca.gov</a></p>	<p><b>Byron Bethany Irrigation District</b> Daniel Kelly Somach Simmons &amp; Dunn 500 Capitol Mall, Suite 1000, Sacramento, CA 95814 <a href="mailto:dkelly@somachlaw.com">dkelly@somachlaw.com</a></p>
<p><b>Patterson Irrigation District</b> <b>Banta-Carbona Irrigation District</b> <b>The West Side Irrigation District</b> Jeanne M. Zolezzi Herum\Crabtree\Suntag 5757 Pacific Ave., Suite 222 Stockton, CA 95207 <a href="mailto:jzolezzi@herumcrabtree.com">jzolezzi@herumcrabtree.com</a></p>	<p><b>City and County of San Francisco</b> Jonathan Knapp Office of the City Attorney 1390 Market Street, Suite 418 San Francisco, CA 94102 <a href="mailto:jonathan.knapp@sfgov.org">jonathan.knapp@sfgov.org</a></p> <p>Robert E. Donlan Ellison, Schneider &amp; Harris L.L.P. 2600 Capitol Avenue, Suite 400 Sacramento, CA 95816 (916) 447-2166 <a href="mailto:red@eslawfirm.com">red@eslawfirm.com</a></p>
<p><b>Central Delta Water Agency</b> Jennifer Spaletta Spaletta Law PC PO Box 2660 Lodi, CA 95241 <a href="mailto:jennifer@spalettalaw.com">jennifer@spalettalaw.com</a></p> <p>Dante Nomellini and Dante Nomellini, Jr. Nomellini, Grilli &amp; McDaniel <a href="mailto:ngmplcs@pacbell.net">ngmplcs@pacbell.net</a> <a href="mailto:dantejr@pacbell.net">dantejr@pacbell.net</a></p>	<p><b>California Department of Water Resources</b> Robin McGinnis, Attorney PO Box 942836 Sacramento, CA 94236-0001 <a href="mailto:robin.mcginnis@water.ca.gov">robin.mcginnis@water.ca.gov</a></p>
<p><b>Richard Morat</b> 2821 Berkshire Way Sacramento, CA 95864 <a href="mailto:rjmorat@gmail.com">rjmorat@gmail.com</a></p>	<p><b>San Joaquin Tributaries Authority</b> Valerie Kincaid O'Laughlin &amp; Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95814 <a href="mailto:vkinaid@olaughlinparis.com">vkinaid@olaughlinparis.com</a> <a href="mailto:lwood@olaughlinparis.com">lwood@olaughlinparis.com</a></p>

**SERVICE LIST OF PARTICIPANTS  
BYRON-BETHANY IRRIGATION DISTRICT  
ADMINISTRATIVE CIVIL LIABILITY HEARING  
(09/02/15; Revised: 09/10/15; Revised 10/06/15; Revised 10/22/15)**

<p><b>South Delta Water Agency</b> John Herrick, Esq. 4255 Pacific Ave., Suite 2 Stockton, CA 95207 <a href="mailto:jherrlaw@aol.com">jherrlaw@aol.com</a></p> <p>Dean Ruiz, Esq. Harris, Perisho &amp; Ruiz, Attorneys at Law 3439 Brookside Road, Suite 210 Stockton, CA 95219 <a href="mailto:dean@hprlaw.net">dean@hprlaw.net</a></p>	<p><b>State Water Contractors</b> Stefani Morris, Attorney 1121 L Street, Suite 1050 Sacramento, CA 95814 <a href="mailto:smorris@swc.org">smorris@swc.org</a></p>
---	--