

September 18, 2015

Via Electronic Mail

Tam M. Doduc, Hearing Officer
State Water Resources Control Board
Division of Water Rights
1001 I Street, 2nd Floor
Sacramento, CA 95814

Re: ENF01951 Pre-Hearing Conference

Dear Hearing Officer Doduc:

This letter responds to the Hearing Team's letter dated September 11, 2015 (Procedural Letter), regarding the Pre-Hearing Conference in the State Water Resources Control Board's (SWRCB) Enforcement Action ENF01951 (Enforcement Action).

The Procedural Letter improperly expands the scope of the proceedings in the Enforcement Action beyond those identified in the SWRCB's August 19, 2015 Notice of Public Hearing and Pre-Hearing Conference (Hearing Notice). The Hearing Notice presents Key Issues to be determined through the Enforcement Action as follows:

KEY ISSUES

In determining the amount of civil liability, the Board must take into consideration all relevant circumstances (Wat. Code, § 1055.3). The hearing will address the following key issues:

- 1) Whether the State Water Board should impose administrative civil liability upon BBID for trespass and, if so, in what amount and on what basis;
 - a. What is the extent of harm caused by BBID's alleged unauthorized diversions?
 - b. What is the nature and persistence of the alleged violation?
 - c. What is the length of time over which the alleged violation occurred?
 - d. What corrective actions, if any, have been taken by BBID?

- 2) What other relevant circumstances should be considered by the State Water Board in determining the amount of any civil liability? (Emphasis added.)

The issue of whether BBID engaged in an unlawful diversion of water is absent from the Hearing Notice. However, the Procedural Letter now identifies, in addition to the two Key Issues contained in the Hearing Notice, a new Key Issue of whether BBID engaged in an unlawful diversion of water. As a procedural matter, the Hearing Notice should be amended or otherwise revised to include this new Key Issue, and the timeline revised accordingly.

Additionally, the Procedural Letter directs the Prosecution Team to submit a status report on “pending requests for records pursuant to the Public Records Act relevant to this matter.”¹ The SWRCB’s compliance with BBID’s requests for records relevant to this Enforcement Action under the California Public Records Act (PRA) is the subject of pending litigation in Santa Clara Superior Court. BBID will object to any discussion in this Enforcement Action of the pending litigation over its PRA requests, as the SWRCB has no jurisdiction over the PRA claims pending in Court.²

Furthermore, the Procedural Letter requires BBID to provide information regarding Mr. Gilmore’s pre-scheduled business during the currently scheduled Public Hearing. As a preliminary matter, BBID objects to the SWRCB’s demand that Mr. Gilmore provide specificity on Mr. Gilmore’s business matters. The SWRCB has itself sought delay in adjudicative proceedings based solely on the representation that SWRCB staff was unavailable. For example, in the case of *California Farm Bureau Federation, et al. v. State Water Resources Control Board, et al.* Sacramento Superior Court Case No. 03CS01776, on remand from the California Supreme Court, the SWRCB sought a continuance of the trial date based solely on the representation from the SWRCB’s counsel that Mr. Andrew H. Sawyer was unable to attend trial due to a pre-planned vacation. Mr. Sawyer was not appearing at trial on behalf of the SWRCB, and was not a witness in the trial. Instead, Mr. Sawyer was simply attending trial on behalf of the SWRCB. (See Notice of Motion and Motion for Continuance of Trial Date; Supporting Memorandum of Points and Authorities; Declaration of Mosley and Exhibits, dated December 1, 2011, attached hereto.) Mr. Sawyer was not required, nor did he offer, any particulars about his pre-planned vacation or unavailability for the trial. As a result of the SWRCB’s Motion, the trial was postponed by nearly 6 months. (See Minute Order, dated January 13, 2012, attached hereto.)

¹ It is not evident from Procedural Letter how the Hearing Team gained knowledge of, or is otherwise aware of, any PRA requests submitted by any of the parties to this proceeding. BBID’s PRA request was submitted the day *after* the Enforcement Action was initiated by the SWRCB. At a minimum, at that time there should have been procedures in place that would prevent *ex parte* communications to the Hearing Team regarding matters like BBID’s Public Records Act. In view of the admonition in your letter regarding the prohibition of *ex parte* communications we are troubled by your direction to the Prosecution Team to submit a status report on matters that should not be before you.

² It is BBID’s position that the SWRCB lacks jurisdiction to adjudicate any of the matters pending in Santa Clara Superior Court.

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The Hearing Team's demand for more particulars regarding Mr. Gilmore's pre-planned business implies that Mr. Gilmore is not actually unavailable during the currently scheduled Public Hearing. Notwithstanding BBID's objections, Mr. Gilmore, in addition to serving as the General Manager of BBID, also serves as the President of the California Utility Executive Management Association (CUEMA).³ CUEMA currently has a meeting scheduled for October 28 through October 30, 2015, and Mr. Gilmore, as President of CUEMA, has existing plans to attend the meeting.

The Procedural Letter also directs BBID to engage the Prosecution Team and "jointly prepare and submit an initial written stipulation of any undisputed facts by noon, September 23, 2015" with respect to issues relevant to potential fines and penalties for the unlawful diversion of water. It is BBID's position that it did not unlawfully divert water, and any requirement that BBID quantify the alleged unlawful diversions is premature. Moreover, BBID is concerned that the Hearing Team did not direct the parties to develop a stipulation regarding the method of determining whether water was available for water right holders in the California Delta, which, despite being absent from the Hearing Notice, should be the threshold issue in the Enforcement Proceeding.

In addition to the foregoing, BBID hereby restates the objections raised in its September 2, 2015 letter regarding the short timeframes associated with this Enforcement Proceeding. In addition to the prior objections, BBID objects to the short timeframes provided in the Procedural Letter as a further violation of BBID's rights to due process.

Very truly yours,


Michael E. Vergara
General Counsel
Byron-Bethany Irrigation District

MEV:mb

cc: See attached Service List

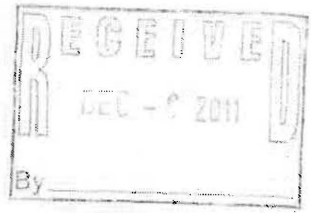
Senator Cathleen Galgiani, Senate District 05
(Via electronic mail: senator.galgiani@senate.ca.gov; marian.norris@sen.ca.gov)

Assemblywoman Dr. Susan Talamantes Eggman, District 13
(Via electronic mail: info@susaneggman.com)

³ In addition to serving as the General Manager of BBID and as President of CUEMA, Mr. Gilmore is the General Manager of the Byron Sanitary District, the Executive Director-Byron Bethany Joint Powers Authority, a Director of the San Luis & Delta-Mendota Water Authority, a Director of the State and Federal Contractors Water Authority, a Director of the National Water Resources Association, a Board Member of ACWA's Region 6 (on behalf of SLDMWA), and serves on various ACWA committees. Mr. Gilmore was previously a Board Member of ACWA and is the former President of ACWA's Health Benefits Authority. As such, his schedule often fills months in advance.

ATTACHMENT 1

Dan



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 Attorney General of California
 2 WILLIAM L. CARTER
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 3 MOLLY K. MOSLEY, SBN 185483
 Deputy Attorney General
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 7 *Attorneys for Defendants and Respondents,
 State Water Resources Control Board et al.*

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 9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 10 COUNTY OF SACRAMENTO

11 CALIFORNIA FARM BUREAU
 12 FEDERATION, ET AL.,
 13 Plaintiffs and Petitioners,
 14 v.
 15 STATE WATER RESOURCES CONTROL
 16 BOARD, ET AL.,
 17 Defendants and Respondents.

Case No. 03CS01776 (consolidated with Case
 No. 04CS00473; coordinated with Riverside
 County Superior Court Case No. INC 043178,
 transferred to Sacramento County and stayed)
 On remand from the Supreme Court of the
 State of California, Case No. S150518
**NOTICE OF MOTION AND MOTION
 FOR CONTINUANCE OF TRIAL DATE;
 SUPPORTING MEMORANDUM OF
 POINTS AND AUTHORITIES;
 DECLARATION OF MOSLEY AND
 EXHIBITS**
 Date: January 13, 2012
 Time: 10:30 a.m.
 Dept: 13
 Judge: Hon. Raymond M. Cadei
 Original Trial Date: April 15, 2005
 Action Filed: December 17, 2003

23 TO EACH PARTY AND THEIR ATTORNEY OF RECORD:

24 PLEASE TAKE NOTICE that on January 13, 2012 a.m. in Department 13 of the above-
 25 entitled court, Defendants/Respondents the State Water Resources Control Board, et al.
 26 (Respondents) will, and hereby do, move for an order continuing the trial of the above-captioned
 27 action from July 16, 2012, to August 13, 2012, or in the alternative, to a date more convenient for
 28 the Court later in August or in September 2012.

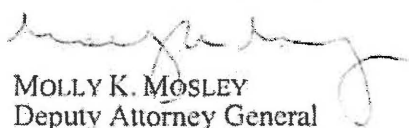
1 Respondents move for an order continuing the trial date pursuant to Code of Civil
2 Procedure section 595.2, in light of the agreement among counsel to the parties that postponing
3 the trial to August or September 2012 would allow the parties' respective counsel to maximize
4 the efficiency of their respective presentations to the Court at trial. Respondents bring this
5 motion, as required by California Rules of Court, rule 3.1332, subdivision (b), even though the
6 parties agree on a continuance from July 16, 2012 to August or September 2012.

7 This motion is based on this notice, the pleadings, records and files in this matter, the
8 memorandum of points and authorities, the declaration of Molly K. Mosley, the Court's file, and
9 any other matter the Court may consider at the hearing of the motion.

10 Pursuant to Local Rule 3.04, the court will make a tentative ruling on the merits of this
11 matter by 2:00 p.m., the court day before the hearing. You may access and download the court's
12 ruling from the court's website at <http://www.saccourt.ca.gov>. If you do not have online access,
13 you may obtain the tentative ruling over the telephone by calling (916) 874-7786 and a deputy
14 clerk will read the ruling to you. If you wish to request oral argument, you must contact the clerk
15 at (916) 874-7786 and the opposing party before 4:00 p.m. the court day before the hearing. If
16 you do not call the court and the opposing party by 4:00 p.m. on the court day before the hearing,
17 no hearing on the matter will be held.

18 Dated: December 1, 2011

KAMALA D. HARRIS
Attorney General of California

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21 MOLLY K. MOSLEY
22 Deputy Attorney General
23 *Attorneys for Defendants and Respondents*
24 *State Water Resources Control Board,*
25 *Board of Equalization, et al.*

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2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **I. INTRODUCTION**

4 By this motion, Respondents (with the agreement of Plaintiffs/Petitioners in all affected
5 actions) seek to have this Court continue the trial date of consolidated lead cases from July 16,
6 2012, to August 13, 2012, or, in the alternative, to a date more convenient for the Court later in
7 August or in September 2012. Respondents bring this motion because following the October 21,
8 2011 Case Management Conference at which the July 16, 2012 trial date was set, Respondents'
9 counsel learned that an important client representative from the State Water Resources Control
10 Board would not be available during that time period.

11 **II. FACTS**

12 At the October 21, 2011 Case Management Conference, the Court set the trial date for July
13 16, 2012; eight days of trial are scheduled. All counsel concurred. Unfortunately, Respondents'
14 counsel subsequently learned that an important client representative from the State Water
15 Resources Control Board would not be available, due to a prearranged vacation during that time
16 period. (Mosley Decl., ¶ 2.) The client representative is Andrew H. Sawyer, Assistant Chief
17 Counsel in charge of legal matters for the Division of Water Rights. He is an integral part of
18 Respondents' legal team, including the presentation of Respondents' case to the Court at trial.
19 (*Ibid.*) Fortunately, counsel to Plaintiffs/Petitioners agreed to a continuance to August or
20 September 2012. (*Id.*, at ¶¶ 4, 5.)

21 Hence, Respondents move for an order continuing the trial date pursuant to Code of Civil
22 Procedure section 595.2, in light of the agreement among counsel to the parties.

23 **III. DISCUSSION**

24 **A. All Parties Agree to Continue the Trial to August or September 2012.**

25 A party may seek a trial continuance by ex parte application or by noticed motion. A
26 request to the Court is required even if the parties agree to a continuance. (Cal. Rules of Court,
27 rule 3.1332, subd. (b).) At the request of Respondents, all parties are agreeable to a continuance
28 of the trial from July 16, 2012, for 30 days, or, in the alternative, to a date more convenient for
the Court later in August or in September 2012. (Mosley Decl., ¶¶ 4-6.)

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When the parties agree to a continuance of a trial date, Code of Civil Procedure section 595.2 provides:

In all cases, the court shall postpone a trial, or the hearing of any motion or demurrer, for a period of not to exceed thirty (30) days, when all attorneys of record of parties who have appeared in the action agree in writing to such postponement.

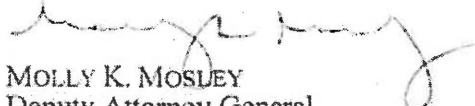
(Code Civ. Proc., § 595.2.) This represents a statement of legislative policy: "When opposing counsel needs a continuance, courts should look to section 595.2 as a statement of policy in favor of professional courtesy. . . ." (*Pham v. Nguyen* (1997) 54 Cal.App.4th 11, 15-16.) As counsel for Plaintiffs/ Petitioners are agreeable to a continuance, the Court should grant the motion.

IV. CONCLUSION

For the reasons stated, Respondents respectfully request the Court grant this motion, and to continue the trial from July 16, 2012 for 30 days, or in the alternative, to a date more convenient for the Court later in August or in September 2012.

Dated: December 1, 2011

Respectfully Submitted,
KAMALA D. HARRIS
Attorney General of California

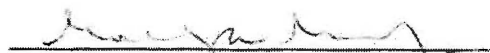

MOLLY K. MOSLEY
Deputy Attorney General
*Attorneys for Defendants and Respondents
State Water Resources Control Board,
Board of Equalization, et al.*

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6. On November 16, 2011, I emailed all counsel for Plaintiffs/Petitioners, including newly substituted counsel to Plaintiff/Petitioner City of Fresno, Kenton Alm, to inform them that Respondents would file a motion for continuance; I specifically asked Mr. Alm to add his concurrence to Respondents' anticipated motion for continuance of the trial date, in light of Mr. Somach's and Mr. Peltzer's concurrence. (A true and correct copy of my November 16, 2011 email is attached as Exhibit 4.)

7. On November 30, 2011, I received an email from Mr. Alm informing me that he had no objection to moving the trial date. (A true and correct copy of the November 30, 2011 email is attached as Exhibit 5.)

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on December 1, 2011, at Sacramento, California.


Molly K. Mosley

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ATTACHMENT 2

