

Farwell Jensen, Jane@Waterboards

From: Tauriainen, Andrew@Waterboards
Sent: Monday, January 25, 2016 12:27 PM
To: Dan Kelly; Unit, Wr_Hearing@Waterboards
Cc: Yolanda De la Cruz; Michael Vergara; Herrick, John @aol.com; Jennifer L. Spaletta; Valerie Kincaid; Jeanne Zolezzi; Tim O'Laughlin; kharrigfeld@herumcrabtree.com; Jonathan Knapp; Richard Morat; McGinnis, Robin C.@DWR; Stefanie Morris; Rick Gilmore; Janelle Krattiger; Daniel O'Hanlon; Akroyd, Rebecca@KMTG; Philip Williams; ngmplcs@pacbell.net; Dante Nomellini Jr.; Michelle Bracha; Uoxina Santos-Aguirre; Kuenzi, Nicole@Waterboards; Farwell Jensen, Jane; Mona, Ernie@Waterboards; Buckman, Michael@Waterboards
Subject: RE: BBID/WSID Hearings

The Prosecution Team does not object to BBID's service via online storage today, or last Tuesday. The Prosecution Team seeks clarification from the Hearing Team that all parties may use this method going forward, because the Hearing Notice and subsequent Hearing Team communications are silent.

The Hearing Officers' direction regarding pre-hearing briefing has been clear. BBID and others requested the opportunity for pre-hearing briefing. The Hearing Officers granted leave for BBID and WSID to each file one motion to dismiss, motion for summary judgment, or a combined motion, not to exceed ten pages. BBID Hearing Officer Doduc granted leave for the BBID parties to submit one brief on specific legal issues, not to exceed ten pages, or a combined brief not to exceed twenty pages. BBID and WSID ignored this direction. Moreover, BBID filed five separate motions to dismiss, but does not appear to have submitted a brief on the specific legal issues requested by Hearing Officer Doduc.

BBID's insistence that the issues framed in the separate litigation are appropriate for adjudication in the ACL proceeding is misplaced. The ACL Complaint frames the issues, and neither the Hearing Team nor the Prosecution Team have indicated that separate issues framed in the litigation are appropriate here. Nevertheless, BBID had the opportunity to raise and brief any such issues within the scope of a single, ten-page, motion to dismiss and/or motion for summary judgment. There is no need for separate formal hearing on the Prosecution Team's request to strike BBID's and WSID's excessive motion briefing.

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From: Dan Kelly [mailto:dkelly@somachlaw.com]
Sent: Monday, January 25, 2016 11:59 AM
To: Unit, Wr_Hearing@Waterboards

Cc: Tauriainen, Andrew@Waterboards; Yolanda De la Cruz; Michael Vergara; Herrick, John @aol.com; Jennifer L. Spaletta; Valerie Kincaid; Jeanne Zolezzi; Tim O'Laughlin; kharrigfeld@herumcrabtree.com; Jonathan Knapp; Richard Morat; McGinnis, Robin C.@DWR; Stefanie Morris; Rick Gilmore; Janelle Krattiger; Daniel O'Hanlon; Akroyd, Rebecca@KMTG; Philip Williams; ngmplcs@pacbell.net; Dante Nomellini Jr.; Michelle Bracha; Uoxina Santos-Aguirre
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Hearing Team:

First, all parties agreed to accept electronic service. Due to size limitations for email submittals, BBID utilizes a file sharing service for the electronic service of documents. BBID served its Case-in-Chief submittal using this method - and no party objected. It is unclear why the Prosecution Team now objects to being served electronically through a file sharing service.

Second, regarding briefing, the Hearing Officer's October 30, 2015 Ruling provides, in pertinent part:

Pre-hearing briefing of legal issues:

After reviewing the responses submitted by BBID, City and County of San Francisco, Department of Water Resources, WSID, Central Delta Water Agency, South Delta Water Agency and the Prosecution Team, I am requesting briefing of the following legal issues in the context of the facts of this case (please consider the range of disputed facts, both as construed in your favor and in favor of opposing parties):

Whether, and in what circumstances: (1) does the State Water Resources Control Board have the authority to curtail, and (2) does Water Code section 1052 apply to diversions made under claim of a pre-1914 or riparian water right?

* * *

Briefing of these legal issues may not exceed ten pages in length. Alternately, parties may file a joint brief of up to twenty pages in length.

Motions to Dismiss and Motions for Summary Judgment:

BBID indicated in its letter of October 22, 2015, that it intends to submit a motion to dismiss. BBID may file a motion to dismiss or motion for summary judgment (or a combined motion).

The Hearing Officer's October 30, 2015 expressly provides for more than a single brief. In addition, and as discussed at the September 25, 2015 prehearing conference, BBID noted that the SWRCB represented to the Santa Clara Superior Court that BBID would have a full opportunity to raise *all* issues, including due process issues, before the SWRCB. The SWRCB made similar representations in its recent filed demurrer in the Santa Clara Superior Court. BBID briefed the legal issues as directed by the Hearing Officer, and also filed its Motion to Dismiss. The remaining briefs raise the due process issues that the SWRCB assured the Santa Clara Superior Court that BBID could bring before the SWRCB.

It is worth noting that the attachments to the declarations submitted with BBID's briefs attach, with very limited exception, documents previously submitted as part of BBID's Case-in-Chief submittal. Because they have not yet been accepted into evidence, BBID provided them again - cross referencing the prior Exhibit numbers.

To the extent the Hearing Team is going to consider the Prosecution Team's objection or motion to strike, BBID request a formal hearing on the objection / motion to strike in order to develop a proper record for judicial review.

Regards,
Dan Kelly



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On Jan 25, 2016, at 11:13 AM, Tauriainen, Andrew@Waterboards
<Andrew.Tauriainen@waterboards.ca.gov> wrote:

1. The Prosecution Team requests clarification regarding BBID's method of service. The Hearing Notices in the BBID and WSID matters do not appear to contemplate service via online document storage. If appropriate, the Prosecution Team requests guidance on how all parties may utilize this method of service.
2. Hearing Officer Doduc's October 30, 2015, ruling provides that "BBID may file a motion to dismiss or motion for summary judgment (or a combined motion)... The motions, including supporting memoranda of points and authorities, and briefs filed in support or opposition may not exceed ten pages in length." This ruling has not been changed, and the page limit was reiterated in the Hearing Team's email dated January 14, 2016. BBID appears to seek to file five (5) separate motions to dismiss, each at or near ten pages of briefing. The Prosecution Team objects to this attempted submittal and requests that the Hearing Team strike all but the first ten pages of BBID's total motion briefing. The Prosecution Team will rescind this request if BBID replaces the five separate motions with one combined motion, not exceeding ten pages in length, before today's noon deadline.

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From: Yolanda De La Cruz [<mailto:ydelacruz@somachlaw.com>]

Sent: Monday, January 25, 2016 10:37 AM

To: Unit, Wr_Hearing@Waterboards

Cc: Michael Vergara; Dan Kelly; Herrick, John [@aol.com](mailto:John.Herrick@aol.com); Jennifer L. Spaletta; Valerie Kincaid; Jeanne Zolezzi; Tim O'Laughlin; kharrigfeld@herumcrabtree.com; Tauriainen, Andrew@Waterboards; Jonathan Knapp; Richard Morat; McGinnis, Robin [C.@DWR](mailto:Robin.McGinnis@DWR.ca.gov); Stefanie Morris; Rick Gilmore; Unit, Wr_Hearing@Waterboards; Janelle Krattiger; Daniel O'Hanlon; Akroyd, Rebecca@KMTG; Phillip Williams; ngmplcs@pacbell.net; Dante Nomellini Jr.; Michelle Bracha; Uoxina Santos-Aguirre

Subject: BBID/WSID Hearings

SWRCB Hearing and Parties:

Please be advised that we are sending you the following Motions and Declarations along with exhibits by HIGHTAIL.

1. NOTICE OF POSITION REGARDING THE STATE WATER RESOURCES CONTROL BOARD AUTHORITY TO ISSUE CURTAILMENTS
2. DECLARATION OF LAUREN D. BERNADETT IN SUPPORT OF BYRON-BETHANY IRRIGATION NOTICE OF POSITION REGARDING THE STATE WATER RESOURCES CONTROL BOARD AUTHORITY TO ISSUE CURTAILMENTS
3. MOTION TO DISMISS ADMINISTRATIVE CIVIL LIABILITY PROCEEDING IN ENF01951 FOR LACK OF STATUTORY AUTHORITY UNDER WATER CODE SECTION 1052
4. DECLARATION OF LAUREN D. BERNADETT IN SUPPORT OF MOTION TO DISMISS ADMINISTRATIVE CIVIL LIABILITY PROCEEDING IN ENF01951 FOR LACK OF STATUTORY AUTHORITY UNDER WATER CODE SECTION 1052
5. MOTION TO DISMISS ADMINISTRATIVE CIVIL LIABILITY COMPLAINT IN ENF01951 FOR LACK OF DELEGATION AUTHORITY
6. DECLARATION OF LAUREN D. BERNADETT IN SUPPORT OF MOTION TO DISMISS ADMINISTRATIVE CIVIL LIABILITY COMPLAINT IN ENF01951 FOR LACK OF DELEGATION AUTHORITY
7. MOTION TO DISMISS ADMINISTRATIVE CIVIL LIABILITY COMPLAINT IN ENF01951 FOR VIOLATION OF DUE PROCESS

8. DECLARATION OF LAUREN D. BERNADETT IN SUPPORT OF MOTION TO DISMISS ADMINISTRATIVE CIVIL LIABILITY COMPLAINT IN ENF01951 FOR VIOLATION OF DUE PROCESS

9. MOTION TO DISMISS ADMINISTRATIVE CIVIL LIABILITY PROCEEDING IN ENF01951 STATE WATER RESOURCES CONTROL BOARD'S METHOD OF DETERMINING WATER AVAILABILITY IS AN UNLAWFUL UNDERGROUND REGULATION

10. DECLARATION OF LAUREN D. BERNADETT IN SUPPORT OF MOTION TO DISMISS ADMINISTRATIVE CIVIL LIABILITY PROCEEDING IN ENF01951 SWRCB'S METHOD OF DETERMINING WATER AVAILABILITY IS AN UNLAWFUL UNDERGROUND REGULATION

11. MOTION TO DISQUALIFY HEARING OFFICER

12. DECLARATION OF LAUREN D. BERNADETT IN SUPPORT OF MOTION TO DISQUALIFY HEARING OFFICER

<image001.gif>

Yolanda De La Cruz | *Legal Secretary*
to Daniel Kelly and Aaron A. Ferguson

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