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November 2, 2016

VIA electronic mail to [CWFhearing@waterboards.ca.gov](mailto:CWFhearing@waterboards.ca.gov) and service list of hearing participants.

Tam Doduc, Member and Co-Hearing Officer  
Felicia Marcus, Chair and Co-Hearing Officer  
State Water Resources Control Board  
1001 I Street  
Sacramento, California 95814

Request for Official Notice  
March 18, 2016 BBID ACL Hearing Ruling

Dear Hearing Officer Doduc and Hearing Officer Marcus,

I request that the Hearing Officers take Official Notice of the March 18, 2016 Hearing Ruling in the Byron-Bethany Irrigation District Administrative Civil Liability Hearing. It is available at [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/hearings/byron\\_bethany/docs/wisdbbid/wsiddbid\\_proceduralruling031816.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/byron_bethany/docs/wisdbbid/wsiddbid_proceduralruling031816.pdf), and is attached to this submission.

Title 23 Cal. Code Regs. § 648.2 states that “[t]he Board or presiding officer may take official notice of such facts as may be judicially noticed by the courts of this state.” The document is a ruling by the State Water Resources Control Board, and is suitable for such notice.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Des Jardins", written in a cursive style.

Deirdre Des Jardins  
Principal, California Water Research

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## State Water Resources Control Board

March 18, 2016

### VIA ELECTRONIC MAIL

TO: ENCLOSED REVISED SERVICE LIST OF PARTICIPANTS

**RULING ON THE FOLLOWING MOTIONS FILED IN THE MATTERS OF ADMINISTRATIVE CIVIL LIABILITY (ACL) COMPLAINT AGAINST BYRON-BETHANY IRRIGATION DISTRICT (BBID) AND DRAFT CEASE AND DESIST ORDER (CDO) AGAINST THE WEST SIDE IRRIGATION DISTRICT (WSID):**

1. **MOTION IN LIMINE WITH RESPECT TO THE TESTIMONY OF MR. BRIAN COATS, MS. KATHERINE MROWKA, AND MS. KATHRYN BARE, BY CENTRAL DELTA WATER AGENCY AND BANTA-CARBONA IRRIGATION DISTRICT.**
2. **MOTION IN LIMINE WITH RESPECT TO THE TESTIMONY OF MR. BRIAN COATS, MS. KATHERINE MROWKA, AND MS. KATHRYN BARE, BY WSID AND PATTERSON IRRIGATION DISTRICT.**
3. **MOTION IN LIMINE WITH RESPECT TO THE TESTIMONY OF MS. MAUREEN SERGENT, MS. KATHERINE MROWKA, AND MR. BRIAN COATS, BY BBID AND SOUTH DELTA WATER AGENCY.**
4. **MOTION IN LIMINE WITH RESPECT TO THE TESTIMONY OF MR. BRIAN COATS, MS. KATHERINE MROWKA, AND CERTAIN PROSECUTION TEAM EXHIBITS BY SAN JOAQUIN TRIBUTARIES AUTHORITY.**
5. **MOTION TO STRIKE THE TESTIMONY OF MR. RICK GILMORE AND MOTION TO EXCLUDE EVIDENCE, BY STATE WATER CONTRACTORS.**
6. **MOTION TO QUASH SUBPOENA DUCES TECUM OR, IN THE ALTERNATIVE, MOTION FOR PROTECTIVE ORDER AND REQUEST TO CLOSE DISCOVERY, BY STATE WATER CONTRACTORS.**

### Background on the Motions in Limine

On February 29, 2016, various parties filed motions in limine objecting to testimony and exhibits offered by the Prosecution Team, as well as that offered by several other parties.

Central Delta Water Agency and Banta-Carbona Irrigation District, and WSID and Patterson Irrigation District, filed joint motions in limine objecting to the admission of testimony by Mr. Brian Coats, Ms. Katherine Mrowka, and Ms. Kathryn Bare, witnesses for the Prosecution Team. BBID and South Delta Water Agency filed a joint motion in limine objecting to admission of the testimony of Ms. Maureen Sergent, rebuttal witness for the Department of Water Resources (DWR), as well as Ms. Mrowka, and Mr. Coats. The Prosecution Team and DWR each filed a brief in opposition to the motions.

San Joaquin Tributaries Authority filed a motion in limine objecting to the admission of testimony by Mr. Coats and Ms. Mrowka, and objecting to sixty-nine of the exhibits submitted by the Prosecution Team. The Prosecution Team's consolidated brief in opposition to all of the motions in limine responded to these arguments.

State Water Contractors filed a motion to strike specific portions of the testimony by Mr. Rick Gilmore, general manager for BBID. State Water Contractors also seek to exclude all evidence of water availability during time periods other than those specifically identified in the ACL complaint and draft CDO. BBID filed a response to State Water Contractors' motion.

## **Analysis**

Adjudicative proceedings before the State Water Resources Control Board (Board) are governed by Title 23 of the California Code of Regulations, section 648 et seq.; Chapter 4.5 of the Administrative Procedure Act (commencing with 11400 of the Government Code); sections 801 to 805 of the Evidence Code; and section 11513 of the Government Code. (Cal. Code Regs., tit. 23, § 648.) Sections 801 to 805 of the Evidence Code set requirements for expert and other opinion testimony. The Board is not bound in its proceedings by other technical rules relating to evidence and witnesses. (See Gov. Code § 11513, subd. (c); Cal. Code Regs., tit. 23, § 648.) Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. (Gov. Code § 11513, subd. (c).)

### Qualifications of Expert Witnesses

We are not bound in our proceedings by Evidence Code 720, which requires the court to qualify an expert witness prior to allowing him or her to testify. Rather, we may determine based on our review of the record, after the submission of all relevant evidence, whether the expert's opinion is "based on a matter (including [the expert's] special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates...." (Evid. Code, § 801, subd. (b).)

The relaxation of strict rules of admissibility in administrative proceedings recognizes that the hearing officer has expertise in the subject matter, and makes both the legal and factual determinations. "There is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself." (*United States v. Brown* (11th Cir. 2005) 415 F.3d 1257, 1269.) Because the hearing officer is "presumably competent to disregard that evidence which should be excluded or to discount that evidence which has lesser probative value, it makes little sense, as a practical matter, for a judge in that position to apply strict exclusionary evidentiary rules." (*Underwood v. Elkay Min., Inc.* (4th Cir. 1997) 105 F.3d 946, 949.)

[I]n an agency proceeding the gate keeping function to evaluate evidence occurs when the evidence is considered in decisionmaking rather than when the evidence is admitted. Even though it arises later in the administrative process than it does in jury trials, the [hearing officer's] duty to screen evidence for reliability, probativeness, and substantiality similarly ensures that final agency decisions will be based on evidence of requisite quality and quantity.

(*U.S. Steel Min. Co., Inc. v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor* (4th Cir. 1999) 187 F.3d 384, 389; see also *Banks v. IMC Kalium Carlsbad Potash Co.* (N.M. 2003) 77 P.3d 1014, 1022.)

We are, therefore, inclined to err on the side of admissibility, and consider whether the expert testimony is reliable, relevant, and comports with sections 801 through 805 of the Evidence Code upon our review of all of the evidence.

*New Scientific Technique*

The California Supreme Court held in *People v. Kelly* that admission of expert testimony based on a new scientific technique requires “a preliminary showing of general acceptance of the new technique in the relevant scientific community.” (*Kelly* (1976) 17 Cal.3d 24, 30.) As explained in *Frye v. United States*, “while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.” (*Frye* (D.C. Cir. 1923) 293 F. 1013, 1014.) The opposing parties assert that the water availability analysis conducted by the Prosecution Team is a new scientific technique subject to the *Kelly* test of admissibility.

At the outset, we do not consider the *Kelly/Frye* line of cases to apply to administrative proceedings of the Board. The reasons for applying the *Kelly* standard to control the admissibility of scientific evidence do not fully translate to the administrative context. “*Kelly* analysis is limited to situations where it will ‘forestall the jury’s uncritical acceptance of scientific evidence or technology that is so foreign to everyday experience as to be unusually difficult for laypersons to evaluate.’” (*People v. Mitchell* (2003) 110 Cal.App.4th 772, 783 [citing *People v. Venegas* (1998) 18 Cal.4th 47, 80].) We are not concerned here with the risk that a lay-jury will be unduly prejudiced by the “misleading aura of certainty which often envelops a new scientific process, obscuring its currently experimental nature.” (*Kelly*, 17 Cal.3d at 32 [quoting *Huntingdon v. Crowley* (1966) 64 Cal.2d 647, 656].)

Even if we were to consider a *Kelly*-type test for admissibility, we do not find that the water availability analysis conducted by the Prosecution Team qualifies as a “new scientific technique.” The Prosecution Team’s water availability analysis is essentially a supply-demand comparison. At issue in this case are disputes regarding the appropriate inputs in that comparison, but the scientific principle is readily understandable. If the demand for water exceeds supply, then water may be unavailable to certain right holders. The analysis does not appear “to provide some definitive truth which the expert need only accurately recognize and relay to the jury.” (*People v. Stoll* (1989) 49 Cal.3d 1136, 1156.) Extensive evidence has been submitted challenging various aspects of the analysis, obviating any appearance that the procedure, itself, is infallible. We fully intend to consider, in detail, the accuracy and reliability of the Prosecution Team’s water availability analysis.

As we have previously discussed, we are inclined to err on the side of admissibility. We will consider whether the proffered expert testimony is reliable, relevant, and comports with sections 801 through 805 of the Evidence Code in light of the record as a whole.

Legal Conclusions and Ultimate Issue Opinions

The opposing parties object that the testimony offered by a number of the witnesses for the Prosecution Team includes legal conclusions that should not be admitted into evidence. We agree that some of the submitted testimony contains conclusory legal argument, but not all testimony that includes legal terms is inappropriate. A distinction must be made between testimony that is “helpful to a clear understanding of [the witness’s] testimony,” (Evid. Code, § 800), and that which does no more than make conclusory statements as to what the law is.

“Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.” (Evid. Code, § 805.) Such an opinion is not improper if a foundation is laid by the witness as to the factors taken into account when forming the opinion on the ultimate issue. A witness may use statutory or other legal terms to frame their opinion, and doing so may be helpful for the decision-maker to understand the witnesses’ testimony. An expert may “properly be called upon to aid the jury in understanding the facts in evidence even though reference to those facts is couched in legal terms” and may “refer to the law in expressing an opinion without that reference rendering the testimony inadmissible.” (*Specht v. Jensen* (10th Cir. 1988) 853 F.2d 805, 809.) We are also not concerned here that an expert’s opinion may unfairly prejudice a jury nor are we concerned that testimony as to legal opinions will “usurp” the role of the judge to instruct the jury on the law. (See *Suter v. General Acc. Ins. Co. of America* (D.N.J. 2006) 424 F.Supp.2d 781, 790-93.) We have the ability to distinguish and disregard testimony that is essentially legal argument.

The Prosecution Team responds that the testimony of their witnesses “is not legal argument, but rather each staff person’s description of his or her understanding of the legal framework governing the Division’s functions, and how that understanding guided staff decisions regarding water availability and these enforcement actions.” (Prosecution Team’s Opposition to Motions in Limine, p. 5:20-22.) We understand the Prosecution Team to mean that staff’s understanding of the legal framework is relevant to explain decisions by staff in the methodology and inputs for its analysis of water availability, and is also relevant to other issues in the proceedings. If so, the testimony is admissible.

But some of the testimony offered by the Prosecution Team’s witnesses appears to include conclusory legal assertions that will not assist us in making determinations of fact. We will not attempt to formulate a line-by-line exclusion of that testimony. Instead, we will simply disregard testimony that has no bearing on the facts to be determined, including conclusory testimony as to ultimate issues raised in these proceedings where the testimony does not make clear the underlying factual foundations for the opinion offered.

Hearsay

Relevant hearsay is admissible in adjudicative proceedings before the Board. Hearsay evidence may be used to supplement or explain other evidence, “but over timely objection [hearsay] shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.” (Gov. Code, § 11513, subd. (d).) We decline to exclude or strike any evidence on the grounds that it is hearsay, but we will only consider relevant hearsay evidence subject to the limitations imposed by Government Code section 11513, subdivision (d).

## **1. Mr. Brian Coats**

The opposing parties object that Mr. Coats is not qualified to render expert testimony on the issue of water availability because he lacks the requisite “special knowledge, skill, experience, training, or education.” Mr. Coats is a senior water resources control engineer with the Division of Water Rights, and supervisor of the enforcement unit. He has been employed by the Division for more than fifteen years. Mr. Coats has sufficient experience that his opinion is likely to bear some relevance to the matters at issue in this proceeding. We are not required to make a final determination of Mr. Coats’ qualifications for rendering expert opinion on the water availability analysis prior to allowing him to testify during the hearing. We will consider his qualifications in our assessment of the reliability and relevance of his testimony.

We first note that a significant portion of Mr. Coats’ testimony concerns the methodology used by the Prosecution Team to develop the water availability analysis. This testimony is not opinion testimony but factual testimony about the methods employed and the input used by Mr. Coats and other staff in that analysis. Though there are portions of Mr. Coats’ testimony that introduce his opinion as to the accuracy and reliability of those methods, these opinions are interwoven with factual descriptions of the analysis. It is difficult to disentangle these factual observations from the opinions offered, and we decline to attempt to do so now. To the extent that we find Mr. Coats has offered conclusory legal opinions that do not assist us in our factual determinations, we will disregard them.

The opposing parties also argue that Mr. Coats’ testimony during his deposition shows that the water availability analysis was based on unverified data and failed to account for relevant factors. They assert that, as a result, the opinions of the Prosecution Team’s witnesses about the availability of water lack foundation and should be excluded.

The reliability of the water availability analysis conducted by the Prosecution Team is one of the primary factual issues raised by these proceedings. The Prosecution Team is relying on that analysis to carry their burden of proof in these enforcement actions. We will not attempt to address such a fundamental issue as a preliminary matter, but will make a determination after the close of the hearings and consideration all of the relevant evidence.

## **2. Ms. Kathryn Bare**

The Prosecution Team identifies Ms. Bare as an expert witness in its Notice of Intent to Appear. Her testimony includes both opinion testimony and factual testimony based on her direct perceptions. The opposing parties object that Ms. Bare lacks the qualifications necessary to testify as an expert regarding Water Code section 1211 and irrigation conveyance losses. The opposing parties also object that portions of Ms. Bare’s testimony lack foundation and contain legal conclusions.

The opposing parties identify specific portions of Ms. Bare’s testimony regarding Water Code section 1211 to which they object as lacking proper foundation, and reference portions of Ms. Bare’s deposition as evidence of her lack of knowledge or opinion on matters included in her testimony. Some of the inconsistencies between Ms. Bare’s written testimony, submitted on January 19, 2016, and her testimony during the deposition held on November 23, 2015, may be the result of differences in her personal knowledge at these two points in time, after reviewing evidence related to these proceedings in preparation of her testimony. But we are not likely to be persuaded that Ms. Bare acquired new expertise to allow her to offer opinions on matters she was not previously qualified to opine upon. We also take note that during Ms. Bare’s

deposition, Ms. Janelle Smith, representing the Division of Water Rights, objected to several questions as calling for legal conclusion from the deponent. However, the Prosecution Team now offers essentially the same testimony from Ms. Bare in their written submittal.

We conclude that the probative value of the portions of Ms. Bare's testimony to which the opposing parties object related to treated wastewater from the City of Tracy is outweighed by risk of prejudice to the other parties, and strike it from the record.<sup>1</sup> We will not attempt a line-by-line review of the remainder of Ms. Bare's testimony, but will consider Ms. Bare's knowledge, experience, and foundations for her opinions when considering the weight it should be assigned. We note that many of her statements appear to be based on documents offered into evidence, which cumulative testimony will not likely help our understanding or otherwise assist us. Other portions of her testimony may include legal conclusions that similarly do not advance our understanding of the facts. We will admit the remainder Ms. Bare's testimony (with the exception described above) and weigh its relevance and reliability upon the whole record.

### **3. Ms. Katherine Mrowka**

The opposing parties object that the testimony of Ms. Mrowka lacks appropriate foundation because she did not conduct the water availability analysis herself, but relied upon the work of her staff.

Ms. Mrowka is a supervising water resources control engineer with the Division of Water Rights, where she has worked in various capacities since 1997. In total, she has been employed by the Board for almost thirty years. Ms. Mrowka also has a master's degree in water resources engineering. Ms. Mrowka states in her testimony that she became familiar with the supply and demand analysis conducted in 2014 and actively participated in the water availability analysis conducted by staff in 2015. In her deposition, Ms. Mrowka describes her supervision of staff with respect to the water availability analysis: "they evaluate the water supply situation and then the demand situation for demand for water full natural flow. And they will come to me with recommendations ... we will discuss and make preliminary determinations whether or not there is sufficient supply for different classes of water rights. So I work with the staff with respect to those tasks." (WSID-0152, pp. 24-25.) In other portions of her deposition, Ms. Mrowka describes some of the technical aspects as to how the water availability analysis was conducted.

Based on the evidence that Ms. Mrowka was involved with and aware of the methods underlying the water availability analysis, we will not exclude any portion of her testimony. We will assign an appropriate weight to her opinions about the water availability analysis upon consideration of the whole record. The degree to which we can ascertain the bases for Ms. Mrowka's opinions, and the relevancy and reliability of those bases, will affect our ultimate conclusion as to whether her testimony is relevant and reliable.

The opposing parties also object that Ms. Mrowka offers legal conclusions throughout her testimony, including recommended language for inclusion in the cease and desist order against WSID. The proposed language embraces some of the ultimate issues to be decided in the proceeding, but it is not inadmissible on that basis. Given Ms. Mrowka's position and experience as the manager of the enforcement section for the Division of Water Rights, her testimony may assist us in our factual determinations related to an appropriate remedy if we determine that a CDO is warranted. We agree that a witness may not merely posit legal

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<sup>1</sup> The stricken statements are identified in Exhibit WSID-173, in green underline, pages 3 through 5.

conclusions as to how a matter should ultimately be resolved. Mere conclusions will not assist us in our determination. Ms. Mrowka's proposed language offers her opinion as to necessary terms to address the alleged threat of future unauthorized diversions by WSID. In considering this testimony, we will look to the bases and foundation for her proposal to determine whether her recommendations are relevant. We will disregard any testimony that we find to be entirely conclusory or lacking foundation.

Ms. Mrowka, Mr. Coats, and Mr. Jeffrey Yeazell all offer testimony as to the water availability analysis conducted by the Prosecution Team. The opposing parties object that their testimony is improperly cumulative, and describe it as "me too" testimony. However, the evidence suggests that each of these individuals had different roles in the creation and application of the water availability analysis. To the extent that the witnesses have different knowledge of the underlying facts or differences in experience, knowledge, and skill, their individual opinions may have independent probative value and are not unnecessarily cumulative. We encourage the parties to consolidate their testimony, however, to the extent possible to streamline the hearing process. Should we find any testimony during the hearing to be unnecessarily cumulative, we may exclude the testimony at that time.

#### **4. Ms. Maureen Sergent**

BBID and South Delta Water Agency object to the admission of rebuttal testimony by Ms. Maureen Sergent regarding the legal effect of certain contracts executed between BBID and DWR. Ms. Sergent is a registered engineer in the State of California and has been employed by DWR since 1991. She is currently a senior engineer with the State Water Project Analysis Office. She states that she was directly involved in the negotiation of some of the referenced agreements between BBID and DWR.

Ms. Sergent appears to be testifying as to DWR's understanding of these legal agreements or the intent of DWR in entering the contracts based on her personal knowledge. Whether or not the subjective understanding of DWR and its staff is relevant to interpretation of the contracts or other issues raised by these proceedings is a matter we will consider at an appropriate time. If we find that Ms. Sergent is merely offering her conclusory opinion as to the legal import of the contracts, we will disregard that portion of her testimony.

#### **5. Post-June 12 Evidence**

BBID and Central Delta Water Agency characterize the proceeding against BBID as adjudicative review of an agency's decision. On that premise, they argue that any evidence post-dating the June 12, 2015 issuance of the Notice of Unavailability of Water by the Board should be excluded from evidence in this proceeding because it was not a part of the record for the Notice. Our consideration of the ACL complaint against BBID is not a proceeding for administrative review of the Notice of Unavailability of Water. The Notice was not an order or decision of the Board. We are not bound by the conclusions in the Notice and do not treat the Notice as having established the availability or unavailability of water for appropriation for purposes of this proceeding. Nor does the allegation that BBID engaged in a trespass under Water Code § 1052 depend upon the Notice. Therefore, we are not limited in our consideration of evidence that was available to the Board or the Board's staff prior to June 12, 2015.



## 6. Specific Prosecution Team Exhibits

San Joaquin Tributaries Authority objects to the admission of a number of exhibits offered by the Prosecution Team as irrelevant, unreliable, and hearsay evidence. These exhibits include news articles; an official press release; drought-related orders issued by the Governor; Board notices, orders and correspondence; studies, graphs, charts, maps, and other data; and Board licenses, water right forms, CEQA documents, and planning materials.

To the extent that San Joaquin Tributaries Authority objects to the admission of these exhibits as hearsay, we decline to exclude or strike any evidence on that basis. We will only consider evidence properly identified as hearsay subject to the limitations imposed by Government Code section 11513, subdivision (d). The Prosecution Team also asserts that some of these materials are not offered for the truth of the matter stated, but as evidence of WSID and BBID's knowledge of certain matters.

San Joaquin Tributaries Authority also objects to many of the exhibits on the basis that they are not relevant to the question of whether BBID or WSID unlawfully diverted water in 2015. However, the issues raised in these proceedings are broader in scope. Phase 2 of the hearing on the ACL complaint against BBID addresses whether the Board should impose administrative civil liability against BBID and, if so, in what amount and on what bases. Factors relevant to this determination include the extent of harm caused by the alleged violation, the nature and persistence of the alleged violation, the length of time over which the alleged violation occurred, and the corrective actions, if any, taken by BBID. Phase 2 of the hearing on the draft CDO against WSID also addresses other issues, including whether there is a future threat of unlawful diversions by WSID.

We will, however, carefully consider the relevance of each of the exhibits prior to relying on any one of them.

## 7. Mr. Rick Gilmore

State Water Contractors moved to strike portions of the testimony by Mr. Rick Gilmore, general manager for BBID, that is based on information outside of the record. Mr. Gilmore testifies as to the contents of studies and other work conducted by CH2M Hill. At least one report by CH2M Hill was submitted into evidence by both BBID and State Water Contractors. (See BBID-218; SWC-5) Mr. Gilmore seems to reference other work conducted by CH2M Hill on behalf of BBID, of which no documentation has been offered.

Although the Board may admit hearsay into evidence, Mr. Gilmore offers hearsay as to another expert's opinion, which opinion is not documented in any written report, nor is the expert available to testify or to be cross-examined about the bases for that opinion. Mr. Gilmore's description of CH2M Hill's work suggests that the analyses may be very relevant to this proceeding, but without any indicia of reliability as to Mr. Gilmore's account of that opinion, this hearsay is not the "sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." (Gov. Code, § 11513, subd. (c).) BBID objects that Mr. Gilmore does not offer his comments about "the report" to prove the truth of the contents, but only to "show BBID's impression of water availability in June 2015." (BBID's Opposition to SWRC's Motion to Strike Testimony of Rick Gilmore, p. 1:17-21.) Therefore, we will admit the testimony by Mr. Gilmore that recounts the expert opinions of CH2M Hill,<sup>2</sup> but only for the purpose of

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<sup>2</sup> The relevant testimony is located as follows: BBID-201, p. 8:24-26 and p. 9:9-12.

demonstrating BBID's understanding of water availability at the time of diversion in June 2015 and not for the truth of the matter.

### **8. Evidence of Water Availability**

State Water Contractors seeks to exclude all evidence of water availability other than that from June 13 through June 25, 2015, and after May 1, 2015, in the respective proceedings. We disagree with the underlying premise that the legality of the diversions of water that occurred during these discrete time periods during 2015 is the only key issue raised by these proceedings. As described above, other issues are identified in the hearing notices, including the nature and persistence of the alleged unauthorized diversions and the threat of future unauthorized diversions.

We also find that historical information about water availability may be relevant to the scope of the water rights under which BBID and WSID claim to have diverted, and conditions in the Delta absent operation of the Projects. Although direct testimony and cross-examination related to this historical information may take considerable time during the hearing, this information is likely to be of some importance to our decision-making.

### **Conclusion on Evidentiary Motions**

The Board generally prefers to admit all relevant evidence, applying the more liberal standards applicable to administrative proceedings. "In a nonjury trial, whether in the district court or before an administrative law judge, little harm can result from the reception of evidence that could perhaps be excluded. This is so because the judge, trial or administrative, is presumably competent to screen out and disregard what he thinks he should not have heard, or to discount it for practical and sensible reasons." (*Multi-Med. Convalescent v. NLRB* (4th Cir. 1977) 550 F.2d 974, 977.) Therefore, we neither deny nor grant the motions at this time except to refrain from excluding the contested evidence (with the exceptions already described). We consider many of the arguments raised by the parties to have merit, and appreciate the detailed briefings on these issues. In keeping with the flexibility offered by administrative proceedings, we will defer our final decisions on the remaining evidentiary matters until such time when the entire record is before us and we have the opportunity to carefully consider all of the evidence.

### **Motion for to Quash Subpoena Duces Tecum by State Water Contractors**

On March 1, 2016, BBID served a subpoena duces tecum on the State Water Contractors seeking the production of a broad scope of documents related to water availability in the Delta in 2015. On March 9, 2016, the State Water Contractors filed a motion to quash the subpoena, or in the alternative a motion for protective order, and a request to close discovery in these proceedings.

On March 9, 2016, we issued a procedural ruling that addressed all of the motions for protective orders that were outstanding at that time. We granted the motions and vacated the notices of deposition, requests for documents, and subpoenas duces tecum. Our reasoning in that ruling equally applies to State Water Contractor's motion addressed here. In addition, to the extent the subpoena requests documents outside the scope of the State Water Contractor's rebuttal evidence, BBID need not have waited until March 1, 2016, to request those documents.

We hereby **vacate** the subpoena duces tecum served on the State Water Contractors by BBID dated March 1, 2016.

State Water Contractors also requests that we close discovery in these proceedings to prevent the issuance of additional subpoenas or other discovery requests by any of the parties. We find that such an order is appropriate, certainly at this point, only days from the start of the evidentiary hearing. Absent our express permission, the parties are prohibited from seeking any additional discovery of other parties or non-parties in these proceedings.

Sincerely,

*Original Signed By*

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Frances Spivy-Weber, Vice-Chair  
WSID Hearing Officer

*Original Signed By*

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Tam M. Doduc, Board Member  
BBID Hearing Officer

Enclosures: Revised Service Lists

**SERVICE LIST OF PARTICIPANTS  
THE WEST SIDE IRRIGATION DISTRICT  
CEASE AND DESIST ORDER HEARING  
(October 8, 2015, Revised 12/18/15)**

Parties	
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><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>THE WEST SIDE IRRIGATION DISTRICT</b> Jeanne M. Zolezzi Karna Harrigfeld Janelle Krattiger Herum\Crabtree\Suntag 5757 Pacific Ave., Suite 222 Stockton, CA 95207 <a href="mailto:jzolezzi@herumcrabtree.com">jzolezzi@herumcrabtree.com</a> <a href="mailto:kharrigfeld@herumcrabtree.com">kharrigfeld@herumcrabtree.com</a> <a href="mailto:jkrattiger@herumcrabtree.com">jkrattiger@herumcrabtree.com</a></p>
<p><b>STATE WATER CONTRACTORS</b> Stephanie Morris 1121 L Street, Suite 1050 Sacramento, CA 95814 <a href="mailto:smorris@swc.org">smorris@swc.org</a></p>	<p><b>WESTLANDS WATER DISTRICT</b> Daniel O'Hanlon Rebecca Akroyd Kronick Moskowitz Tiedemann &amp; Girard 400 Capitol Mall, 27th Floor Sacramento, CA 95814 <a href="mailto:dohanlon@kmtg.com">dohanlon@kmtg.com</a> <a href="mailto:rakroyd@kmtg.com">rakroyd@kmtg.com</a></p> <p>Philip Williams of Westlands Water District <a href="mailto:pwilliams@westlandswater.org">pwilliams@westlandswater.org</a></p>
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<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><b>SAN JOAQUIN TRIBUTARIES AUTHORITY</b> Valerie Kincaid O'Laughlin &amp; Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95814 <a href="mailto:ykincaid@olaughlinparis.com">ykincaid@olaughlinparis.com</a> <a href="mailto:towater@olaughlinparis.com">towater@olaughlinparis.com</a>  (revised 12/18/15)</p>
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**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, 12/18/15)**

<p align="center"><b>PARTIES</b></p> <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>

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<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:ykincaid@olaughlinparis.com">ykincaid@olaughlinparis.com</a> <a href="mailto:towater@olaughlinparis.com">towater@olaughlinparis.com</a> <a href="mailto:lwood@olaughlinparis.com">lwood@olaughlinparis.com</a></p> <p><b>(revised 12/18/15)</b></p>
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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):

**Request for Official Notice – March 18, 2016 BBID Ruling  
March 18, 2016 BBID ACL Hearing Ruling  
Response to Objections to Use of Documents in Cross**

to be served by Electronic Mail (email) upon the parties listed in the Current Service List for the California Water Fix Petition Hearing, dated October 6, 2016, posted by the State Water Resources Control Board at

[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/docs/100616revsrvlist.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/100616revsrvlist.pdf)

*Note: In the event that any emails to any parties on the Current Service List are undeliverable, you must attempt to effectuate service using another method of service, if necessary, and submit another statement of service that describes any changes to the date and method of service for those parties.*

I certify that the foregoing is true and correct and that this document was executed on November 2, 2016.



Deirdre Des Jardins

California Water Research

Name: Deirdre Des Jardins  
Title: Principal  
Party/Affiliation: California Water Research  
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