



EDMUND G. BROWN JR.  
GOVERNOR

MATTHEW RODRIGUEZ  
SECRETARY FOR  
ENVIRONMENTAL PROTECTION

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## State Water Resources Control Board

September 2, 2015

### VIA ELECTRONIC MAIL

TO: ENCLOSED SERVICE LIST OF PARTICIPANTS

### SERVICE LIST OF PARTICIPANTS TO EXCHANGE INFORMATION: BYRON-BETHANY IRRIGATION DISTRICT – ADMINISTRATIVE CIVIL LIABILITY HEARING

In accordance with the State Water Resources Control Board's (State Water Board) August 19, 2015 Notice of Public Hearing, regarding the above subject hearing, a Service List of Participants is enclosed reflecting those who have submitted a Notice of Intent to Appear (NOI) and who have indicated intent to participate in the above-referenced hearing.

The NOIs and other documents related to this supplemental hearing are posted on the Division of Water Rights project dedicated website:

[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/hearings/byron\\_bethany/index.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/byron_bethany/index.shtml).

As previously noticed, the hearing officer will conduct a pre-hearing conference to discuss the scope of the hearing and any other procedural issues on **Friday, September 25, 2015 at 9:00 a.m.**

The State Water Board has received several procedural requests related to discovery and postponement of the scheduled hearing dates. These requests are under consideration by the hearing officer.

If you have any questions regarding this letter, please contact Jane Farwell-Jensen at (916) 341-5349 or by email at [Jane.Farwell-Jensen@waterboards.ca.gov](mailto:Jane.Farwell-Jensen@waterboards.ca.gov); or Nicole Kuenzi at (916) 322-4142 or by email at [Nicole.Kuenzi@waterboards.ca.gov](mailto:Nicole.Kuenzi@waterboards.ca.gov).

Sincerely,

Michael Buckman, Chief  
Hearings Unit

Enclosure: Service List

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FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

1001 I Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 100, Sacramento, Ca 95812-0100 | [www.waterboards.ca.gov](http://www.waterboards.ca.gov)

**SERVICE LIST OF PARTICIPANTS  
 BYRON-BETHANY IRRIGATION DISTRICT  
 ADMINISTRATIVE CIVIL LIABILITY HEARING  
 (09/02/15)**

<b>PARTIES</b> (Per Notice of Public Hearing dated 08/19/15)	
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.)	
Division of Water Rights 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>	Byron Bethany Irrigation District Daniel Kelly 500 Capitol Mall, Suite 1000, Sacramento, CA 95814 <a href="mailto:dkelly@somachlaw.com">dkelly@somachlaw.com</a>
<b>OTHER PARTICIPANTS</b> (Party Designation Pending)	
THE FOLLOWING ARE OTHER PARTICIPANTS WHO SUBMITTED A NOTICE OF INTENT TO APPEAR (NOI) INDICATING AN INTENT TO: (1) call the Witnesses to testify at the hearing (2) participate by cross-examination or rebuttal only	
Patterson Irrigation District Banta-Carbona Irrigation District The West Side Irrigation District Jeanne M. Zolezzi 5757 Pacific Ave., Suite 222 Stockton, CA 95207 <a href="mailto:jzolezzi@herumcrabtree.com">jzolezzi@herumcrabtree.com</a>	City and County of San Francisco Johnathan 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>
Central Delta Water Agency Jennifer Spaletta Dante Nomellini and Dante Nomellini, Jr. Spaletta Law P.O. Box 2660 Lodi, CA 95241 <a href="mailto:jennifer@spalettalaw.com">jennifer@spalettalaw.com</a> <a href="mailto:ngmplcs@pacbell.net">ngmplcs@pacbell.net</a> <a href="mailto:dantejr@pacbell.net">dantejr@pacbell.net</a>	California Department of Water Resources Robin McGinnis, Attorney P O Box 942836 Sacramento, CA 94236-0001 <a href="mailto:robin.mcginis@water.ca.gov">robin.mcginis@water.ca.gov</a>
Richard Morat 2821 Berkshire Way Sacramento, CA 95864 <a href="mailto:rjmorat@gmail.com">rjmorat@gmail.com</a>	State Water Contractors Stefani Morris 1121 L Street, Suite 1050 Sacramento, CA 95814 <a href="mailto:smorris@swc.org">smorris@swc.org</a>

<p>South Delta Water Agency John Herrick. Esq. 4255 Pacific Ave., Suite 2 Stockton, CA 95207 <a href="mailto:jherrlaw@aol.com">jherrlaw@aol.com</a></p>	<p>San Joaquin Tributaries Authority Valerie Kincaid 2617 K Street, Suite 100 Sacramento, CA 95814 <a href="mailto:vkinaid@olaughlinparis.com">vkinaid@olaughlinparis.com</a></p>
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## NOTICE OF INTENT TO APPEAR

**Division of Water Rights Prosecution Team** plans to participate in the water right hearing regarding

Administrative Civil Liability  
against  
Byron-Bethany Irrigation District

**scheduled to commence  
Wednesday, October 28, 2015 and continue, if necessary,  
on October 29 and 30, 2015  
at 9:00 a.m.**

**1) Check only one (1) of the following:**

I/we intend to present a policy statement only.

I/we intend to participate by cross-examination or rebuttal only.

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)
Brian Coats, Sr. WRCE	Water availability determination; Key Issues 1 and 2	15	Yes
Paul Wells, Sr. WRCE	BBID diversions; Key Issues 1 and 2	15	Yes
Jeff Yeazel, WRCE	Water availability determination; Key Issues 1 and 2	15	Yes
Kathy Mrowka, Sr. WRCE	Water availability determination; Key Issues 1 and 2	10	Yes
Stephen Nemeth, Department of Water Resources	Department of Water Resources stream flow data and full natural flow calculations used in water availability determinations; CDEC.	5	Yes
Rebuttal Witnesses TBD	The Prosecution Team will call rebuttal witnesses as necessary to address legal argument, evidence or testimony presented by the other parties.		

(If more space is required, please add additional pages or use reverse side.)

**2) Fill in the following information of the Participant, Party, Attorney, or Other Representative:**

Name (Print): Andrew Tauriainen, Attorney III

Mailing Address: SWRCB Office of Enforcement  
1001 I Street, 16<sup>th</sup> Floor  
Sacramento, CA 95814

Phone Number: (916) 341-5445

Fax Number: (916) 341-5896

E-mail: [Andrew.Tauriainen@waterboards.ca.gov](mailto:Andrew.Tauriainen@waterboards.ca.gov)

Optional:

I/we decline electronic service of hearing-related materials. **[PT accepts electronic service]**

Signature:  Dated: September 2, 2015

  
**SOMACH SIMMONS & DUNN**  
A PROFESSIONAL CORPORATION  
ATTORNEYS AT LAW

500 CAPITOL MALL, SUITE 1000, SACRAMENTO, CA 95814  
OFFICE: 916-446-7979 FAX: 916-446-8199  
SOMACHLAW.COM

September 2, 2015

Via Hand Delivery

State Water Resources Control Board  
Division of Water Rights  
Attention: Jane Farwell-Jensen  
1001 I Street, 2nd Floor Sacramento, CA 95814

**Re: BBID ACL Hearing**

Dear Ms. Farwell-Jensen:

As mandated by the State Water Resources Control Board's (SWRCB) August 19, 2015 Notice of Public Hearing and Pre-Hearing Conference (Hearing Notice), attached is a Notice of Intent to Appear on behalf of the Byron-Bethany Irrigation District (BBID). BBID submits its Notice of Intent to Appear without waiving its objections to the SWRCB's improper assertion of jurisdiction over the subject matter of SWRCB Enforcement Action ENF01951 (ENF01951).

ENF01951 was issued on July 20, 2015. Nearly one month prior to the issuance of ENF01951, BBID filed an action in Contra Costa Superior Court challenging the SWRCB's unlawful curtailment of BBID's pre-1914 appropriative water right and otherwise unlawful conduct, including the SWRCB's unlawful issuance of the June 12, 2015 Notice of Unavailability of Water And Need For Immediate Curtailment (Curtailment Notice). BBID's action challenging the SWRCB's unlawful conduct is currently pending before the Santa Clara Superior Court. As BBID's action was filed prior to the SWRCB issuing ENF01951, the Santa Clara Superior Court has jurisdiction over the matter. As such, the SWRCB's attempt to undermine the Court's jurisdiction over the subject matter of the pending litigation is unlawful and otherwise inappropriate. BBID will seek relief from the Santa Clara Superior Court through an application for stay to prevent the SWRCB from unlawfully impeding on the Court's exercise of jurisdiction over the subject matter of the pending litigation.

Notwithstanding the jurisdictional defect, the timeline proposed by the SWRCB in the Hearing Notice for ENF01951 undermines BBID's ability to prepare for and present its case, thereby creating significant due process issues. The Hearing Notice was issued on August 19, 2015, and received via U.S. Mail by BBID on August 24, 2015.<sup>1</sup> With a noon September 2, 2015 deadline to identify witnesses and submit a Notice of Intent to Appear, BBID has *less than nine days* to identify witnesses to testify at a



*Hand-delivered  
accepted by PCW*

<sup>1</sup> BBID has not agreed to accept service via electronica mail.

State Water Resources Control Board  
Attention: Jane Farwell-Jensen  
Re: BBID ACL Hearing  
September 2, 2015  
Page 2

hearing in which the SWRCB proposes to impose a financial penalty of five million one hundred eighty thousand five hundred dollars (\$5,180,500). While BBID has diligently proceeded to identify witnesses to testify in general subject matters at the hearing currently scheduled to commence on October 28, 2015, BBID simply requires additional time to identify the appropriate witnesses to testify at the hearing.

Additionally, while the stated purpose of the hearing, as outlined in the Hearing Notice, is to determine the amount of financial penalty to impose on BBID, as provided in Water Code section 1055.3, for alleged unauthorized diversions, BBID expects to present evidence regarding the foundational question that would be a predicate to any proper determination of an appropriate amount of penalty, that is, whether there was even a violation of Water Code section 1052 or, was water, in fact available for diversion by BBID. In this regard, BBID is in the process of obtaining expert witnesses that will be available to testify on BBID's behalf at the hearing. Those experts will need to undertake a review of the water availability analysis supporting ENF10951, the database relied upon by the SWRCB in conducting that analysis, as well as conducting independent modeling to confirm the availability of water at BBID's point of diversion during the June 13 through June 25, 2015 period. BBID cannot be expected to engage consultants and have expert witnesses prepared to testify within the short time frames provided for in the Hearing Notice.

BBID will also need to prepare to address the criteria for imposing civil liability as provided for in Water Code section 1055.3, which will also necessitate engaging expert witnesses to determine whether any downstream water right holders were injured by BBID's activities or whether any other harm occurred, as well as addressing the other criteria contained in Section 1055.3. BBID also anticipates having to re-engage these same, or perhaps different, expert consultants to develop testimony to rebut whatever evidence the SWRCB Prosecution Team presents in its case-in-chief at the hearing. The short timeframes within which to request a hearing and to prepare for a hearing wherein the SWRCB proposes to impose "the biggest civil liability ever"<sup>2</sup> on a water right holder itself operates to deprive BBID of its rights to adequately prepare for the hearing on ENF01951.

The short timeframes identified in the Hearing Notice are also problematic in that BBID will not be able to conduct appropriate discovery to defend itself against the nearly \$5.2 million fine proposed by the SWRCB. BBID is entitled and, to the extent the Santa Clara Superior Court does not stay the proceedings on ENF01951, expects to notice depositions pursuant to Water Code section 1100 of various SWRCB staff and management to discovery evidence critical to BBID's defense of ENF01951. It is likely

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<sup>2</sup> *California Farm District Accused of Diverting Water*, New York Times, July 20, 2015, quoting Andrew Tauriainen.

State Water Resources Control Board  
Attention: Jane Farwell-Jensen  
Re: BBID ACL Hearing  
September 2, 2015  
Page 3

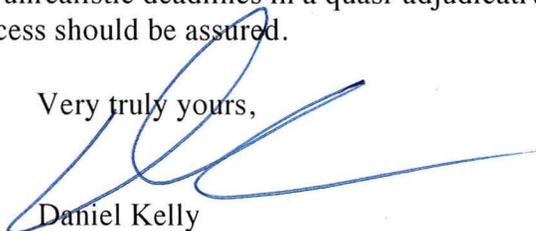
that BBID will need to depose third parties and will therefore require the SWRCB to issue subpoenas and subpoenas duces tecum as provided by section 649.6 of title 23 of the California Code of Regulations to allow BBID to depose persons not party to the Public Hearing. It is highly unlikely that this will occur prior to the currently scheduled hearing date of October 28, 2015.

To complicate matters further, BBID's General Manager, Rick Gilmore, is traveling on pre-scheduled District business on both the Pre-Hearing date of September 25, 2015, and the Public Hearing date of October 28-29, 2015. Mr. Gilmore's testimony will be required for BBID's defense of ENF01951.

Given the substantial amount of preparation work BBID needs to undertake to prepare for ENF01951, where the SWRCB will seek to impose "the biggest civil liability ever", the discovery that will need to occur, and the unavailability of BBID's main witness, the SWRCB should reschedule the Public Hearing on ENF01951 to provide BBID with sufficient time to prepare for and defend itself in the proceedings in ENF01951. BBID expects that it can be prepared to participate in a Public Hearing on ENF01951 in May 2016. This should provide BBID with sufficient time to complete its hydrologic analysis, analyze the data and modeling relied upon by the SWRCB in issuing the Curtailment Notice, and conduct discovery in preparation for the Public Hearing.<sup>3</sup>

With the alleged unlawful conduct occurring over a 13-day period in June 2015, there should be no need to impose unrealistic deadlines in a quasi-adjudicative process where some semblance of due process should be assured.

Very truly yours,



Daniel Kelly  
General Counsel  
Byron-Bethany Irrigation District

DK:yd

cc: Senator Cathleen Galgiani, Senate District 05  
Assemblywoman Dr. Susan Talamantes Eggman, District 13

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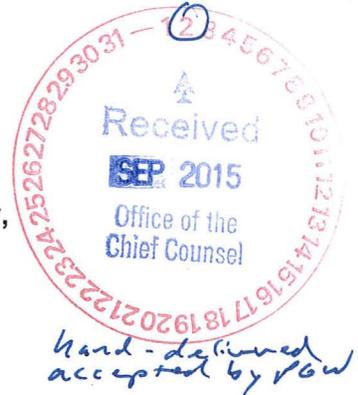
<sup>3</sup> The proposed Public Hearing date of May 2016 assumes that the only parties to the Public Hearing on ENF01951 are the SWRCB's Prosecution Team and BBID. Should other parties submit Notices of Intent to Appear, the time to prepare to address the positions of all participating parties will necessitate adjustments to the schedule.

**NOTICE OF INTENT TO APPEAR**

Byron-Bethany Irrigation District plans to participate in the water right hearing regarding  
(name of party or participant)

Administrative Civil Liability  
against  
Byron-Bethany Irrigation District

scheduled to commence  
**Wednesday, October 28, 2015 and continue, if necessary,  
on October 29 and 30, 2015  
at 9:00 a.m.**



**1) Check only one (1) of the following:**

- I/we intend to present a policy statement only.
- I/we intend to participate by cross-examination or rebuttal only.
- I/we plan to call the following witnesses to testify at the hearing. (Fill in the Following Table)

NAME	SUBJECT OF PROPOSED TESTIMONY	ESTIMATED LENGTH OF DIRECT TESTIMONY	EXPERT WITNESS (YES/NO)
See Attached			

(If more space is required, please add additional pages or use reverse side.)

**2) Fill in the following information of the Participant, Party, Attorney, or Other Representative:**

Name (Print): Daniel Kelly

Mailing Address: 500 Capitol Mall, Suite 1000, Sacramento, CA 95814

Phone Number: (916) 446-7979 Fax Number: (916) 446-8199

E-mail: dkelly@somachlaw.com

Optional:

- I/we decline electronic service of hearing-related materials.

Signature:  Dated: 9/2/2015

Name	Subject of Proposed Testimony	Estimated Length of Direct Testimony	Expert Witness (Yes/No)
Rick Gilmore	Water diversions and related issues	1 hour	No
TBD	Water availability	2 hours	Yes
TBD	SWRCB water availability analysis	1 hour	Yes
TDB	SWRCB water demand database	1 hour	Yes
TBD	SWRCB water supply data	1 hour	Yes
Mountain House Community Services District	Mountain House demand and use	1 hour	No
Mariposa Energy Project	MEP use	20 minutes	No
Contra Costa Airport	Airport use	20 minutes	No
Tom Howard	Curtailments, water supply, and related matters	1 hour	No
John O'Hagan	Curtailments, water supply, and related matters	4 hours	No
Kathy Mrowka	Curtailments, water supply, and related matters	2 hours	No
Michael George	Curtailments, water supply, and related matters	1 hour	
TBD	Criteria in Water Code section 1055.3	4 hours	Yes

Byron-Bethany Irrigation District reserves the right to amend or supplement this draft witness list any time prior to the hearing based upon relevant information discovered or developed subsequent to the submittal of this draft witness list.

BBID anticipates that it will not have written testimony to submit for Tom Howard, John O'Hagan, Kathy Mrowka, or Michael George. BBID intends on deposing these witnesses and may be able to rely, at least in part, on the deposition transcripts of each witness in place of written testimony. If so, the estimated times for direct testimony will likely be substantially less than provided above.

**NOTICE OF INTENT TO APPEAR**

Patterson Irrigation District plans to participate in the water right hearing regarding  
(name of party or participant)

Administrative Civil Liability  
against  
Byron-Bethany Irrigation District

scheduled to commence  
**Wednesday, October 28, 2015 and continue, if necessary,  
on October 29 and 30, 2015  
at 9:00 a.m.**

**1) Check only one (1) of the following:**

- I/we intend to present a policy statement only.
- I/we intend to participate by cross-examination or rebuttal only.
- I/we plan to call the following witnesses to testify at the hearing. (Fill in the Following Table)

NAME	SUBJECT OF PROPOSED TESTIMONY	ESTIMATED LENGTH OF DIRECT TESTIMONY	EXPERT WITNESS (YES/NO)

(If more space is required, please add additional pages or use reverse side.)

**2) Fill in the following information of the Participant, Party, Attorney, or Other Representative:**

Name (Print): Jeanne M. Zolezzi

Mailing Address: 5757 Pacific Ave., Suite 222

Stockton, CA 95207

Phone Number: (209) 472-7700 Fax Number: (209) 472-7986

E-mail: jzolezzi@herumcrabtree.com

Optional:

- I/we decline electronic service of hearing-related materials.

Signature:  Dated: 9/1/15

**NOTICE OF INTENT TO APPEAR**

Banta-Carbona Irrigation District plans to participate in the water right hearing regarding  
(name of party or participant)

Administrative Civil Liability  
against  
Byron-Bethany Irrigation District

scheduled to commence  
**Wednesday, October 28, 2015 and continue, if necessary,  
on October 29 and 30, 2015  
at 9:00 a.m.**

**1) Check only one (1) of the following:**

- I/we intend to present a policy statement only.
- I/we intend to participate by cross-examination or rebuttal only.
- I/we plan to call the following witnesses to testify at the hearing. (Fill in the Following Table)

NAME	SUBJECT OF PROPOSED TESTIMONY	ESTIMATED LENGTH OF DIRECT TESTIMONY	EXPERT WITNESS (YES/NO)

(If more space is required, please add additional pages or use reverse side.)

**2) Fill in the following information of the Participant, Party, Attorney, or Other Representative:**

Name (Print): Jeanne M. Zolezzi

Mailing Address: 5757 Pacific Ave., Suite 222

Stockton, CA 95207

Phone Number: (209) 472-7700 Fax Number: (209) 472-7986

E-mail: jzolezzi@herumcrabtree.com

Optional:

- I/we decline electronic service of hearing-related materials.

Signature:  Dated: 9/11/15

**NOTICE OF INTENT TO APPEAR**

The West Side  
Irrigation District \_\_\_\_\_ plans to participate in the water right hearing regarding  
(name of party or participant)

Administrative Civil Liability  
against  
Byron-Bethany Irrigation District

scheduled to commence  
**Wednesday, October 28, 2015 and continue, if necessary,  
on October 29 and 30, 2015  
at 9:00 a.m.**

**1) Check only one (1) of the following:**

- I/we intend to present a policy statement only.
- I/we intend to participate by cross-examination or rebuttal only.
- I/we plan to call the following witnesses to testify at the hearing. (Fill in the Following Table)

NAME	SUBJECT OF PROPOSED TESTIMONY	ESTIMATED LENGTH OF DIRECT TESTIMONY	EXPERT WITNESS (YES/NO)

(If more space is required, please add additional pages or use reverse side.)

**2) Fill in the following information of the Participant, Party, Attorney, or Other Representative:**

Name (Print): Jeanne M. Zolezzi

Mailing Address: 5757 Pacific Ave., Suite 222

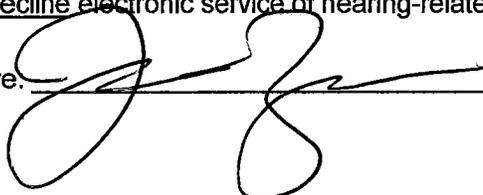
Stockton, CA 95207

Phone Number: (209) 472-7700 Fax Number: (209) 472-7986

E-mail: jzolezzi@herumcrabtree.com

Optional:

- I/we decline electronic service of hearing-related materials.

Signature:  \_\_\_\_\_ Dated: 9/11/15

CITY AND COUNTY OF SAN FRANCISCO



DENNIS J. HERRERA  
City Attorney

OFFICE OF THE CITY ATTORNEY

JONATHAN P. KNAPP  
Deputy City Attorney

Direct Dial: (415) 554-4261  
Email: jonathan.knapp@sfgov.org

August 31, 2015

Via Electronic and U.S. Mail

Attention: Jane Farewell-Jensen  
Division of Water Rights  
State Water Resources Control Board  
P.O. Box 2000  
Sacramento, CA 95814-0100  
wrhearing@waterboards.ca.gov

**Re: *Notice of Intent to Appear in State Water Resource Control Board's  
Enforcement Proceeding Against Byron-Bethany Irrigation District.***

Dear Ms. Farewell-Jensen:

Enclosed is a Notice of Intent to Appear, on behalf of the City and County of San Francisco, in the State Water Resources Control Board's hearing to determine whether to impose administrative civil liability against Byron-Bethany Irrigation District for alleged unauthorized diversion of water. Please do not hesitate to contact me if you have any questions.

Very truly yours,

DENNIS J. HERRERA  
City Attorney

A handwritten signature in black ink, appearing to read "Jonathan P. Knapp".

Jonathan P. Knapp  
Deputy City Attorney

Enclosure

## NOTICE OF INTENT TO APPEAR

The City and County of San Francisco plans to participate in the water right hearing regarding  
(name of party or participant)

Whether to impose Administrative Civil Liability Against Byron - Bethany  
Irrigation District for alleged unauthorized diversion of water.

**scheduled to commence**  
October 28, 2015 at 9 a.m.

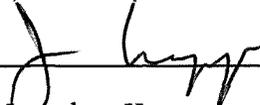
**Check all that apply:**

- 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)
Daniel Steiner	water availability	one hour	yes

(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:  Dated: 8/31/15  
 Name (Print): Jonathan Knapp

Mailing Address: Office of the City Attorney  
1390 Market Street, Suite 418, San Francisco, CA 94102

Phone Number: (415) 554-4261 Fax Number: (415) 554-8793

E-mail: jonathan.knapp@sfgov.org

1 Dante John Nomellini (SBN 040992)  
Daniel A. McDaniel (SBN 77363)  
2 Dante John Nomellini, Jr. (SBN 186072)  
NOMELLINI, GRILLI & McDANIEL  
3 PROFESSIONAL LAW CORPORATIONS  
235 East Weber Avenue  
4 Stockton, California 95202  
Telephone: (209) 465-5883  
5 Facsimile: (209) 465-3956

6 Jennifer L. Spaletta – SBN: 200032  
David S. Green – SBN: 287176  
SPALETTA LAW PC  
7 Post Office Box 2660  
Lodi, California 95241  
8 Telephone: (209) 224-5568  
Facsimile: (209) 224-5589  
9 Email: jennifer@spalettalaw.com

10 Attorneys for  
Central Delta Water Agency

11  
12 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

13  
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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**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.		

(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

Mailing Address: Spaletta Law;  
 PO Box 2660, Lodi, CA 95241

Nomellini, Grilli & McDaniel: 235 East Weber Avenue, Stockton, California 95202

Spaletta Law: Nomellini, Grilli & McDaniel: Spaletta Law: Nomellini, Grilli & McDaniel:  
 Phone Number: (209) 224-5568 (209) 465-5883 Fax Number: (209) 224-5589 (209) 465-3956

E-mail: jennifer@spalettalaw.com, ngmplcs@pacbell.net, dantejr@pacbell.net

**NOTICE OF INTENT TO APPEAR**

Department of Water Resources plans to participate in the water right hearing regarding  
(name of party or participant)

Administrative Civil Liability  
against  
Byron-Bethany Irrigation District

scheduled to commence  
**Wednesday, October 28, 2015 and continue, if necessary,  
on October 29 and 30, 2015**  
at 9:00 a.m.

**1) Check only one (1) of the following:**

- I/we intend to present a policy statement only.
- I/we intend to participate by cross-examination or rebuttal only.
- I/we plan to call the following witnesses to testify at the hearing. (Fill in the Following Table)

NAME	SUBJECT OF PROPOSED TESTIMONY	ESTIMATED LENGTH OF DIRECT TESTIMONY	EXPERT WITNESS (YES/NO)
Paul Marshall	Effects of Delta Diversions	One hour	Yes

(If more space is required, please add additional pages or use reverse side.)

**2) Fill in the following information of the Participant, Party, Attorney, or Other Representative:**

Name (Print): Robin McGinnis, Attorney

Mailing Address: P.O. Box 942836, Sacramento, CA 94236-0001

Phone Number: (916) 657-5400 Fax Number: ( )

E-mail: robin.mcginis@water.ca.gov

Optional:

- I/we decline electronic service of hearing-related materials.

Signature:  Dated: 9/2/15

**NOTICE OF INTENT TO APPEAR**

Richard Morat plans to participate in the water right hearing regarding  
(name of party or participant)

Administrative Civil Liability  
against  
Byron-Bethany Irrigation District

scheduled to commence  
**Wednesday, October 28, 2015 and continue, if necessary,  
on October 29 and 30, 2015  
at 9:00 a.m.**

**1) Check only one (1) of the following:**

- I/we intend to present a policy statement only.
- I/we intend to participate by cross-examination or rebuttal only.
- I/we plan to call the following witnesses to testify at the hearing. (Fill in the Following Table)

NAME	SUBJECT OF PROPOSED TESTIMONY	ESTIMATED LENGTH OF DIRECT TESTIMONY	EXPERT WITNESS (YES/NO)
RICHARD MORAT	The harm to living resources of the aquatic ecosystem that BBID's unpermitted operation occasioned and that the Board should address (Key Issue 1a.)	10 minutes	Y

(If more space is required, please add additional pages or use reverse side.)

**2) Fill in the following information of the Participant, Party, Attorney, or Other Representative:**

Name (Print): Richard Morat

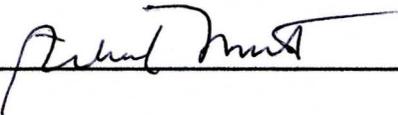
Mailing Address: 2821 Berkshire way  
Sacramento, CA 95864

Phone Number: 916 487-9030 Fax Number: ( ) none

E-mail: rijmorat@gmail.com

**Optional:**

I/we decline electronic service of hearing-related materials.

Signature:  Dated: Aug 28, 2015

**NOTICE OF INTENT TO APPEAR**

Richard Morat plans to participate in the water right hearing regarding  
(name of party or participant)

Administrative Civil Liability  
against  
Byron-Bethany Irrigation District

scheduled to commence  
**Wednesday, October 28, 2015 and continue, if necessary,  
on October 29 and 30, 2015  
at 9:00 a.m.**

**1) Check only one (1) of the following:**

- I/we intend to present a policy statement *only. separately & an noticing to participant*
- I/we intend to participate by cross-examination or rebuttal only.
- I/we plan to call the following witnesses to testify at the hearing. (Fill in the Following Table)

NAME	SUBJECT OF PROPOSED TESTIMONY	ESTIMATED LENGTH OF DIRECT TESTIMONY	EXPERT WITNESS (YES/NO)
<u>Richard Morat</u>	<u>Policy Statement - The role of enforcement in protection of public trust resources</u>	<u>10 min</u>	<u>N</u>

(If more space is required, please add additional pages or use reverse side.)

**2) Fill in the following information of the Participant, Party, Attorney, or Other Representative:**

Name (Print): Richard Morat

Mailing Address: 2821 Berkshire Way  
Sacramento, CA 95864

Phone Number: ( ) 916-487-9090 Fax Number: ( ) None

E-mail: rjmorat@gmail.com

Optional:  
 I/we decline electronic service of hearing-related materials.

Signature: Richard Morat Dated: Aug 30, 2015

**NOTICE OF INTENT TO APPEAR**

State Water Contractors plans to participate in the water right hearing regarding  
(name of party or participant)

Administrative Civil Liability  
against  
Byron-Bethany Irrigation District

**scheduled to commence  
Wednesday, October 28, 2015 and continue, if necessary,  
on October 29 and 30, 2015  
at 9:00 a.m.**

**1) Check only one (1) of the following:**

- I/we intend to present a policy statement only.
- I/we intend to participate by cross-examination or rebuttal only.
- I/we plan to call the following witnesses to testify at the hearing. (Fill in the Following Table)

NAME	SUBJECT OF PROPOSED TESTIMONY	ESTIMATED LENGTH OF DIRECT TESTIMONY	EXPERT WITNESS (YES/NO)

(If more space is required, please add additional pages or use reverse side.)

**2) Fill in the following information of the Participant, Party, Attorney, or Other Representative:**

Name (Print): Stefanie Morris

Mailing Address: 1121 L Street, Suite 1050

Sacramento, California 95814

Phone Number: (916) 447-7357. Fax Number: (916) 447-2734

E-mail: smorris@swc.org

Optional:

- I/we decline electronic service of hearing-related materials.

Signature:  Dated: 8/27/2015

## SOUTH DELTA WATER AGENCY

4255 PACIFIC AVENUE, SUITE 2  
STOCKTON, CALIFORNIA 95207  
TELEPHONE (209) 956-0150  
FAX (209) 956-0154  
E-MAIL [Jherrlaw@aol.com](mailto:Jherrlaw@aol.com)

Directors:

Jerry Robinson, Chairman  
Robert K. Ferguson, Vice-Chairman  
Natalino Bacchetti  
Jack Alvarez  
Mary Hildebrand

Counsel & Manager:  
John Herrick

August 28, 2015

Sent Via E-mail [wrhearing@waterboards.ca.gov](mailto:wrhearing@waterboards.ca.gov)

Division of Water Rights  
State Water Resources Control Board  
P.O. Box 2000  
Sacramento, CA 95812-2000  
Attn: Jane Farwell-Jensen

Re: Byron-Bethany Irrigation District ACL Hearing

Dear Ms. Farwell-Jensen:

Included herewith is the South Delta Water Agency's Notice of Intent to Appear in the above referenced hearing. As you can see, SDWA will be presenting testimony, including expert witness testimony as a party to the proceedings. Please note the following issues/requests:

1. The Notice for the hearing sets the commencement of the hearing on Wednesday, October 28, 2015. In our opinion that date should be continued for at least two reasons. First, Byron-Bethany Irrigation District ("BBID") recently filed a Petition in the Superior Court of Contra Costa County challenging the SWRCB's jurisdiction to issue any curtailment notice dealing with BBID's water rights (and other claims). That case is now being coordinated in Santa Clara County with other similar cases. During the coordination, BBID will be asking the court to stay the above referenced hearing pending the outcome of the court cases. Not only are the underlying issues similar, but the SWRCB was arguably required to bring this action as a mandatory cross-complaint in court once BBID filed its action. Since BBID (and others) allege the SWRCB has acted improperly and without authority regarding the curtailment of Delta and other senior water rights, it would be inappropriate for the SWRCB to rule on its own actions, especially now that the matter is before the court.

Secondly, the ACL Hearing will include significant testimony regarding water availability, water quality, priority of rights and Delta hydrodynamics. This will necessary include not only the presentation of technical evidence, but also depositions of the relevant SWRCB personnel. It is unrealistic to assume that a party can find the necessary technical/expert

SWRCB; Attn: Jane Farwell-Jensen  
August 28, 2015  
Page - 2 -

witnesses, prepare the necessary testimony and participate in such a hearing within such a short time frame. We believe it would be a denial of due process to conduct the hearing so soon after the Notice. Given this, SDWA requests that the SWRCB continue this hearing until the court has ruled on BBID's soon-to-be-hear motion. Even if the court does not grant any sort of stay of this proceeding, the ACL Hearing and all deadlines associated therewith should be continued for at least 3-4 months.

2. The Key Issues listed in the Notice appear to exclude the purported underlying factual and legal bases upon which the ACL is sought. Those issues include the calculation of the available supply for in-Delta users and the many related issues. It would be unfair for the SWRCB to consider much less assess a monetary penalty against a party for diverting without allowing the party to challenge the bases on which the purported wrongful diversion was determined. The Key Issues in the Notice suggest that the SWRCB has already determined liability and the only things left to consider are mitigating circumstances. Such limitations on the hearing would also be a violation of the party's due process rights.

3. SDWA believes it is necessary to depose certain SWRCB staff members well before the hearing. We hereby request the Board issue us four (4) deposition subpoenas so that we can begin the discovery process.

Please feel free to contact me if you have any questions.

Very truly yours,

  
JOHN HERRICK, Esq

NOTICE OF INTENT TO APPEAR

South Delta Water Agency plans to participate in the water right hearing regarding

Administrative Civil Liability
against
Byron-Bethany Irrigation District

scheduled to commence
Wednesday, October 28, 2015 and continue, if necessary
on October 29 and 20, 2015
at 9:00 a.m.

Check all that apply:

- I/we intend to present a policy statement only.
I/we intend to participate by cross-examination or rebuttal only.
X I/we plan to call the following witnesses to testify at the hearing.

Table with 4 columns: NAME, SUBJECT OF PROPOSED TESTIMONY, ESTIMATED LENGTH OF DIRECT TESTIMONY, EXPERT WITNESS (YES/NO). Rows include Tom Burke, P.E., Terry Prichard, and Chris Neudeck, P.E.

(If more space is required, please add additional pages or use reverse side.)

Name (Print): John Herrick, Esq.

Mailing Address: 4255 Pacific Avenue, Suite 2, Stockton, CA 95207

Phone Number: (209) 956-0150 Fax Number: (209) 956-0154

E-mail: jherrlaw@aol.com

Optional:

I/we decline electronic service of hearing-related materials.

Signature: John Herrick

Dated: August 26, 2015

**NOTICE OF INTENT TO APPEAR**

San Joaquin Tributaries Authority plans to participate in the water right hearing regarding  
 (name of party or participant)

Administrative Civil Liability  
 against  
 Byron-Bethany Irrigation District

scheduled to commence  
**Wednesday, October 28, 2015 and continue, if necessary,  
 on October 29 and 30, 2015  
 at 9:00 a.m.**

**1) Check only one (1) of the following:**

- I/we intend to present a policy statement only.
- I/we intend to participate by cross-examination or rebuttal only.
- I/we plan to call the following witnesses to testify at the hearing. (Fill in the Following Table)

NAME	SUBJECT OF PROPOSED TESTIMONY	ESTIMATED LENGTH OF DIRECT TESTIMONY	EXPERT WITNESS (YES/NO)
Dan Steiner	Water Supply	1.5 hr	yes
Susan Paulson	Hydrodynamics	1 hr	yes
John O'Hagan	SWB Estimate of Supply / demand	1 hr	no

(If more space is required, please add additional pages or use reverse side.)

**2) Fill in the following information of the Participant, Party, Attorney, or Other Representative:**

Name (Print): Valerie Kincaid

Mailing Address: 2617 K Street, Suite 100

Phone Number: 916599-5498 Fax Number: ( )

E-mail: VKincaid@olaughlinparis.com

Optional:

- I/we decline electronic service of hearing-related materials.

Signature: Valerie Kincaid Dated: 9/2/15

