

ATTORNEYS AT LAW

500 CAPITOL MALL, SUITE 1000, SACRAMENTO, CA 95814 OFFICE: 916-446-7979 FAX: 916-446-8199 SCMACHLAW.COM January 27, 2016

Hearing Team State Water Resources Control Board 1001 I Street Sacramento, CA 95814

> Enforcement Action ENF01951 and ENF01949 Re:

Dear Hearing Team:

This letter responds to the Prosecution Team's January 26, 2016 email to the Hearing Team, in which the Prosecution Team reiterates its objection to, among other things, the motions to dismiss filed by Byron-Bethany Irrigation District (BBID) on January 25, 2016. In their latest email, the Prosecution Team requests a "ruling on these objections as soon as possible." While BBID has no objection to the Prosecution Team's request for a quick determination from the Hearing Team on their objections, BBID's cautions against a determination that ignores or strikes any of the motions filed by BBID.

On January 12, 2016, the Hearing Team directed BBID to provide a pre-hearing legal briefing on two questions: "(1) does the State Water Resources Control Board (SWRCB) have the authority to curtail, and (2) does Water Code section 1052 (Section 1052) apply to diversions made under claim of a pre-1914 or riparian water right?" Regarding the first issue, BBID filed a "Notice of Position" on the question of curtailments, explaining that curtailments are not at issue in Enforcement Proceeding ENF01951. Thus, "legal briefing" was not required on this issue. On the second issue, the application of Section 1052, BBID provided its briefing in the form of a Motion to Dismiss, as Section 1052 does not apply to BBID's diversions.

The remainder of the motions to dismiss filed by BBID raise threshold procedural and jurisdictional issues that require resolution prior to the scheduled hearing in this matter. Two of BBID's briefs raise constitutional due process issues: the right to a fair hearing and unbiased decision maker, and BBID's right to a hearing before being deprived of its property rights. There is no authority that would prohibit BBID from being able to raise due process issues during the pendency of the proceeding. Another motion raises the issue of whether SWRCB staff's water availability analysis and subsequent curtailments constitute underground regulations – prohibited by California law. The last motion raises defects in the SWRCB Enforcement staff's issuance of the ACL Complaint against BBID because Mr. O'Hagan does not have legitimate authority to issue ACL Complaints.

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In the Hearing Team's January 14, 2016, email entitled "Clarification – Byron-Bethany Irrigation District and West Side Irrigation District Hearings," (January 14 Clarification) the Hearing Team states the following:

Motions to dismiss or motions for summary judgment may be submitted by BBID in the BBID proceeding and by WSID in the WSID proceeding. The Prosecution Team may file a motion for summary judgment in both proceedings. The motions must be received by the Board by Noon, January 25, 2016. The briefs may not exceed ten pages in length. The motions may include a motion for summary judgment; at the parties' discretion, the motions may address evidence submitted to the Board and need not be strictly based on the allegations in the Administrative Civil Liability Complaint or draft Cease and Desist Order.

All other parties may submit responsive briefs in support or opposition to the motions, to be received by the Board by **Noon**, **February 22**, **2016**. Responsive briefs may not exceed ten pages in length. Alternatively, parties may file a joint responsive brief of up to twenty pages in length. (Bold in original; italics added.)

This directive supports the filing of multiple motions to dismiss on relevant issues. However, during an email exchange between counsel that followed the Prosecution Team's initial objection to BBID's motion, Andrew Tauriainen contradicts the Hearing Team's directive regarding the issues BBID can raise by motion stating, in material part, the following:

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. (A copy is attached; emphasis added.)

The idea that BBID can effectively brief in ten pages the threshold issues raised in its motions to dismiss is absurd. The issues addressed in these motions go directly to the Hearing Team's jurisdiction and authority to continue these proceedings. If it is in fact the Hearing Team's intent to ignore the motions filed by BBID, BBID maintains that such intent constitutes bias and selective enforcement supporting a claim under 42 U.S.C.

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section 1983. (Squaw Valley Development Company v. Goldberg (9th Cir. 2004) 375 F.3d 936.)

In his order denying BBID's and West Side Irrigation District's (WSID) motion for stay, Santa Clara Superior Court judge, Perter Kirwan, states the following:

In the instant case, both BBID and WSID will have the opportunity to present evidence at the administrative enforcement hearing regarding their respective rights to the water before a tribunal that is required to be impartial, fair and neutral, and has the specific expertise to adjudicate these issues.... To the extent that the Plaintiffs claim the process is procedurally deficient (i.e., biased or pre-determined), they will have opportunity to raise those issues to the Court, but there simply is not enough evidence at this point for the Court to reach that conclusion. (Order at pp. 5:28-6:15; emphasis added.)

If the Hearing Team ignores the motions filed by BBID, as urged by the Prosecution Team, the failure constitutes bias per se. Such a position is at odds with the SWRCB's position before the Superior Court, Judge Kirwan's Order, and the Hearing

Team's January 14 Clarification.

Best Regards,

MEV:mb

Enclosure

From: Tauriainen, Andrew@Waterboards Andrew.Tauriainen@waterboards.ca.gov @

Subject: RE: BBID/WSID Hearings Date: January 25, 2016 at 12:27 PM

To: Dan Kelly dkeily@somachlaw.com, Unit, Wr_Hearing@Waterboards Wr_Hearing.Unit@waterboards.ca.gov

c: Yolanda De la Cruz ydelacruz@somachlaw.com, Michael Vergara mvergara@somachlaw.com, Herrick, John @aol.com jherrlaw@aol.com, Jennifer L. Spaletta Jennifer@spalettalaw.com, Valerie Kincaid vkincaid@olgughtinparis.com, Jeanne Zolezzi izolezzi@herumcrabtree.com, Tim O'Laughlin towater@olaughlinparis.com, kharrigfeld@herumcrabtree.com, Jonathan Knapp jonathan.knapp@sfgov.org, Richard Morat rmorat@gmail.com, McGinnis, Robin C.@DWR Robin.McGinnis@water.ca.gov, Stefanie Morris smorris@swc.org, Rick Gilmore r.gilmore@bbid.org, Janelle Krattiger jkrattiger@herumcrabtree.com, Daniel O'Hanlon donanlon@kmtg.com, Akroyd, Rebecca@KMTG rakroyd@kmtg.com, Philip Williams pwilliams@westlandswater.org, ngmplcs@pacbell.net, Dante Nomellini Jr. dantejr@pacbell.net, Michelle Bracha mbracha@somachlaw.com, Uoxina Santos-Aguirre usantos-aguirre@somachlaw.com, Kuenzi, Nicole@Waterboards Nicole.Kuenzi@waterboards.ca.gov, Farwell Jensen, Jane Jane.Farwell-Jensen@waterboards.ca.gov, Mona, Ernie@Waterboards Ernie.Mona@waterboards.ca.gov, Buckman, Michael@Waterboards

Michael.Buckman@waterboards.ca.gov

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

Subject: Re: BBID/WSID Hearings

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.

Dan Kelly



Daniel Kelly | Attorney

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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; Jennifer L. Spaletta; Valerie Kincaid;

Jeanne Zolezzi; Tim O'Laughlin; kharrigfeld@herumcrabtree.com; Tauriainen,

Andrew@Waterboards; Jonathan Knapp; Richard Morat; McGinnis, Robin <u>C.@DWR</u>; 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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