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7 BETHANY IRRIGATION DISTRICT

8
9 BEFORE THE
10 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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12 ENFORCEMENT ACTION ENF01949
DRAFT CEASE AND DESIST ORDER
13 REGARDING UNAUTHORIZED
DIVERSIONS OR THREATENED
14 UNAUTHORIZED DIVERSIONS OF WATER
FROM OLD RIVER IN SAN JOAQUIN
15 COUNTY

16 In the Matter of ENFORCEMENT ACTION
ENF01951 – ADMINISTRATIVE CIVIL
17 LIABILITY COMPLAINT REGARDING
UNAUTHORIZED DIVERSION OF WATER
18 FROM THE INTAKE CHANNEL TO THE
BANKS PUMPING PLANT (FORMERLY
19 ITALIAN SLOUGH) IN CONTRA COSTA
COUNTY

SWRCB Enforcement Action
ENF01951 and ENF01949

BYRON-BETHANY IRRIGATION
DISTRICT'S OPPOSITION TO
STATE WATER CONTRACTORS'
MOTION TO QUASH SUBPOENA
DUCES TECUM, OR, IN THE
ALTERNATIVE, MOTION FOR
PROTECTIVE ORDER AND
REQUEST TO CLOSE
DISCOVERY

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1 I. INTRODUCTION

2 On February 22, 2016, State Water Contractors (SWC) submitted Paul Hutton's
3 (Hutton) rebuttal testimony, almost entirely based on a 60-page report prepared by
4 engineers with CH2M Hill, Inc. (CH2M Hill). The report is attached as an exhibit to the
5 testimony. CH2M Hill engineer Chandra Chilmakuri (Chilmakuri) assisted in preparation
6 of the report. At the same time Chilmakuri was working on the report, Kyle Winslow
7 (Winslow), also with CH2M Hill, was conducting similar work for Byron-Bethany Irrigation
8 District (BBID), and communicating with Chilmakuri with respect to that work. BBID
9 seeks the production of documents by CH2M Hill via subpoena referring to Chilmakuri's
10 and Winslow's work. SWC moves to quash BBID's subpoena to CH2M Hill and requests
11 that the SWRCB close discovery.

12 On March 9, 2016, the State Water Resource Control Board (SWRCB) Hearing
13 Officers issued an order prohibiting additional depositions before the hearing, stating that
14 questioning could be conducted through cross-examination. As such, it is critical for
15 BBID to receive the CH2M Hill documents in order to be reasonably and adequately
16 prepared to cross-examine SWC's expert Hutton at the March 21, 2016 hearing.

17 Discovery is meant to be a liberal vehicle for finding evidence that may be helpful
18 or harmful to a party's case in advance of the final adjudication. Winslow undertook
19 work on behalf of BBID. The subpoena issued to Winslow seeks information regarding
20 that work, and cannot be withheld from BBID based on an assertion of privilege.
21 Chilmakuri engaged in work on behalf of SWC, and the results of that work have been
22 submitted to the SWRCB as part of SWC's testimony in the Administrative Civil Liability
23 Complaint to BBID, Enforcement Action ENF01951 (the "ACL"). SWC cannot assert
24 privilege to materials submitted as expert testimony in a quasi-adjudicatory proceeding.
25 Moreover, the subpoena is not even directed to SWC. It is directed to a non-party.
26 SWC will not be burdened, prejudiced, or even involved with the CH2M Hill document
27 production.

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1 BBID respectfully requests the SWRCB prevent SWC's attempt to limit BBID's
2 access to discoverable documents in advance of the hearing, and order that the
3 production of the requested documents proceed as soon as possible and prior to the
4 hearing to allow BBID to effectively prepare for cross-examination.

5 II. STATEMENT OF FACTS

6 On June 12, 2015, the SWRCB sent a Notice of Unavailability of Water and Need
7 for Immediate Curtailment (Curtailment Notice) to BBID and others that purported to
8 curtail appropriative water right with 1903 and later priority dates within the Sacramento
9 and San Joaquin River watersheds, including the Delta. (Declaration of Theresa C.
10 Barfield in Support of BBID's Opposition to SWC's Motion to Quash Subpoena Duces
11 Tecum or in the Alternative, Motion for Protective Order and Request to Close Discovery
12 (Barfield Decl.), at ¶ 2.) The Curtailment Notice directed BBID to "immediately stop
13 diverting" under its pre-1914 water rights, and provided that any further diversions would
14 subject BBID to "administrative penalties, cease and desist orders, or prosecution in
15 court." (Barfield Decl., at ¶ 3.)

16 On June 26, 2015, BBID filed suit against the SWRCB, challenging the
17 Curtailment Notice and asserting that the SWRCB conducted a flawed water availability
18 analysis, among other errors. (Barfield Decl., at ¶ 4.) On July 20, 2015, the SWRCB
19 issued the ACL, alleging BBID unlawfully diverted water from June 13, 2015 to June 25,
20 2015. (Barfield Decl., at ¶ 5.)

21 In 2015, BBID hired CH2M Hill to conduct modeling showing water availability and
22 salinity concentrations in the Delta and sources of water at BBID's point of diversion in
23 2015. (Barfield Decl., at ¶ 6.) Until the beginning of November 2015, Winslow worked
24 extensively with upper management and counsel for BBID to produce models
25 addressing questions presented, and underwent several iterations of modeling to
26 address further questions as they arose. (Barfield Decl., at ¶ 7.) This modeling was all
27 in draft form. (Barfield Decl., at ¶ 8.) BBID never received a final report. (Barfield Decl.,
28 at ¶ 9.)

1 On November 6, 2015, counsel for BBID received an email from Allan Highstreet,
2 the Vice President of CH2M Hill, stating that CH2M Hill would no longer assist BBID with
3 modeling regarding the Curtailment Notice and the ACL and attaching a letter stating
4 CH2M Hill's position. (Barfield Decl., at Exh. A.)

5 On February 22, 2016, as part of the ACL, SWC filed Hutton's rebuttal testimony.
6 Exhibit 5 to Hutton's testimony is a draft technical memorandum prepared by Tyler Hatch
7 and Chilmakuri titled "2012-2015 Delta Salinity Conditions under a Without Project
8 Scenario." (Barfield Decl., at Exh. B.) The draft technical memorandum includes
9 modeling of salinity concentrations in the Delta from January 28, 2012 through
10 August 29, 2015, with and without the State Water Project. (Barfield Decl., at ¶ 12.)

11 On February 24, 2016, BBID served Subpoenas Duces Tecum on Winslow and
12 Chilmakuri, amended on March 3, 2016. (Barfield Decl., at ¶ 13.) BBID served a
13 Subpoena Duces Tecum on the Custodian of Records for CH2M Hill on March 3, 2016
14 seeking production of documents in CH2M Hill's control related to (1) the draft technical
15 memorandum, (2) communications between CH2M Hill and SWC or between CH2M Hill
16 and Metropolitan Water District of Southern California (MET) about the draft technical
17 memorandum, (3) communications between CH2M Hill and SWC or between CH2M Hill
18 and MET about BBID, (4) communications between CH2M Hill and SWC or between
19 CH2M Hill and MET about CH2M Hill's modeling work for BBID, and (5) the report that
20 CH2M Hill was in the process of preparing for BBID. (Barfield Decl., at Exh. C.)

21 On March 2, 2016, SWC moved to quash the Chilmakuri and Winslow deposition
22 subpoenas. (Barfield Decl., at ¶ 17.) On March 9, 2016, the Hearing Officer issued an
23 order prohibiting the depositions of CH2M Hill engineers and the SWC's rebuttal expert
24 witnesses before the ACL hearing. (Barfield Decl., at Exh. D.) In so ordering, the
25 SWRCB concluded that the parties could explore the rebuttal testimony of the SWC
26 experts through cross-examination at the hearing. (*Ibid.*) The ACL hearing is set to
27 begin on March 21, 2016.

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III. ARGUMENT

Administrative hearings and discovery procedures are governed by the Water Code (Wat. Code, § 1075 et seq.) and SWRCB regulations (Cal. Code Regs., tit. 23, § 648 et seq.), which incorporate portions of the Administrative Procedure Act (Gov. Code, § 11400 et seq., 11513) and the Civil Discovery Act (Code Civ. Proc., § 2016.010 et seq.). The Board or any party to a proceeding before the Board may take the deposition of witnesses in accordance with the Civil Discovery Act. (Wat. Code, § 1100.)

Discovery in the SWRCB's proceedings should, as in civil actions in the superior courts, be construed broadly in favor of permitting discovery. As courts have repeatedly explained, “[t]he scope of discovery [in civil actions] is very broad.” (*Tien v. Superior Court (The People)* (2006) 139 Cal.App.4th 528, 535.) This expansive scope of discovery “enable[s] a party to obtain evidence in the control of his adversary in order to further the efficient, economical disposition of cases according to right and justice on the merits.” (*Fairfield v. Superior Court (The People)* (1966) 246 Cal.App.2d 113, 119-120.) Consistent with this purpose, the California Supreme Court has consistently held that “discovery statutes are to be construed broadly in favor of disclosure, so as to uphold the right to discovery whenever possible.” (*Puerto v. Superior Court (The People)* (2008) 158 Cal.App.4th 1242, 1249 [citing *Emerson Electric Co. v. Superior Court (The People)* (1997) 16 Cal.4th 1101, 1107-08; *Greyhound Corp. v. Superior Court (The People)* (1961) 56 Cal.2d 355, 377].)

Further, parties to an adjudicative proceeding are entitled to due process, which includes a full and fair opportunity to participate. (See, e.g., *Sallas v. Municipal Court* (1978) 86 Cal.App.3d 737, 742 [“due process of law requires that an accused ... have a reasonable opportunity to prepare and present his defense”].) BBID is seeking no more than it is afforded by the Water Code, the Code of Civil Procedure, and the basic tenets of due process rights.

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1 A. The Attorney Work Product Privilege Is Inapplicable to the Requested Discovery

2 SWC claims BBID seeks information protected by the attorney work product
3 privilege. Work product subject to protection includes writings that reflect an attorney's
4 impressions, conclusions, opinions, legal research, or theories. (Code Civ. Proc.,
5 § 2018.030.) Winslow undertook work on behalf of BBID. The subpoena issued to
6 CH2M Hill seeks information regarding that work. The request seeks documents related
7 to Winslow's work for BBID – not SWC. SWC has no legal right to object on the basis of
8 work product relative to Winslow's work for BBID.

9 The work Chilmakuri conducted for SWC was submitted to the SWRCB as part of
10 SWC's testimony in the ACL. The documents are now part of the SWRCB's record in
11 this hearing. SWC cannot assert privilege to materials submitted as expert testimony in
12 a quasi-adjudicatory proceeding.

13 SWC states BBID will not be unfairly prejudiced by denying the requested
14 discovery because, in order to prepare to cross-examine Hutton, BBID has access to
15 Hutton's rebuttal testimony and the supporting documents. BBID's ability to cross-
16 examine Hutton should not be limited to documents chosen by the SWC. BBID must
17 have an opportunity to conduct its own research and make its own determination on
18 what documents support its case.

19 To the extent the SWRCB determines that privilege is properly asserted, BBID is
20 entitled to a privilege log with respect to the documents. However, there is no legal basis
21 to prevent the document productions in their entirety on the basis of privilege.

22 B. SWC's Relevance and Burden Objections to the Document Requests Are
23 Unfounded and Improper

24 SWC argues that BBID's subpoenas are overbroad, unduly burdensome, seek
25 information already available, and seek irrelevant information that is not reasonably
26 calculated to lead to the discovery of admissible evidence. Code of Civil Procedure
27 section 2017.010 provides that "any party may obtain discovery regarding any matter,
28 not privileged, that is relevant to the subject matter involved in the pending action[.]" In

1 an administrative hearing, relevant evidence “is the sort of evidence on which
2 responsible persons are accustomed to rely in the conduct of serious affairs.” (Gov.
3 Code, § 11513(c).) Although administrative adjudications follow a relaxed standard of
4 admissibility, the evidence still “must be relevant and reliable.” (*Aengst v. Bd. of Medical*
5 *Quality Assurance* (1980) 110 Cal.App.3d 275, 283.)

6 BBID requests all documents related to (1) the draft technical memorandum,
7 (2) communications between CH2M Hill and SWC or between CH2M Hill and MET about
8 the draft technical memorandum, (3) communications between CH2M Hill and SWC or
9 between CH2M Hill and MET about BBID, (4) communications between CH2M Hill and
10 SWC or between CH2M Hill and MET about CH2M Hill’s modeling work for BBID, and
11 (5) the report that CH2M Hill was in the process of preparing for BBID. (Barfield Decl., at
12 Exh. C.) The draft technical memorandum and modeling work done for BBID relates to
13 water availability in the Delta, which is the focus of Phase I of the ACL hearing.
14 Certainly, the requested categories of documents have a tendency to prove or disprove
15 disputed facts in this matter and are necessary for BBID to properly prepare to cross-
16 examine Hutton. Moreover, BBID is entitled to production of all documents relied upon
17 by Hutton in forming his opinions. (Code Civ. Proc., § 2034.210(c).)

18 Further, the standard for production of documents at the discovery stage is
19 whether the documents sought are likely to lead to the discovery of admissible evidence,
20 not whether they are actually admissible at the hearing. (Code Civ. Proc., § 2017.010.)
21 It is improper to assert “relevance” as a justification for refusing to produce documents
22 unless the categories sought are blatantly unrelated to the issues. That is not the case
23 with BBID’s document requests, and SWC’s objection to the production of documents
24 that, at a minimum, are likely to lead to the discovery of admissible evidence is an abuse
25 of the discovery process. Furthermore, the subpoena is not directed to SWC. Thus,
26 SWC’s claim that it will suffer from “burden, expense, and intrusiveness of the discovery
27 sought” is without merit.

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1 C. BBID Served Subpoenas As Quickly As Possible Given Its Shortened Timeframe
2 SWC claims there is insufficient time for CH2M Hill to produce documents. Again,
3 SWC is not required to produce documents pursuant to the subpoena at issue. The
4 subpoena is directed to a non-party, CH2M Hill, and CH2M Hill has not filed a Motion to
5 Quash or requested a Protective Order. Furthermore, BBID had little choice on the
6 timeframes within which to serve subpoenas and request documents. SWC submitted
7 testimony relying on Chilmakuri's work on February 22, 2016, mere weeks prior to the
8 evidentiary hearing for the ACL that is set to begin on March 21, 2016. Given this
9 already short timeframe, BBID served CH2M Hill on March 3, 2016, as expeditiously as
10 possible.

11 D. SWC's Request to Close Discovery and Alternative Request to Limit the Scope of
12 the Document Productions are Unfounded

13 SWC's request to close discovery and alternative request to limit the scope of the
14 depositions and document productions should be denied. BBID has a statutory right to
15 "obtain discovery regarding any matter, not privileged, that is relevant to the subject
16 matter involved in the pending action[.]" (Code Civ. Proc., § 2017.010.) SWC points out
17 that discovery "generally" must be completed 30 days prior to the trial. Here, however,
18 the SWRCB has already permitted the exchange of discovery within 30 days of trial by
19 way or ordering the production of rebuttal testimony after what would "generally" have
20 been the close of discovery. SWC's submission of rebuttal testimony within 30 days of
21 trial in the form of a witness relying upon documents in the possession of a non-party,
22 forced BBID to serve a subpoena seeking production of these documents. SWC cannot
23 now argue that discovery should be closed when the SWC itself placed the subject
24 discovery in issue this close to the hearing date. SWC fails to set forth any facts or legal
25 arguments to reasonably justify any curtailment of BBID's discovery rights.

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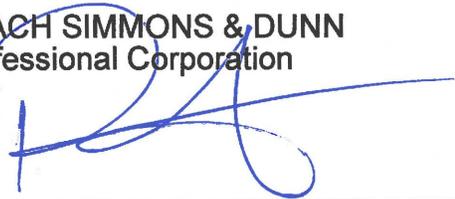
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IV. CONCLUSION

For the foregoing reasons, BBID respectfully requests the SWRCB deny SWC's Motion to Quash Subpoena Duces Tecum and order non-party CH2M Hill to produce the documents pursuant to the subpoena. To the extent that the SWRCB permits withholding documents on the basis of a privilege, BBID requests production of a privilege log.

Dated: March 10, 2016

SOMACH SIMMONS & DUNN
A Professional Corporation

By: 
Theresa C. Barfield, Esq.
Attorneys for Petitioner/Plaintiff BYRON-
BETHANY IRRIGATION DISTRICT

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PROOF OF SERVICE

I am employed in the County of Sacramento; my business address is 500 Capitol Mall, Suite 1000, Sacramento, California; I am over the age of 18 years and not a party to the foregoing action.

On March 10, 2016, I served the following document(s):

BYRON-BETHANY IRRIGATION DISTRICT'S OPPOSITION TO STATE WATER CONTRACTORS' MOTION TO QUASH SUBPOENA DUCES TECUM, OR, IN THE ALTERNATIVE, MOTION FOR PROTECTIVE ORDER AND REQUEST TO CLOSE DISCOVERY

(via electronic mail) by causing to be delivered a true copy thereof to the person(s) and at the email addresses set forth below:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 10, 2016 at Sacramento, California.


Michelle Bracha

**SERVICE LIST OF PARTICIPANTS
 BYRON-BETHANY IRRIGATION DISTRICT
 ADMINISTRATIVE CIVIL LIABILITY HEARING
 (Revised 9/2/15; Revised: 9/11/15)**

SOMACH SIMMONS & DUNN
 A Professional Corporation

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**SERVICE LIST
WEST SIDE IRRIGATION DISTRICT
CEASE AND DESIST ORDER HEARING**

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