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9 AUTHORITY, Real Party in Interest

10 **BEFORE THE STATE WATER RESOURCES CONTROL BOARD**

11 In the Matter of:) **SAN JOAQUIN TRIBUTARIES**
12) **AUTHORITY'S MOTION IN LIMINE TO**
13) **EXCLUDE THE FOLLOWING**
14) **EVIDENCE: WRITTEN TESTIMONY OF**
15) **KATHERINE MROWKA (WR-7),**
16) **WRITTEN TESTIMONY OF BRIAN**
17) **COATS (WR-9), AND PROSECUTION**
18) **TEAM EXHIBITS (WR-23, 24, 25, 27, 28,**
19) **29, 30, 31, 43, 44, 45, 58, 59, 60, 61, 62,**
20) **64, 65, 71, 72, 76, 79, 80, 81, 84, 85, 86,**
21) **87, 88, 100, 101, 102, 103, 104, 105, 108,**
22) **111, 115, 116, 117, 118, 119, 120, 121,**
23) **122, 132, 133, 149, 150, 152, 153, 154,**
24) **155, 158, 159, 169, 170, 174, 175, 176,**
25) **177, 178, 179, 191, 192, 193, 194, 206,**
26) **207)**
27)
28)
Consolidated.)

18 **I. INTRODUCTION**

19 Pursuant to this motion *in limine*, the San Joaquin Tributaries Authority ("SJTA")
20 seeks to preclude the presentation of the following exhibits and testimony proffered by the
21 Prosecution Team: (1) any and all expert opinion, whether by report or testimony, from
22 Katherine Mrowka ("Mrowka") relating her legal conclusions and opinions; (2) any and all
23 expert opinion, whether by report or testimony, from Brian Coats ("Coats") relating to the
24 process, rationale, accuracy, and scientific validity of the water availability analysis or
25 determination of whether there was sufficient supply to satisfy demand in watersheds
26 affected by the drought; and (3) the specific Exhibits cited herein and proffered by
27 Prosecution Team.
28

1 This motion is based upon the evidentiary rules and statutes controlling adjudicative
2 proceedings before the State Water Resources Control Board ("State Water Board").
3 Certain exhibits and testimony proffered by the Prosecution Team violate the governing
4 evidentiary rules and thus should be excluded in their entirety from consideration by the
5 Hearing Officers in this matter.

6 II. ARGUMENT

7 A. **Applicable Evidentiary Rules and Standard of Review**

8 Administrative adjudications generally follow a unique and limited set of rules
9 governing the admissibility of evidence. (See Cal. Code Regs., tit. 23, § 648.5.1; Gov.
10 Code, § 11513(c).) The State Water Board regulations recognize that "all adjudicative
11 proceedings before the State Board . . . shall be governed by . . . sections 801-805 of the
12 Evidence Code." (Cal. Code Regs., tit. 23, § 648(b).) These evidentiary standards control
13 the admissibility of opinion testimony, which is particularly relevant in this matter. (See
14 *generally* Evid. Code, §§ 801-805.) Here, the Prosecution Team's introduction of expert
15 testimony by Mrowka and Coats violates Evidence Code section 801 because their
16 testimony extends beyond their qualifications as designated experts.

17 Additionally, even in administrative proceedings, evidence must be relevant and
18 reliable. (*Aengst v. Bd. of Medical Quality Assurance* (1980) 110 Cal. App. 3d 275, 283.)
19 This reliability requirement mandates that hearsay evidence can only support a finding if it
20 would be admissible over objection in civil actions. (Gov. Code, § 11513(d).) In this matter,
21 many of the Exhibits introduced by the Prosecution Team are neither relevant nor reliable
22 to the key issues that will ultimately be resolved by the Hearing Officers.

23 This motion in limine is brought to request the Hearing Officers exclude specific
24 evidence before it is offered at the Hearing. (See *People v. Morris* (1991) 53 Cal. 3d 152,
25 188 [*disapproved on other grounds in People v. Stansbury* (1995) 9 Cal. 4th 824, 889].)
26 This motion provides the Hearing Officers the opportunity to improve the efficiency of the
27 hearing and resolve critical issues "at the outset" rather than during the Hearing. (*Id.*) If this
28 motion in limine is granted, all challenged evidence should be excluded; counsel, the
parties, and witnesses should not refer to the excluded material during the Hearing. (*Id.*)

1 **B. Mrowka's Testimony Should Be Excluded in Its Entirety**

2 The Prosecution Team submitted expert testimony from Mrowka, a Supervising
3 Water Resources Control Engineer at the State Water Board, to explain the legal basis for
4 issuing the enforcement actions against the Westside Irrigation District ("WSID") and the
5 Byron-Bethany Irrigation District ("BBID"). (WR-7, at 4.) Mrowka's written testimony also
6 discusses the rationale for issuance of the ACL Complaint, the rights claimed by WSID and
7 BBID, and the alleged deficiencies in those rights, and the recommended ACL penalty
8 amount. (WR-7 at 15.)

9 At the February 8, 2016 Pre-Hearing Conference, Hearing Officer Dudoc stated she
10 would not allow the parties and intervenors to present testimony and exhibits that are
11 based on legal theories, opinions, or conclusions. Hearing Officer Dudoc noted that such
12 evidence would properly be subject to a motion in limine on the ground that it invades the
13 State Water Board's responsibility to decide the legal issues of this matter and issue
14 judgments.

15 Mrowka's written testimony violates Officer Dudoc's order and the evidentiary rules
16 governing this proceeding. The testimony is comprised primarily of legal conclusions with
17 only minor factual assertions intertwined with the legal theories. Therefore, Mrowka's
18 written testimony should be excluded in its entirety.

19 1. Mrowka's Factual Assertions and Opinions Constitute Improper Legal
20 Conclusions

21 Mrowka's expert testimony violates the legal principle that "experts may not give
22 opinions on matters essentially within the province of the courts to decide." (*Asplund v.*
23 *Selected Invs. In Fin. Equities* (2000) 86 Cal. App. 4th 26, 50.) This legal principle is in
24 place to avoid legal conclusions being entered into evidence under the guise of expert
25 opinion. (*People v. Stevens* (2015) 62 Cal. 4th 325, 336.) The application of law to facts is
26 a legal question that may be briefed and argued, but cannot be subject to expert opinion.
27 (*Downer v. Bramet* (1984) 152 Cal. App. 3d 837, 841.) Relying on expert witness opinion to
28 apply the law to facts would usurp the duty of the decision maker, in this case the State
Water Board. (*Id.*, at 842.)

1 Mrowka's testimony is replete with legal theories and conclusions. In her testimony
2 addressing WSID, Mrowka repeatedly asserts that "unauthorized diversions actually
3 occurred in 2014 . . . and [also] in 2015 . . ." (WR-7, at 5.) Mrowka testified that "West Side
4 diverted . . . when there was insufficient water to divert under the priority of License 1381."
5 (WR-7, at 4.) She also offered the following legal conclusions: "West Side's history of
6 actual unauthorized diversions . . . indicates that West Side remains a threat to resume
7 such unauthorized diversions . . ." (WR-7, at 5.) "[A]bsent a CDO barring diversion . . . West
8 Side will be a threat to again divert unlawfully . . ." (WR-7, at 6.)

9 Mrowka made similar conclusions when discussing BBID. Mrowka opines that "BBID
10 diverted . . . without a basis of right." (WR-7, at 16.) At multiple points of her testimony she
11 expresses legal judgments about the available evidence. (WR-7, at 18 ["There is no
12 available evidence indicating that BBID may have had alternate supplies to explain the
13 diversions during the alleged violations period"]; WR-7 at 17 ["There is no evidence
14 indicating whether BBID or any other entity diverted water under BBID's claimed pre-1914
15 appropriative right in order to satisfy these agreements during the alleged violation
16 period"].)

17 Mrowka's testimony runs the gamut of legal opinions and conclusions, even going as
18 far as recommending revised terms of the Cease and Desist Order against WSID. (WR-7,
19 at 6.) This is inappropriate testimony because the questions of whether diversions were
20 unauthorized and whether certain penalties apply for any such unlawful diversions are the
21 ultimate issues that must be decided by the Hearing Officers. The governing legal
22 authorities uniformly reject the proposition that a witness may simply make conclusions
23 about how a matter should ultimately be resolved. Such decisions can only be properly
24 issued by the Hearing Officers. For these reasons, Mrowka's written testimony must be
25 excluded.

26 2. Mrowka's Legal Conclusions Are Irrelevant and Unreliable

27 The rules governing administrative adjudications mandate that submitted testimony
28 and exhibits must be relevant and reliable. (*Aengst v. Bd. Of Medical Quality Assurance*
(1980) 110 Cal. App. 275, 283.) Evidence is not relevant if it requires drawing speculative

1 or conjectural inferences to prove or disprove a fact. (*People v. Louie* (1984) 158 Cal. App.
2 3d Supp. 28, 47.) Mrowka's written testimony includes legal opinions throughout the
3 entirety of the testimony which require speculative or conjectural inferences to establish
4 whether they prove or disprove a disputed fact. As such, they are irrelevant, unreliable, and
5 should be excluded.

6 **C. Coats' Testimony Should Be Excluded in Its Entirety**

7 The Prosecution Team submitted expert testimony from Coats, a Senior Water
8 Resources Control Engineer, regarding the evidence, actions, and rationale in support of
9 the enforcement actions against WSID and BBID. (WR-9, at 1.) Coats' testimony explains
10 the water supply availability analysis the Division undertook in 2015 and makes conclusions
11 regarding why the analyses were appropriate and supported. (*Id.*)

12 Prior to conducting the supply and demand analyses at issue in this consolidated
13 matter, Coats had never conducted a formal water availability analysis. (WSID-0150, at
14 23:18-22.) When asked what work Coats has done that relates to the subjects of his
15 proposed testimony, Coats stated that his only related work experience is the current
16 "water availability determination with respect to the supply and demand analysis." (WSID-
17 0150, at 32:1-4.)

18 In addition to Coats' lack of experience in conducting these analyses, Coats'
19 methodological approach was not the product of his own decisions or planning. Coats was
20 asked the following questions at his deposition, and he gave the following answers:

21 Q: "So my question was, why did you only look at full natural flow for the water
22 availability analysis?"

23 A: "That's what we were instructed to do by management."

24 Q: "Who instructed you to do that?"

25 A: "John O'Hagan."

26 Q: "Anyone else?"

27 A: "No."

28 Q: "Did you have any input in that decision?"

A: "No."

1 (WSID-0150, at 49:18- 50:1.)

2 In fact, even the geographic area of the water availability analysis was not decided
3 by Coats; John O'Hagan directed the scope of the analyses without any input from Coats.
4 (WSID-0150, at 130: 25-131:12.)

5 Coats likewise based numerous factors of the analyses on unverified data, and
6 some potentially influential factors were outright ignored. For example, when asked
7 whether the "return flow factors" that were used in the analysis were accurate, Coats
8 replied that his analytical team "used what was available to us. As far as the accuracy, I'd
9 have to actually go out and measure that." (WSID-0150, at 79:16-25.) But when asked if
10 any measurement of return flows had been done to confirm the accuracy of the factors
11 used in the analysis, Coats replied "no." (WSID-0150, at 79: 22-25.) Similarly, when asked
12 why groundwater return flow was not included in the analyses, Coats replied that there was
13 no "third party source from a public agency to support using that number in addition to any
14 way to qualify those numbers." (WSID-0150, at 80:14-18.)

15 Coats' lack of experience in water supply analyses was made apparent during his
16 deposition when he responded that his sole understanding of "water availability" comes
17 from nothing "more than just what [he has] been directed to do by [his] supervisors."
18 (WSID-0150, at 124: 24-125:2.)

19 1. Coats Lacks Sufficient Expertise and Knowledge to Provide Expert
20 Testimony and Reports about Water Availability Analyses

21 Evidence Code section 801 requires designated expert witness to have special
22 knowledge, skill, experience, training or education sufficient to qualify as an expert on the
23 subject to which the testimony relates. (*People v. Singh* (1995) 37 Cal. App. 4th 1343,
24 1377.) The State Water Board is obligated to exclude expert testimony when there is not a
25 proper basis for the opinion and/or when the witness does not qualify as an expert. (Evid.
26 Code, § 803.) Similarly, Evidence Code section 801 requires expert testimony to be
27 confined within the area of the professed expertise and require adequate foundation for the
28 opinion. (*Kotla v. Regents of Univ. of California* (2004) 115 Cal. App. 4th 283, 292.)

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1 The Coats testimony does not satisfy these obligations. Coats lacks the necessary
2 experience or expertise to opine about whether the water availability analysis was properly
3 conducted. He lacked adequate knowledge or authority to discuss why certain actions and
4 decisions were taken when conducting the analysis. For these reasons, Coats' testimony
5 should be excluded in its entirety on the grounds that Coats has not shown the necessary
6 expertise to opine on the subject matter and has not established an adequate foundation
7 upon which to base his opinions.

8 2. Coats' Expert Opinion Is Irrelevant and Unreliable

9 Coats' testimony is similarly irrelevant and unreliable because it requires speculative
10 or conjectural inferences to prove or disprove a fact. (*People v. Louie* (1984) 158 Cal. App.
11 3d Supp. 28, 47.) In this case, Coats' testimony is based almost entirely upon speculation
12 and conjecture. He had no experience in conducting water availability analyses and his
13 actions were the product of others' decisions and planning. Thus, when hearing Coats'
14 opinions and conclusions, the Hearing Officers would necessarily need to fill gaps in the
15 testimony by speculating about the justifications for why certain actions were taken, why
16 others were not taken, and how such procedures could lead to an accurate result. For
17 these reasons, Coats' testimony is irrelevant and unreliable in this matter.

18 **D. Specific Prosecution Team's Exhibits Should Be Excluded**

19 The Prosecution Team seeks to introduce specific news articles, agency notices and
20 orders, studies, graphs, charts, maps, photographs, and other data reports. Each of the
21 Exhibits cited herein contains fatal evidentiary defects relating to relevance, reliability, and
22 hearsay. Due to the page limitation on motions *in limine* in this matter, the bases for
23 excluding the challenged exhibits will be discussed categorically as opposed to individually.
24 Several categories of documents share the same defective characteristics which render
25 each of them inadmissible.

26 1. The News Article and Website Screenshots Exhibits Proffered by the
27 Prosecution Team Are Irrelevant, Unreliable, and Constitute Hearsay in
28 this Matter

The news articles and website screenshots submitted by the Prosecution Team are
inadmissible for several reasons. (WR-23, 25, 100, 101, 102, 103, 104, 105, 108, 206, and

1 207.) First, the news articles are not relevant to this present matter. The news articles
2 discuss various ancillary issues related to the drought, water rights issues, and curtailment
3 in a general sense. These articles do not establish the material facts associated with key
4 issues in this case, namely, whether BBID or WSID diverted in excess of right. The Exhibits
5 proffered by the Prosecution Team merely discuss water issues affecting the state in
6 general but do not address BBID or WSID's diversions. Therefore, the Exhibits lead only to
7 speculative inferences about relevant issues in this matter and should be excluded. (*People*
8 *v. Morrison* (2004) 34 Cal. 4th 698, 711.)

9 The newspaper articles are also inadmissible hearsay. Newspaper articles may be
10 entered into evidence to prove the article was published. However, an article cannot be
11 entered into evidence to prove the truth of the facts stated therein; to do so would
12 unlawfully admit hearsay statements of author of the article. (*People v. Reyes* (1976) 62
13 Cal. App. 3d 53, 69.) The Government Code specifically prohibits the entry of such hearsay
14 evidence in administrative proceedings. (Gov. Code, §11513(d).) To the extent the
15 Prosecution Team seeks to introduce these Exhibits to show the truth of the statements
16 therein, the Exhibits are inadmissible hearsay.

17 2. The State Water Board Notices, Orders, and Correspondence Cited
18 Herein Are Irrelevant and Constitute Hearsay in this Matter

19 The Prosecution Team submitted several Exhibits of State Water Board notices,
20 orders, and correspondence relating to general issues of water shortage or availability.
21 (WR-24, 27, 28, 29, 30, 31, 43, 44, 45, 80, 111, 174, 175, 176, 177, 178, 194.) These
22 Exhibits contain documents that do not address the specific matters at issue in this case,
23 but instead pertain to general planning for curtailment of diversions. The existence of the
24 notices, orders, and correspondence is not in dispute and their existence does not affect
25 the contested issues in this matter. These Exhibits do not address whether BBID or WSID
26 unlawfully diverted water in 2015, and thus the Exhibits are inadmissible on the grounds
27 that they are irrelevant. (*See People v. Morrison, supra* (2004) 34 Cal. 4th at 711.)

28 To the extent that these Exhibits are submitted to support the truth of the legal
theories, statements, and factual allegations asserted therein, the Exhibits are inadmissible

1 hearsay. (*People v. Brown* (1994) 8 Cal. 4th 746, 760 [“Admission of evidence concerning
2 details of the statements themselves, to prove the truth of the matter asserted, would
3 violate the hearsay rule”].) The content of the Exhibits includes extrajudicial statements,
4 opinions, and factual allegations. If the Prosecution Team intends to use these Exhibits to
5 support the truth of such content, the Exhibits must be excluded as hearsay.

6 3. The Studies, Graphs, Charts, Maps, Photographs and Other Data
7 Proffered by the Prosecution Team Are Hearsay, Unreliable, and
8 Irrelevant

9 The Exhibits containing studies, reports and related materials introduced by the
10 Prosecution Team should not be admitted. (WR-58, 59, 60, 61, 62, 64, 65, 71, 72, 76, 79,
11 81, 132, 133, 149, 150, 152, 153, 154, 155, and 158.) The reports and associated materials
12 convey out-of-court statements, opinions, and conclusions that appear to be presented to
13 support the alleged facts therein, and thus they constitute hearsay. (See *Roberts v.*
14 *Permanente Corp.* (1961) 188 Cal. App. 2d 526, 532 [finding that a County Health
15 Department report “clearly is hearsay, abounding in opinions and conclusions”].)

16 In addition, the statistical graphs, charts, and data representations associated with
17 such reports are generally only protected from the hearsay rule when they are “made by
18 persons indifferent between the parties.” (Evid. Code, § 1341.) These studies, reports, and
19 related materials were prepared by the State Water Board and Department of Water
20 Resources, and those agencies have a clear stake in the outcome of this matter. Because
21 of the nature and source of the Exhibits, they are unreliable and constitute hearsay. To the
22 extent the Prosecution Team seeks to introduce these Exhibits for reasons other than
23 supporting the truth of the matters asserted therein, they are irrelevant and should likewise
24 be excluded from consideration by the Hearing Officers.

25 4. The State Water Board Licenses, Water Right Forms, CEQA Documents,
26 and Planning Materials Are Irrelevant to the Issues in this Matter

27 The documents proffered by the Prosecution Team in the Exhibits cited herein have
28 not “logically, naturally, and by reasonable inference establish[ed] material facts” that affect
these proceedings. (WR-84, 85, 86, 87, 88, 115, 116, 117, 118, 119, 120, 121, 122, 159,

1 191, 192, 193; See *People v. Morrison*, supra (2004) 34 Cal. 4th at 711.) As a result, these
2 Exhibits are irrelevant and should not be considered.

3 The State Water Board licenses and forms cited in the above-referenced Exhibits do
4 not pertain to whether BBID or WSID illegally diverted in 2015 because the licenses and
5 forms address only diversions prior to 2015. (See, e.g., WR-115 (“2007 Report of
6 Licensee”), WR-116 (“2008 Report of Licensee”).) The other referenced exhibits suffer from
7 the same defect: they simply do not address the alleged unlawful diversions from 2015.
8 The permits, statements, or other planning materials covering other years have nothing to
9 do with what was done in 2015. Therefore, these Exhibits are irrelevant and should not be
10 admitted.

11 **III. CONCLUSION**

12 The evidentiary rules applicable to these proceedings are designed to ensure that
13 the exhibits and testimony presented constitute “credible, competent evidence” and are
14 “relevant and reliable.” (*Aengst v. Bd. Of Medical Quality Assurance* (1980) 110 Cal. App.
15 3d 275, 283, 284.) Although the rules of admissibility are in some ways different from
16 traditional civil matters, the rules of relevance, reliability, and hearsay nonetheless govern
17 these proceedings. The testimony submitted by Mrowka and Coats, along with the
18 Prosecution Team’s Exhibits cited in this motion *in limine*, violate the rules of evidence
19 recognized by this tribunal. For these reasons, the Hearing Officers should exclude in their
20 entirety the testimony and exhibits referenced herein.

21
22 DATED: February 29, 2016

O’LAUGHLIN & PARIS LLP

23
24 By:



25 TIM O’LAUGHLIN
26 VALERIE KINCAID, Attorneys for
27 SAN JOAQUIN TRIBUTARIES AUTHORITY
28

1 Re: SWB - BBID-ACL/WSID CDO Hearings

2
3 **PROOF OF SERVICE BY MAIL**
4 (Government Code §11440.20)

5 I, Linda L. Wood, declare that:

6 I am employed in the County of Sacramento, State of California. I am over the age of
7 eighteen years and not a party to the within cause. My business address is 2617 K Street,
8 Suite 100, Sacramento, CA 95814. On this date, in the following manner, I served the
9 foregoing document(s) identified as:

10 **SAN JOAQUIN TRIBUTARIES AUTHORITY'S MOTION IN LIMINE TO EXCLUDE THE**
11 **FOLLOWING EVIDENCE: WRITTEN TESTIMONY OF KATHERINE MROWKA (WR-7),**
12 **WRITTEN TESTIMONY OF BRIAN COATS (WR-9), AND PROSECUTION TEAM'S**
13 **EXHIBITS (WR-23, 24, 25, 27, 28, 29, 30, 31, 43, 44, 45, 58, 59, 60, 61, 62, 64, 65, 71, 72,**
14 **76, 79, 80, 81, 84, 85, 86, 87, 88, 100, 101, 102, 103, 104, 105, 108, 111, 115, 116, 117,**
15 **118, 119, 120, 121, 122, 132, 133, 149, 150, 152, 153, 154, 155, 158, 159, 169, 170, 174,**
16 **175, 176, 177, 178, 179, 191, 192, 193, 194, 206, 207)**

17 **▶▶▶E-MAIL** [CCP §1010.6]: Based on pending consent of the parties, and/or court order
18 or an agreement of the parties to accept service by e-mail, I caused the documents to
19 be sent to the following persons at the following e-mail address, and did not receive,
20 within a reasonable time after the transmission, any electronic message or other
21 indication that the transmission was unsuccessful:

22 _____**PERSONAL DELIVERY** [CCP §415.10] I arranged to have the documents personally
23 delivered to the office of the persons identified below on _____:

24 **SEE ATTACHED SERVICE LIST**

25 I declare under penalty of perjury under the laws of the State of California that the
26 foregoing is true and correct. Executed this 29th day of February, 2016, at Sacramento,
27 California.

28 By:



Linda L. Wood, Legal Assistant

**BYRON-BETHANY IRRIGATION DISTRICT
ADMINISTRATIVE CIVIL LIABILITY HEARING
(09/02/15; Revised 09/10/15; Revised 10/06/16; Revised 10/22/15)**

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

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