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BEFORE THE STATE WATER RESOURCES CONTROL BOARD

ENFORCEMENT ACTION ENFO1949) **MOTION *IN LIMINE* FOR AN ORDER TO**
DRAFT CEASE AND DESIST ORDER) **EXCLUDE OR LIMIT THE TESTIMONY**
REGARDING UNAUTHORIZED) **OF (1) BRIAN COATS, (2) KATHY**
DIVERSIONS OR THREATENED) **MROWKA, (3) PAUL HUTTON, (4) PAUL**
UNAUTHORIZED DIVERSIONS OF) **MARSHALL, AND (5) KATHERINE BARE**
WATER FROM OLD RIVER IN SAN)
JOAQUIN COUNTY)

Hearing Date: March 21, 2016

ENFORCEMENT ACTION ENF01951)
DRAFT ADMINISTRATIVE LIABILITY) Hearing Officer: Frances Spivy-Weber
COMPLAINT REGARDING)
UNAUTHORIZED DIVERSIONS BY)
BYRON-BETHANY IRRIGATION)
DISTRICT)

The West Side Irrigation District (“**WSID**”) and Patterson Irrigation District (“**PID**”)
hereby move the State Water Resources Control Board (“**Water Board**”) for an order:

1. Excluding any portion of the testimony of Brian Coats or Katherine Mrowka as
“expert” testimony regarding water availability determinations.
2. Excluding portions of the testimony of Brian Coats and Katherine Mrowka as
improper legal conclusions, conclusory, speculative and lacking foundation.
3. Excluding the rebuttal testimony of Paul Hutton and Paul Marshall has improper and
untimely expert opinion testimony that should have been provided as part of DWR
and SWC’s cases in chief.
4. Excluding any portion of the testimony of Katherine Bare as “expert” testimony
regarding Water Code Section 1211, and excluding portions of the testimony of

1 Katherine Bare as improper hearsay, speculative, conclusory and lacking proper
2 foundation.

3 The purpose of this Motion *in Limine* is to ensure the testimony in these proceedings is proper
4 fact testimony to protect the rights of all parties and provide a level playing field. WSID and PID
5 also join in and support the Motions *in Limine* of Byron-Bethany Irrigation District, South Delta
6 Water Agency, Central Delta Water Agency and Banta-Carbona Irrigation District. Due to the
7 page limits set by the hearing team, it was impossible for each party to fully brief each motion *in*
8 *limine* for each witness.

9
10 **I. INTRODUCTION**

11 The Hearing Officer is empowered to rule on the admissibility of evidence prior to the
12 hearing. *Baskett v. United States*, 2 Ct.Cl. 356, 359. A motion *in limine* is one method by which a
13 party can obtain such a ruling. The basic purpose of a motion *in limine* is "to prevent a party before
14 trial from encumbering the record with irrelevant, immaterial or cumulative matters. Such a motion
15 enables a court to rule in advance on the admissibility of documentary or testimonial evidence and
16 thus expedite and render efficient a subsequent trial." *Id.* at 367-368. As such, motions *in limine*
17 "promote trial efficiency and improved accuracy of evidentiary determinations by virtue of the more
18 thorough briefing and argument of the issues that are possible prior to the crush of trial." *Int'l*
19 *Graphics, Div. of Moore Bus. Forms, Inc. v. United States*, 5 Cl.Ct. 100, 104 (1984) (quoting *Zenith*
20 *Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F.Supp. 1125, 1140 (E.D. PA. 1980)). The party
21 offering the evidence that is the subject of a motion *in limine* must demonstrate its admissibility by a
22 preponderance of the evidence. *See Bourjaily v. United States*, 483 U.S. 171, 175-176 (1987).

23 **II. LEGAL STANDARD**

24 A person is qualified to testify as an expert if she "has special knowledge, skill,
25 experience, training, or education sufficient to qualify [her] as an expert on the subject to which
26 [her] testimony relates". California Evidence Code §720(a). Further, under Evidence Code §801:

27 If a witness is testifying as an expert, his testimony in the form of an opinion is limited to
28 such an opinion as is: (a) Related to a subject that is sufficiently beyond common
experience that the opinion of an expert would assist the trier of fact; and (b) Based on

1 matter (including his special knowledge, skill, experience, training, and education)
2 perceived by or personally known to the witness or made known to him at or before the
3 hearing, whether or not admissible, that is of a type that reasonably may be relied upon
4 by an expert in forming an opinion upon the subject to which his testimony relates, unless
5 an expert is precluded by law from using such matter as a basis for his opinion.

6 In practical terms, this means that: (1) the proposed expert must qualify as an expert, (2) the
7 testimony of the proposed expert must be based on scientific, technical, or other specialized
8 knowledge and concern a matter beyond a layperson's understanding; and (3) the testimony,
9 reports, and opinions of the proposed expert must be reliable and relevant. See, e.g., *United*
10 *States v. Hankey*, 203 F.3d 1160, 1168 (9th Cir. 2000).

11 **A. The Witness Must Qualify as an Expert**

12 As a preliminary matter, a witness must first qualify as an expert before he or she may
13 proffer expert testimony. A witness may be qualified as an expert on the basis of knowledge,
14 skill, experience, training or education, a witness still must have some foundation of knowledge,
15 skill, or experience—a witness with cursory or very limited experience does not satisfy this
16 “foundation” requirement.

17 **B. The Witness' Testimony Must Be Based on Scientific, Technical, or “Other
18 Specialized” Knowledge and Must Concern a Matter Beyond a Layperson's
19 Common Knowledge**

20 In order to be admissible expert testimony, the testimony must be based on scientific,
21 technical, or other specialized knowledge [that] will assist the trier of fact. A witness may not
22 testify as an expert unless he or she testifies about matters that are beyond the ability and
23 experience of the average layperson. Testimony on an issue not outside a layperson's
24 understanding does not assist the trier of fact and is thus not admissible expert testimony.

25 **C. The Witness' Testimony Must be Reliable**

26 The Hearing Officer here is charged with the task of ensuring that an expert's testimony
27 rests on a reliable foundation. In *Sargon Enterprises, Inc. v. University of Southern California*
28 (2012) 55 Cal.4th 747, the California Supreme Court held that the Hearing Officer here “has the
duty to act as a ‘gatekeeper’ to exclude speculative expert testimony” at p. 755. The Prosecution
Team bear the burden of establishing by a preponderance of the evidence that Ms. Bare's

1 testimony and opinions are reliable. To determine a reliable foundation for Ms. Bare's testimony
2 under Evidence Code §801, the Hearing Officer must "determine whether the matter relied on
3 can provide a reasonable basis for the opinion or whether that opinion is based on a leap of logic
4 or conjecture." Id at p. 772.

5 **III. ARGUMENT**

6 **A. Ms. Bare is Not Qualified as an Expert.**

7 The Prosecution Team offer Ms. Bare as an expert witnesses in this Enforcement Action;
8 however, Ms. Bare's written testimony and statements during her deposition establish that she
9 does not meet the statutory requirement of having special knowledge, skill, experience, training
10 or education sufficient to qualify her as an expert on the subject to which her testimony relates.
11 California Evidence Code §702. Although the Hearing Officer has wide latitude to admit expert
12 testimony, such testimony is inadmissible if it does not meet two related requirements: (1) it
13 must be based on the special knowledge of the expert; and (2) it must be helpful to the finder of
14 fact. The burden is on the party offering the proposed expert opinion testimony to prove by a
15 preponderance of the evidence that the testimony satisfies the requirements for admissibility. See
16 Daubert, 509 U.S. at 592 n.10. An expert for one purpose is not an expert for all purposes. "Even
17 where a witness has special knowledge or experience, qualification to testify as an expert also
18 requires that the area of the witness's competence matches the subject matter of the witness's
19 testimony." See 29 Charles A. Wright. et al., Federal Practice & Procedure § 6265 at p. 255 &
20 nn. 34 & 35 (1977). Accordingly, not all opinions that happen to be held by an expert are "expert
21 opinions." See United States v. Benson, 941 F.2d 598, 604 (7th Cir. 1991). Opinions falling
22 outside the expert's area of expertise are inadmissible.

23 In her testimony, Ms. Bare provides opinions regarding Water Code Section 1211 and
24 irrigation conveyance losses. This testimony regarding should be excluded because she is not
25 qualified to testify as an expert on these subjects, and her opinions are not helpful. Although Ms.
26 Bare has worked for the Enforcement Division for 3½ years, by her own admission she lacks any
27 education or training relating to Water Code section 1211, water availability determination or the
28 recapture of drainage water. Accordingly, Ms. Bare lacks even a minimal foundation of

1 knowledge required by California Evidence Code §720 to qualify her as an expert on this issue.

2 More importantly, Ms. Bare's testimony is filled with legal conclusions, most on the
3 ultimate issues to be determined by the State Water Resources Control Board in this
4 Enforcement Action. These opinions are without foundation. These factors combine to renders
5 each of her opinions unreliable and irrelevant under the California Evidence Code. For these
6 reasons, it is entirely appropriate for this Court to exclude Ms. Bare's testimony prior to the
7 hearing.

8 B. **There is No Foundation for the Opinion Included in her Testimony.**

9
10 Even if an expert is qualified, her testimony must be limited to offering her opinion,
11 within her area of expertise, "related to a subject that is sufficiently beyond common experience
12 that such opinion would assist" the Hearing Officer. The expert's opinion may be based upon
13 matters that she personally knows or has perceived, or upon facts related to her by someone else,
14 provided those are the kind of facts and matters experts in her field reasonably rely upon in
15 forming an opinion of the type the expert is going to offer. The expert may also rely upon her
16 own special knowledge, skill, experience, training and education in rendering her opinion.

17 Under California law, expert witness testimony is limited to information sufficiently
18 beyond common experience such that the opinion of an expert would assist the trier of fact. *See*
19 Evid. Code § 801(a). That is, expert witnesses may express *opinions* on matters on which the
20 Hearing Officer may need assistance in drawing its own conclusions. In accordance with this
21 standard, portion of the expert testimony of Ms. Bare should be excluded on three grounds: (1)
22 her proposed testimony relates to *facts* she perceived; (2) her proposed testimony is not beyond
23 common experience; and (3) her proposed testimony relates to issues of law, which usurps the
24 role of the hearing officer.

25 C. **Ms. Bare's Testimony Regarding Water Code Section 1211 Should Be**
26 **Stricken From the Proposed Written Testimony.**

27 Ms. Bare makes the following statement/opinions regarding Water Code Section 1211:

- 28 1. *"The 2014 Agreement represents a change in the place of use and/or*

purpose of use of the City's treated water, because the City previously abandoned its wastewater discharge." WSID0173, Paragraph 15 on page 3.

2. Because WSID planned to divert this water during periods when it would not be able to divert under License 1381, any WSID diversion of this wastewater would potentially reduce flows downstream as compared to before the Agreement. Therefore, the City should have filed a wastewater change petition with the State Water Board under Water Code section 1211 prior to selling any wastewater to WSID. WSID0173, Paragraph 15 on Page 3.

3. These diversions were unlawful because the City had not complied with Water Code Section 1211, and because WSID could not divert the wastewater from Old River under any valid claim of right. WSID0173, Paragraph 17 on page 4.

4. . . .the fact that WSID did unlawfully divert City of Tracy wastewater in 2014. . . WSID0173, Paragraph 24 on Page 5.

These statements should be stricken. First, Ms. Bare, by her own admission, is not an expert on Water Code Section 1211, and has no knowledge of its application to WSID. Ms. Bare has failed to lay a foundation as to how she has personal knowledge of this, or how she obtained knowledge on which to base her opinion. In her deposition testimony Ms. Bare is honest, and clearly acknowledges her lack of experience and knowledge regarding these issues:

Q: Look at finding No. 4, please, on page 2. It says, "Until 2014, the City abandoned the wastewater treatment plant discharged to Old River."

A: Uh-huh.

Q: Did you make that determination?

A: No.

Q: Or did someone else?

A: That wouldn't have been me.

Q: Do you know how that determination was made?

A: No. I wasn't part of the conversation.

EXHIBIT WSID0059, Page 24:7-16.

Q: Do you know anything about the history of what has happened to that treated wastewater from the City of Tracy at the time?

A: No.

EXHIBIT WSID0059, Page 24:23-25, Page 25:1.

1 Q: Did you perform any analysis related to Water Code Section 1211?
2 A: No.

3 EXHIBIT WSID0059, Page 25:25, Page 26:1-1.

4 Q: Is it your understanding that in order for West Side to divert the City of Tracy's
5 wastewater, that there is some type of State Board approval needed?
6 A: Yes.
7 Q: And what is that understanding based on?
8 A: Section 1211(a)
9 Q: Is that based on your own analysis of Section 1211(a) or is it based on something that
10 somebody else has told you?
11 A: Someone else has told me. And that's part of the subject of the CDO,
12 Q: Is that someone else a lawyer at the State Board?
13 A: Yes.

14 EXHIBIT WSID0059, Page 25:25, Page 26:1-1.

15 Q: And did somebody make the determination of whether there was a change in the point of
16 discharge, place of use or purpose of use?
17 A: I don't know.

18 EXHIBIT WSID0059, Page 29:13-16.

19 Q: So any specific analysis of prior history of what happened to the wastewater from the
20 City of Tracy?
21 A: No.

22 EXHIBIT WSID0059, Page 30:21-13.

23 Q: Did you make any conclusions whether there had been a change in the purpose of use? . .
24 A: No.
25 Q: Do you know whether anyone else did?
26 A: I do not know.

27 EXHIBIT WSID0059, Page 30:25, 31-1-8.

28 Q: Did you undertake any analysis to see if there was a permanent decrease of flow in any
portion of a watercourse?
A: No.
Q: Do you know if anyone else did?
A: I'm not sure.

EXHIBIT WSID0059, Page 31:12017.

1 Finally, Ms. Bare's testimony is not reliable: there is no foundation, and it contradicts
2 her prior testimony. Her written testimony contradicts her testimony at deposition given
3 November 23, 2015, wherein Ms. Bare testified that with regard to the alleged violation of
4 Water Code Section 1211 against WSID in the Draft CDO, her only action was "to see if the
5 City had south approval from the State Water Board" and nothing else. Page 25:19-24. In direct
6 response to the question of whether or not she performed any analysis related to Water Code
7 Section 1211, Ms. Bare answered "No." Page 25:25, Page 26:1-2. Further, Ms. Bare testified
8 that her understanding that WSID needed to comply with Water Code Section 1211 was based
9 upon her understanding of Water Code Section 1211(a) (Page 26:25, Page 27:1), and then not
10 even on her own understanding, but on something that someone else had told her. Page 26:2-6.
11 Ms. Bare, by her own admission, undertook no analysis as to whether or not would permanently
12 reduce flows downstream, a prerequisite to the applicability of §1211 to WSID, but she now
13 testifies that WSID's diversions would reduce flows downstream and trigger compliance with
14 §1211.

15 The testimony of a witness who is qualified as an expert by knowledge, skill,
16 experience, training, or education may testify in the form of an opinion as to relevant matters
17 only if the following three criteria are met:

- 18 1. the testimony is based on sufficient facts or data
- 19 2. the testimony is the product of reliable principle and methods
- 20 3. the expert has reliably applied the principles and methods to the facts of the case.

21 Ms. Bare's opinion is not based upon sufficient facts or data; actually, as Ms. Bare admitted in
22 her deposition, her testimony is not based upon any facts or data. Here, there is so great an
23 analytical gap between Ms. Bare's admitted knowledge and the opinion proffered that the
24 opinion is supported only by her statement, making it speculative and conjectural. Most
25 importantly, its prejudicial affect outweighs its probative value.

26 D. **Ms. Bare's Testimony Regarding Water Availability and Illegal Diversions**
27 **Should Be Stricken From the Proposed Written Testimony.**

28 Ms. Bare makes the following statement/opinions regarding water availability and

1 alleged illegal diversions:

2 1. *State Water Board staff had determined that no water was available to*
3 *serve WSID's License 1381 starting on May 27, 2014, and the evidence indicates that WSID*
4 *was aware of these staff determinations. Therefore, WSID could not divert Tracy wastewater*
5 *under License 1381. WSID0173, Paragraph 16 on Page 4.*

6 2. *The information above shows that WSID unlawfully diverted 735.51 acre*
7 *feet from the Old River over 13 consecutive days from May 1 to May 13, 2015. WSID0173,*
8 *Paragraph 22 on Page 5.*

9 3. *Based on the above information, WSID unlawfully diverted 85.08 acre-feet*
10 *from the Old under the BCID Pumping Agreement between June 17 and June 17, 2015, when no*
11 *water was available under BCID's claimed pre-1914 water right. WSID0173, Paragraph 28 on*
12 *Page 6.*

13 This testimony should be stricken. Ms. Bare relies upon a determination made by staff,
14 which is the key issue to be determined in the hearing, of which she has no knowledge or
15 experience:

16 Q: Did you work at all on the water availability analysis that the State Board did in 2015?

17 A: No.

18 EXHIBIT WSID0059, Page 13:12-14.

19 Solely based upon the conclusions that she was not involved in, she reaches a conclusion
20 that the actions of WSID were unlawful. These conclusions are not "sufficiently beyond
21 common experience that the opinion of an expert would assist the trier of fact," and are not based
22 on any special knowledge, skill, experience or training held by Ms. Bare as required by Evidence
23 Code §801. Therefore, these statements must be stricken because Ms. Bare does not qualify as
24 an expert, her testimony is not based on scientific, technical, or other specialized knowledge and
25 does not concern a matter beyond a layperson's understanding. As such the statements are
26 nothing more than unsupported legal conclusions that are prejudicial to WSID.

27 E. **Ms. Bare's Testimony Regarding WSID Drainage Water Should Be**
28 **Stricken From the Proposed Written Testimony.**

Ms. Bare makes the following statement/opinions regarding water availability and alleged illegal diversions:

1. *I also understand that WSID's drain collects tailwater collected from lands beyond WSID's boundaries, and that these amounts are included in the "Accretion Water Diverted" table. WSID0173, Paragraph 30 on Page 6.*

2. *I understand also that WSID began measuring the flows from Bethany Drain into its diversion cut in 2015, using visual observation of a permanent weir constructed in early 2015 (WSID claims to have used a temporary weir in 2014), but it is not clear how often WSID collects these observations, whether the weir is calibrated accurately, how the accretions are calculated based on the weir observations. WSID0173, Paragraph 30 on Page 6.*

2. *Finally, I understand that the "Accretion Water Diverted" table lists the total amount of tailwater and accretion flows delivered to WSID water users, and not the total amount of such water pumped from the diversion cut. From this, it is reasonable to conclude due to potential conveyance losses that WSID may need to pump more than the Bethany Drain discharges in order to deliver an amount equivalent to the Bethany Drain discharges to its water users. If WSID at any time pumps at a greater rate than the Bethany Drain discharges, WSID would draw water from the Old River through its unregulated diversion cut. WSID0173, Paragraph 30 on Page 6.*

Ms. Bare provides no foundation for her statements, and no support for her factual or legal conclusions. She provides no support for her statement that "WSID's drain collects tailwater collected from lands beyond WSID's boundaries," and no support for her statement of when WSID began measuring flows, or how they are measured.

Q: Do you know anything about West Side's Bethany Drain?

A: I've reviewed the file, so I have some understanding of it, and I have looked at very old photos.

Q: Did you do any work on the West Side enforcement action related to tailwater from the Bethany Drain?

A: No. I'm not sure. I could be asked to do that in the future, but at this point I have not.

EXHIBIT WSID0059, Page 25:2-10.

Similarly, there is no evidence that Ms. Bare knows anything about "potential

1 conveyance losses” or WSID’s drainage or irrigation systems to support her opinions on that
2 subject.

3 **IV. ADDITIONAL MOTIONS IN LIMINE**

4 WSID and PID hereby joint in the Motions in Limine filed this date by Central Delta
5 Water Agency, Banta-Carbona Irrigation District, South Delta Water Agency and Byron-
6 Bethany Irrigation District to exclude testimony of Brian Coats, Kathy Mrowka, Paul Hutton and
7 Paul Marshall.

8 **V. CONCLUSION**

9 Ms. Bare’s testimony does nothing more than offer her non-expert opinion on facts that
10 have been represented to her by others. Her statements amount to nothing more than an
11 expression of her belief as to how this Enforcement Action should be decided. As such, it is
12 inadmissible. *Summers v. A. L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1183. The bottom line,
13 according to the California courts, is that expert testimony should not be accepted, merely
14 because the person testifying has expertise. The expert has to be testifying about his or her
15 particular methodology used, and those methods have to be considered logical, reliable, and
16 realistic. In this instance, Ms. Bare has been placed in an uncomfortable situation where she has
17 been asked to testify to legal conclusions of which she has no knowledge or expertise, to the
18 prejudice of WSID.

19 Date: February 29, 2016

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24 Attorneys for
25 The West Side Irrigation District and
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