

1 SOMACH SIMMONS & DUNN  
A Professional Corporation  
2 DANIEL KELLY, ESQ. (SBN 215051)  
MICHAEL E. VERGARA, ESQ. (SBN 137689)  
3 THERESA C. BARFIELD, ESQ. (SBN 185568)  
LAUREN D. BERNADETT, ESQ. (SBN 295251)  
4 500 Capitol Mall, Suite 1000  
Sacramento, California 95814-2403  
5 Telephone: (916) 446-7979  
Facsimile: (916) 446-8199

6 Attorneys for Petitioner/Plaintiff BYRON-  
7 BETHANY IRRIGATION DISTRICT

8  
9 BEFORE THE  
10 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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

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

SWRCB Enforcement Action  
ENF01951 and ENF01949

BYRON-BETHANY IRRIGATION  
DISTRICT'S CONSOLIDATED  
OPPOSITION TO:

(1) STATE WATER  
CONTRACTORS' MOTION TO  
QUASH SUBPOENAS DUCES  
TECUM TO CHANDRA  
CHILMAKURI AND KYLE  
WINSLOW, OR, IN THE  
ALTERNATIVE, MOTION FOR  
PROTECTIVE ORDER, AND

(2) NON-PARTIES CH2M HILL  
ENGINEERS, INC., CHANDRA  
CHILMAKURI AND KYLE  
WINSLOW'S MOTION TO QUASH  
SUBPEONAS DUCES TECUM TO  
CH2M HILL, CHANDRA  
CHILMAKURI AND KYLE  
WINSLOW OR, ALTERNATIVELY,  
MOTION FOR A PROTECTIVE  
ORDER

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I. INTRODUCTION

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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. This same report is an exhibit to the complaint filed by the SWC with the  
7 State Water Resources Control Board (SWRCB). At the same time Chilmakuri was  
8 working on the report, Kyle Winslow (Winslow), also with CHWM Hill, was conducting  
9 similar work for BBID, and communicating with Chilmakuri with respect to that work.  
10 BBID sought to conduct discovery on this evidence relied on by Hutton to form the basis  
11 of his testimony, and served CH2M Hill, Chilmakuri, and Winslow (collectively, "CH2M")  
12 with deposition notices and document production requests. SWC and CH2M moved to  
13 quash BBID's subpoenas on the basis of burden, relevance, privilege, and timeliness  
14 issues.

15 Discovery is meant to be a liberal vehicle for finding evidence that may be helpful  
16 or harmful to a party's case in advance of the final adjudication. Winslow undertook  
17 work on behalf of BBID. The subpoena issued to Winslow seeks information regarding  
18 that work, and cannot be withheld from BBID based on an assertion of privilege.  
19 Chilmakuri engaged in work on behalf of SWC, and the results of that work have been  
20 submitted to the SWRCB as part of SWC's testimony in the Administrative Civil Liability  
21 Complaint to BBID, Enforcement Action ENF01951 (the "ACL"). SWC cannot assert  
22 privilege to materials submitted as expert testimony in a quasi-adjudicatory proceeding.  
23 The short timeframe within which to comply with the subpoena is forced by SWC's  
24 decision to submit testimony which relies, in part, on Chilmakuri's work, just weeks prior  
25 to the evidentiary hearing in the ACL.

26 BBID respectfully requests the SWRCB prevent SWC's and CH2M's attempt to  
27 limit BBID's access to discoverable information in advance of the hearing, and order that  
28 the Chilmakuri and Winslow depositions, along with production of the requested

1 documents, proceed as soon as possible and prior to the hearing.

2 II. STATEMENT OF FACTS

3 On June 12, 2015, the SWRCB sent a Curtailment Notice to BBID and others that  
4 purported to curtail appropriative water right with 1903 and later priority dates within the  
5 Sacramento and San Joaquin River watersheds, including the Delta (Curtailment  
6 Notice). (Declaration of Michael E. Vergara in Support of BBID's Opposition to:  
7 (1) SWC's Motion to Quash Subpoenas Duces Tecum to Chilmakuri and Wilson and  
8 (2) CH2M, Chilmakuri, and Wilson's Motion to Quash Subpoenas Duces Tecum to  
9 CH2M, Chilmakuri, and Wilson (Vergara Decl.), ¶ 2.) The Curtailment Notice directed  
10 BBID to "immediately stop diverting" under its pre-1914 water rights, and provided that  
11 any further diversions would subject BBID to "administrative penalties, cease and desist  
12 orders, or prosecution in court." (Vergara Decl. at ¶ 3.)

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

18 In 2015, BBID hired CH2M Hill to conduct modeling showing water availability and  
19 salinity concentrations in the Delta and sources of water at BBID's point of diversion in  
20 2015. (Vergara Decl. at ¶ 6.) Until the beginning of November 2015, Winslow worked  
21 extensively with upper management and counsel for BBID to produce models  
22 addressing questions presented, and underwent several iterations of modeling to  
23 address further questions as they arose. (Vergara Decl. at ¶ 7.) This modeling was all  
24 in draft form. (Vergara Decl. at ¶ 8.) BBID never received a final report. (Vergara Decl.  
25 at ¶ 9.)

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

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

9 On February 24, 2016, BBID served Subpoenas Duces Tecum on Winslow and  
10 Chilmakuri. (Vergara Decl. at ¶ 13.) On March 3, 2016, BBID served Amended  
11 Subpoenas Duces Tecum on Winslow and Chilmakuri, and a Subpoena Duces Tecum  
12 on the Custodian of Records for CH2M Hill. (Vergara Decl. at Exhs. C, D, and E.)  
13 Winslow is required to appear for his deposition on March 16, 2016 and Chilmakuri is  
14 required to appear for his deposition on March 18, 2016. (Vergara Decl. at Exhs. C and  
15 D.) The Subpoenas Duces Tecum require Winslow, Chilmakuri, and the Custodian of  
16 Records for CH2M Hill to produce all documents in their control related to (1) the draft  
17 technical memorandum, (2) communications between CH2M and SWC or between  
18 CH2M and Metropolitan Water District of Southern California (MET) about the draft  
19 technical memorandum, (3) communications between CH2M and SWC or between  
20 CH2M and MET about BBID, (4) communications between CH2M and SWC or between  
21 CH2M and MET about CH2M's modeling work for BBID, and (5) the report that CH2M  
22 was in the process of preparing for BBID. (Vergara Decl. at Exhs. C, D, and E.)

23 On March 2, 2016, SWC filed its Motion to Quash Subpoenas Duces Tecum to  
24 Chilmakuri and Winslow. (Vergara Decl. at ¶ 17.) On March 3, 2016, counsel for CH2M  
25 sent a letter to counsel for BBID advising that CH2M was preparing a motion to quash.  
26 (Vergara Decl. at Exh. F.) On March 4, 2016, counsel for BBID responded by letter,  
27 notifying counsel for CH2M of the flaws associated with their arguments stated in their  
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1 letter. (Vergara Decl. at Exh. G.) On March 4, 2016, CH2M filed a motion to quash  
2 CH2M's Subpoenas Duces Tecum. (Vergara Decl. at ¶ 20.)

3 The ACL hearing is set to begin on March 21, 2016.

4 III. ARGUMENT

5 Administrative hearings and discovery procedures are governed by the Water  
6 Code (Wat. Code, § 1075 et seq.) and SWRCB regulations (Cal. Code Regs., tit. 23,  
7 § 648 et seq.), which incorporate portions of the Administrative Procedure Act (Gov.  
8 Code, § 11400 et seq., 11513) and the Civil Discovery Act (Code Civ. Proc., § 2016.010  
9 et seq.). The Board or any party to a proceeding before the Board may take the  
10 deposition of witnesses in accordance with the Civil Discovery Act. (Wat. Code, § 1100.)

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

23 Further, parties to an adjudicative proceeding are entitled to due process, which  
24 includes a full and fair opportunity to participate. (See, e.g., *Sallas v. Municipal Court*  
25 (1978) 86 Cal.App.3d 737, 742 ["due process of law requires that an accused ... have a  
26 reasonable opportunity to prepare and present his defense ...."] BBID is seeking no  
27 more than it is afforded by the Water Code, the Code of Civil Procedure, and the basic  
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1 tenets of due process rights.

2 A. The Attorney Work Product Privilege is Inapplicable to the Requested Discovery

3  
4 SWC and CH2M claim BBID seeks information protected by the attorney work  
5 product privilege. Work product subject to protection includes writings that reflect an  
6 attorney's impressions, conclusions, opinions, legal research, or theories. (Code Civ.  
7 Proc., § 2018.030.) Winslow undertook work on behalf of BBID. The subpoena issued to  
8 Winslow seeks information regarding that work. Work that was done for BBID cannot be  
9 withheld from BBID based on an assertion of privilege. The work Chilmakuri conducted  
10 for SWC was submitted to the SWRCB as part of SWC's testimony in the ACL. The  
11 documents are now part of the SWRCB's record in this hearing. SWC cannot assert  
12 privilege to materials submitted as expert testimony in a quasi-adjudicatory proceeding.

13 SWC and CH2M state that BBID will not be unfairly prejudiced by denying the  
14 requested discovery because all testimony and supporting documents have been  
15 submitted and the requested testimony and documents have no bearing on whether BBID  
16 engaged in unauthorized diversions, which SWC and CH2M claim is the subject of the  
17 ACL. SWC and CH2M demonstrate a misunderstanding of the scope of the ACL. Phase  
18 I of the ACL is dedicated to water availability in the Delta, which is the topic of Chilmakuri  
19 and Winslow's work. Such work is absolutely relevant to the ACL, as evidenced by the  
20 reliance by SWC's expert on this work, along with the SWRCB's submission of the same  
21 in conjunction with its filing of the ACL.

22 To the extent the SWRCB determines that privilege is properly asserted, BBID is  
23 entitled to a privilege log with respect to the documents. Further, witnesses can be  
24 directed not to answer questions during the depositions. However, there is no legal basis  
25 to prevent the depositions in their entirety on the basis of privilege.

26 B. SWC and CH2M's Relevance and Burden Objections to the Document Requests  
27 Are Unfounded and Improper

28 SWC and CH2M argue that BBID's subpoenas are overbroad, unduly

1 burdensome, seek information already available, and seek irrelevant information that is  
2 not reasonably calculated to lead to the discovery of admissible evidence. Code of Civil  
3 Procedure section 2017.010 provides that “any party may obtain discovery regarding  
4 any matter, not privileged, that is relevant to the subject matter involved in the pending  
5 action[.]” In an administrative hearing, relevant evidence “is the sort of evidence on  
6 which responsible persons are accustomed to rely in the conduct of serious affairs.”  
7 (Gov. Code, § 11513(c).) Although administrative adjudications follow a relaxed  
8 standard of admissibility, the evidence still “must be relevant and reliable.” (*Aengst v.*  
9 *Bd. of Medical Quality Assurance* (1980) 110 Cal.App.3d 275, 283.)

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

21 Further, the standard for production of documents at the discovery stage is  
22 whether the documents sought are likely to lead to the discovery of admissible evidence,  
23 not whether they are actually admissible at the hearing. (Code Civ. Proc., § 2017.010.)  
24 It is improper to assert “relevance” as a justification for refusing to produce documents  
25 unless the categories sought are blatantly unrelated to the issues. That is not the case  
26 with BBID’s document requests, and CH2M’s refusal to produce documents that, at a  
27 minimum, are likely to lead to the discovery of admissible evidence is an abuse of the  
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1 discovery process.

2 C. BBID Served Subpoenas As Quickly As Possible Given Its Shortened Timeframe

3 SWC and CH2M claim there is insufficient time to produce documents and  
4 prepare for depositions. BBID had little choice on the timeframes within which to serve  
5 subpoenas and request documents. SWC submitted testimony relying on Chilmakuri's  
6 work on February 22, 2016, mere weeks prior to the evidentiary hearing for the ACL that  
7 is set to begin on March 21, 2016. Given this already short timeframe, BBID served  
8 CH2M on March 3, 2016, as expeditiously as possible.

9 D. The Subpoenas Were Served on the Proper Parties

10 CH2M claim BBID served the wrong parties because it seeks records held by  
11 CH2M Hill Engineers, Inc. (CHE), which is the entity retained by SWC, MET, and BBID.  
12 However, BBID served the Custodian of Records for CH2M Hill, a separate entity, and  
13 Winslow and Chilmakuri, who are employed by CH2M Hill. BBID seeks to depose  
14 Chilmakuri and Winslow, who work for CH2M Hill. Presumably, their documents are  
15 owned or controlled by CH2M Hill, as they are employees of CH2M Hill. For this reason,  
16 BBID also subpoenaed CH2M Hill's Custodian of Record. If the documents BBID seeks  
17 are in fact housed in CHE, BBID would have no way of knowing that was the case  
18 without detailed conversations with CH2M. CH2M Hill cannot use its non-intuitive  
19 division of labor and document retention policy to confound discovery. BBID believes it  
20 served the correct party. To the extent it has not, it is CH2M Hill and CHE's  
21 responsibility to determine the proper course of action between the two entities.

22 E. SWC and CH2M's Alternative Request to Limit the Scope of the Depositions and  
23 Document Productions is Unfounded

24 SWC and CH2M's alternative request to limit the scope of the depositions and  
25 document productions is unfounded and must be denied. BBID has a statutory right to  
26 "obtain discovery regarding any matter, not privileged, that is relevant to the subject  
27 matter involved in the pending action[.]" (Code Civ. Proc., § 2017.010.) For the reasons  
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1 discussed above, SWC and CH2M fail to set forth any facts or legal arguments to  
2 reasonably justify any curtailment of BBID's discovery rights.

3 IV. CONCLUSION

4 For the foregoing reasons, BBID respectfully requests the SWRCB deny SWC's  
5 and CH2M's Motions to Quash Subpoenas Duces Tecum and allow the Chilmakuri and  
6 Wilson depositions to proceed as noticed. BBID further requests that the SWRCB deny  
7 SWC's and CHWM's requests to Quash the document requests set forth in the  
8 subpoenas. To the extent that the SWRCB permits withholding documents on the basis  
9 of a privilege, BBID requests production of a privilege log.

10 Dated: March 8, 2016

SOMACH SIMMONS & DUNN  
A Professional Corporation

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13 By:   
14 Michael Vergara, Esq.  
15 Attorneys for Petitioner/Plaintiff BYRON-  
16 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 8, 2016, I served the following document(s):

BYRON-BETHANY IRRIGATION DISTRICT'S CONSOLIDATED OPPOSITION TO:

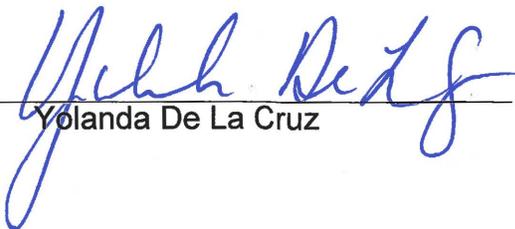
(1) STATE WATER CONTRACTORS' MOTION TO QUASH SUBPOENAS DUCES TECUM TO CHANDRA CHILMAKURI AND KYLE WINSLOW, OR, IN THE ALTERNATIVE, MOTION FOR PROTECTIVE ORDER, AND

(2) NON-PARTIES CH2M HILL ENGINEERS, INC., CHANDRA CHILMAKURI AND KYLE WINSLOW'S MOTION TO QUASH SUBPEONAS DUCES TECUM TO CH2M HILL, CHANDRA CHILMAKURI AND KYLE WINSLOW OR, ALTERNATIVELY, MOTION FOR A PROTECTIVE ORDER

X (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 8, 2016 at Sacramento, California.

  
\_\_\_\_\_  
Yolanda De La Cruz

**SERVICE LIST OF PARTICIPANTS  
BYRON-BETHANY IRRIGATION DISTRICT  
ADMINISTRATIVE CIVIL LIABILITY HEARING**  
(Revised 9/2/15; Revised: 9/1 1/15)

SOMACH SIMMONS & DUNN  
A Professional Corporation

<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>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></p>	<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>Byron-Bethany Irrigation District Daniel Vergara Somach Simmons &amp; Dunn 500 Capitol Mall, Suite 1000 Sacramento, CA 95814 <a href="mailto:dVergara@somachlaw.com">dVergara@somachlaw.com</a></p>
<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>Patterson Irrigation District Banta-Carbona Irrigation District The West Side Irrigation District Jeanne M. Zolezzi Herum\Crabtree\Suntag 5757 Pacific Avenue, Suite 222 Stockton, CA 95207 <a href="mailto:jzolezzi@herumcrabtree.com">jzolezzi@herumcrabtree.com</a></p>	<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>City and County of San Francisco Jonathan 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></p>
<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>Central Delta Water Agency Jennifer Spaletta Law PC P.O. Box 2660 Lodi, CA 95241 <a href="mailto:jennifer@spalettalaw.com">jennifer@spalettalaw.com</a></p> <p>Dante John Nomellini Daniel A. McDaniel Dante John Nomellini, Jr. NOMELLINI, GRILLI &amp; MCDANIEL 235 East Weber Avenue Stockton, CA 95202 <a href="mailto:ngmplcs@pacbell.net">ngmplcs@pacbell.net</a> <a href="mailto:dantejr@pacbell.net">dantejr@pacbell.net</a></p>	<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>California Department of Water Resources Robin McGinnis, Attorney P.O. Box 942836 Sacramento, CA 94236-0001 <a href="mailto:robin.mcginnis@water.ca.gov">robin.mcginnis@water.ca.gov</a></p>
<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>Richard Morat 2821 Berkshire Way Sacramento, CA 95864 <a href="mailto:rmorat@gmail.com">rmorat@gmail.com</a></p>	<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>San Joaquin Tributaries Authority Tim O'Laughlin Valerie C. Kincaid O'Laughlin &amp; Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95816 <a href="mailto:towater@olaughlinparis.com">towater@olaughlinparis.com</a> <a href="mailto:vkincaid@olaughlinparis.com">vkincaid@olaughlinparis.com</a></p>

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<u>VIA ELECTRONIC MAIL</u>	<u>VIA ELECTRONIC MAIL</u>
South Delta Water Agency John Herrick Law Offices of John Herrick 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 Email: Jherriaw@aol.com	State Water Contractors Stefani Morris 1121 L Street, Suite 1050 Sacramento, CA 95814 <a href="mailto:smorris@swc.org">smorris@swc.org</a>

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

**SOMACH SIMMONS & DUNN**  
A Professional Corporation

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<p>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></p>	<p>The West Side Irrigation District Jeanne M. Zolezzi Karna Harringfeld Janelle Krattiger Herum\Crabtree\Suntag 5757 Pacific Avenue, Suite 222 Stockton, CA 95207 <a href="mailto:jzolezzi@herumcrabtree.com">jzolezzi@herumcrabtree.com</a> <a href="mailto:kharringfeld@herumcrabtree.com">kharringfeld@herumcrabtree.com</a> <a href="mailto:jkrattiger@herumcrabtree.com">jkrattiger@herumcrabtree.com</a></p>
<p>State Water Contractors Stefani Morris 1121 L Street, Suite 1050 Sacramento, CA 95814 <a href="mailto:smorris@swc.org">smorris@swc.org</a></p>	<p>Westlands Water District Daniel O'Hanlon Rebecca Akroyd Kronick Moskovitz Tiedemann &amp; Girad 400 Capitol Mall, 27<sup>th</sup> Floor Sacramento, CA 95814 <a href="mailto:dohanlon@kmtg.com">dohanlon@kmtg.com</a> <a href="mailto:rakroyd@kmtg.com">rakroyd@kmtg.com</a></p> <p>Phillip Williams of Westlands Water District <a href="mailto:pwilliams@westlandswater.org">pwilliams@westlandswater.org</a></p>
<p>South Delta Water Agency John Herrick Law Offices of John Herrick 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 Email: <a href="mailto:Jherlaw@aol.com">Jherlaw@aol.com</a></p>	<p>Central Delta Water Agency Jennifer Spaletta Law PC P.O. Box 2660 Lodi, CA 95241 <a href="mailto:jennifer@spalettalaw.com">jennifer@spalettalaw.com</a></p> <p>Dante Nomellini and Dante Nomellini, Jr. NOMELLINI, GRILLI &amp; MCDANIEL <a href="mailto:ngmplcs@pacbell.net">ngmplcs@pacbell.net</a> <a href="mailto:dantejr@pacbell.net">dantejr@pacbell.net</a></p>
<p>City and County of San Francisco Jonathan 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></p>	<p>San Joaquin Tributaries Authority Valerie C. Kincaid O'Laughlin &amp; Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95816 <a href="mailto:vkincaid@olaughlinparis.com">vkincaid@olaughlinparis.com</a></p>
<p>Byron-Bethany Irrigaton District Daniel Vergara Somach Simmons &amp; Dunn 500 Capitol Mall, Suite 1000 Sacramento, CA 95814 <a href="mailto:dVergara@somachlaw.com">dVergara@somachlaw.com</a></p>	<p>California Department of Water Resources Robin McGinnis, Attorney P.O. Box 942836 Sacramento, CA 94236-0001 <a href="mailto:robin.mcginnis@water.ca.gov">robin.mcginnis@water.ca.gov</a></p>