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5
6 Attorneys for Petitioner
MORONGO BAND OF MISSION INDIANS

7
8 BEFORE THE STATE WATER RESOURCES CONTROL BOARD
9 STATE OF CALIFORNIA

10
11 In Re Matter of License No. 659,
Morongo Band of Mission Indians

**OBJECTIONS TO REQUIREMENT TO
FILE NOTICE OF INTENT TO
APPEAR, TO IDENTIFY WITNESSES
FOR CASE IN CHIEF, AND TO
NOTICE OF PROPOSED
REVOCATION; REQUEST FOR
DISMISSAL ON DUE PROCESS
GROUNDS**

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17 The Morongo Band of Mission Indians ("Morongo") hereby objects to the requirement to
18 file a Notice of Intent to Appear¹, to identify witnesses for Morongo's case-in-chief, and to the
19 Notice of Proposed Revocation and hereby requests that the State Water Resources Control Board
20 ("SWRCB") dismiss these proceedings on due process grounds.

21 **I. INTRODUCTION AND BACKGROUND**

22 Several notices and other communications have been issued by the SWRCB as part of the
23 proposed revocation of License 659.

24 On or about April 28, 2003, the SWRCB issued a Notice of Proposed Revocation of
25 License 659 (Application 553). The Notice appears to have been mailed to Great Spring Waters
26 of America, Inc., with a cover letter signed by Larry Attaway, Program Manager, Application and

27 _____
28 ¹ Morongo has attached a Notice of Intent to Appear to these objections, which is being filed subject to the
objections contained herein.

1 Petition Section of the SWRCB. The letterhead for this letter is SWRCB letterhead and there is
2 nothing to indicate it originated from the Prosecution Team. The purpose of the letter appears to
3 attempt to put the recipient on notice of the requirement to request a hearing to oppose revocation.

4 To that end, the letter provides:

5 If the SWRCB conducts a hearing, *you will be expected to present evidence disproving*
6 *the facts and conclusions set forth in the Notice of Proposed Revocation* or provide
7 other evidence showing that License 659 should not be revoked. (Emphasis added.)

8 The Notice, after reciting various allegations, concludes as follows:

9 **Based on the above facts, conclusions,** and statutory provisions, the Division of Water
10 Rights will revoke License 659 after the passage of 15 days after the Licensee receives
11 this notice, unless by that date the Division of Water Rights has received a written request
12 for a hearing signed by or on behalf of the Licensee. (Emphasis added.)

13 The SWRCB is proposing to revoke License 659 for, among other things, alleged
14 violations of Water Code section 1241. Water Code section 1241 provides:

15 If the person entitled to the use of water fails to use beneficially all or any part of
16 the water claimed by him or her, for which a right of use has vested, for the
17 purpose for which it was appropriated or adjudicated, for a period of five years,
18 that unused water may revert to the public and shall, if reverted, be regarded as
19 unappropriated public water. That reversion shall occur upon a finding by the
20 board following notice to the ... licensee ... and a public hearing if requested by
21 the ... licensee

22 On or about January 26, 2012, the SWRCB issued its Hearing Notice pertaining to the
23 Proposed Revocation of License 659 (Application 553) of The Morongo Band of Mission
24 Indians, Millard Canyon in Riverside County. The Hearing Notice identifies three key issues to
25 be determined at the hearing:

- 26 1. Should License 659 (Application 553) be revoked, in whole or in part, in
27 accordance with Water Code section 1675?
- 28 2. Did licensee or its predecessors-in-interest fail to use beneficially and in
accordance with the Water Code, in whole or in part, the water authorized to be
used under License 659 for the applicable statutory period? If so, what amount of
water was unused during what period or periods of time?
3. Did licensee or its predecessors-in-interest fail to comply with any of the terms or
conditions of License 659? If so, which terms or conditions did licensee or its
predecessors-in-interest violate?

1 On or about February 10, 2012, the SWRCB issued a Notice of Rescheduling of Public
2 Hearing (“Rescheduling Notice”), moving the commencement of the hearing from April 25, 2012
3 to May 21, 2012.² The Rescheduling Notice sets new dates for submittal of Notice of Intent to
4 Appear and submittal of proposed testimony, exhibits, etc., but otherwise leaves the January 26,
5 2012 Hearing Notice intact. (See Rescheduling Notice, p. 2 [“The January 26, 2012 notice
6 remains in effect except for the changes in dates noted herein.”].) On March 2, 2012, Morongo
7 filed a Request for the SWRCB to Direct the Prosecution Team to Provide More Specificity of
8 Allegations Supporting Proposed Revocation (“Morongo’s Request for More Specificity”). To
9 date, Morongo has not received a response from the SWRCB.

10 The SWRCB has set noon, March 14, 2012 as the deadline for submitting a Notice of
11 Intent to Appear before the Board in this proceeding. The Hearing Notice provides, among other
12 things:

13 If Morongo Band fails to submit a Notice of Intent to Appear by the deadline
14 specified in this notice, the State Water Board will deem its request for a hearing
15 regarding the proposed revocation of License 659 to be withdrawn and License
659 may be revoked without further notice.

16 A Notice of Intent to Appear requires, among other things, the identification of witnesses, subject
17 of proposed testimony and estimated length of testimony of witnesses for a party’s case-in-chief.
18 Morongo is substantially prejudiced from having to try to anticipate the scope of the proceedings;
19 namely, what aspect of the water right will be at issue over what portion of the last century.

20 Moreover, the Notice of Proposed Revocation demonstrates actual bias on the part of the
21 SWRCB and, as such, Morongo’s due process rights have been violated and this proceeding must
22 be dismissed.

23 II. DISCUSSION

24 A. Morongo Objects to the Requirement to File a Notice of Intent to Appear

25 As explained in more detail in Morongo’s Request for More Specificity, which is hereby
26 incorporated herein, the Hearing Notice fails to provide sufficient information to put Morongo on

27 ² The hearing date was moved, at the request of Morongo, because one of Morongo’s potential witnesses was
28 unavailable on the April 25, 2012 hearing date.

1 notice of the scope of this adjudicatory proceeding. Without limits on the scope of the
2 revocation proceeding, Morongo cannot tell whether it must prepare to defend and prove water
3 diversions spanning an entire century or something less. Adequate notice requires, among others
4 things, clear and sufficient information regarding the scope of the hearing prior to the time a
5 party has to make an election of whether to even request a hearing. (*Tafti v. County of Tulare*
6 (2011) 198 Cal.App.4th 891, 900.) Due process defects are not cured where a party later learns
7 of the specific matters to be heard at the hearing and where that party actually participates in the
8 hearing. (*Ibid.*) Without a scope of the proposed revocation hearing, Morongo is being deprived
9 of its opportunity to prepare a case-in-chief to defend its vested property right. As such, the
10 SWRCB is depriving Morongo of its due process rights.

11 **D. The Notice of Proposed Revocation Is Improper and Should Be Rescinded**

12 An essential element of a fair hearing is an impartial decision maker. Indeed, there should
13 be no dispute that due process “minimally contemplates the opportunity to be fully and fairly
14 heard before an impartial decision maker.” (*Catchpole v. Brannon* (1995) 36 Cal.App.4th 237,
15 245.) Even Water Code section 1241 affirms that revocation can occur, if at all, based on factual
16 findings *after* a hearing.

17 Here, it is quite clear that the SWRCB has accepted as true, the allegations (called “facts”)
18 and “conclusions” contained in the Notice of Proposed Revocation without any opportunity to
19 cross-examine the evidence underlying the allegations. The Notice, after reciting various
20 allegations, concludes as follows:

21 **Based on the above facts, conclusions,** and statutory provisions, the Division of Water
22 Rights will revoke License 659 after the passage of 15 days after the Licensee receives
23 this notice, unless by that date the Division of Water Rights has received a written request
for a hearing signed by or on behalf of the Licensee. (Emphasis added.)

24 Indeed, the Notice of Revocation demonstrates that the SWRCB has already accepted as
25 true, without any hearing, cross-examination, or appropriate burden of proof, the factual
26 allegations and proposed conclusions contained in the Notice of Proposed Revocation.

27 Actual bias is also demonstrated by the cover letter accompanying the Notice of Proposed
28 Revocation, which provides:

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If the SWRCB conducts a hearing, *you will be expected to present evidence disproving the facts and conclusions set forth in the Notice of Proposed Revocation* or provide other evidence showing that License 659 should not be revoked. (Emphasis added.)

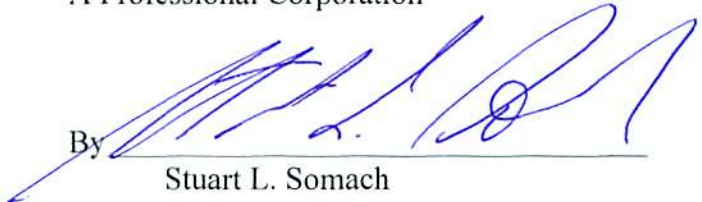
The SWRCB, which is required to be an impartial decision maker, has accepted as true the allegations contained in the Notice of Proposed Revocation without a hearing and is requiring Morongo to *disprove* the allegations. This is an outrageous violation of Morongo's due process rights.

As the SWRCB has demonstrated actual bias by accepting, as true, facts and conclusions without a fair hearing and an opportunity for cross-examination to test the veracity of the allegations, the SWRCB has denied Morongo its due process rights under the federal and State Constitutions. As such, the Notice of Proposed Revocation should be rescinded and this matter should be dismissed.

III. CONCLUSION

Morongo objects to the requirement to file a Notice of Intent to Appear without knowledge of the scope of the proceeding. In addition, the Notice of Proposed Revocation and transmittal letter demonstrate actual bias by the SWRCB in violation of Morongo's due process rights. As such, the SWRCB should rescind the Notice of Proposed Revocation and dismiss this matter.

SOMACH SIMMONS & DUNN
A Professional Corporation

By 
Stuart L. Somach

DATED: March 14, 2012

Attorneys for Petitioner
Morongo Band of Mission Indians

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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 95814; I am over the age of 18 years and not a party to the foregoing action.

On March 14, 2012, I served a true and correct copy of

OBJECTIONS TO REQUIREMENT TO FILE NOTICE OF INTENT TO APPEAR, TO IDENTIFY WITNESSES FOR CASE-IN-CHIEF, AND TO NOTICE OF PROPOSED REVOCATION; REQUEST FOR DISMISSAL ON DUE PROCESS GROUNDS

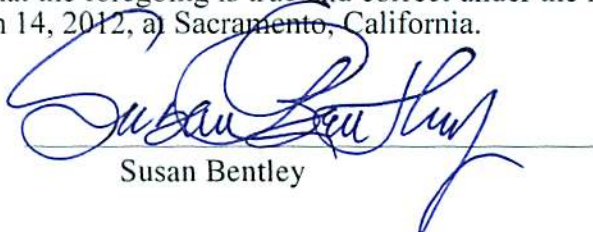
X (by mail) on all parties in said action listed on the attached service list, in accordance with Code of Civil Procedure §1013a(3), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At Somach Simmons & Dunn, mail placed in that designated area is given the correct amount of postage and is deposited that same day, in the ordinary course of business, in a United States mailbox in the City of Sacramento, California.

AND

X (by electronic service) I hereby certify that a true and correct copy of the foregoing will be e-mailed on March 14, 2012 as listed below:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct under the laws of the State of California. Executed on March 14, 2012, at Sacramento, California.


Susan Bentley

SERVICE LIST

1		
2		
3	Division of Water Rights Prosecution Team	Desert Water Agency
4	c/o Samantha Olson	P.O. Box 1710
5	State Water Resources Control Board	Palm Springs, CA 92263
6	1001 I Street	dluker@dwa.org
7	Sacramento, CA 95814	sbaca@dwa.org
8	solson@waterboards.ca.gov	
9	Coachella Valley Water District	Bold, Polisner, Maddow, Nelson & Judson
10	P.O. Box 1058	500 Ygnacio Valley Road, Suite 325
11	Coachella, CA 92236	Walnut Creek, CA 94596
12	srobbins@cvwd.org	cnelson@bpmnj.com
13	customerservice@cvwd.org	rmaddow@bpmnj.com
14	Brownstein Hyatt Farber Schreck	Redwine & Sherrill
15	21 East Carrillo Street	1950 Market Street
16	Santa Barbara, CA 93101-2706	Riverside, CA 92501
17	wstrickland@bhfs.com	gshoaf@redwineandsherrill.com
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19	The Morongo Band of Mission Indians	
20	c/o Barbara Karshmer	
21	765 Market Street, Suite 28F	
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