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11
12 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

13 PUBLIC HEARING TO DETERMINE
14 WHETHER TO ISSUE A CEASE AND
DESIST ORDER AGAINST WEST SIDE
15 IRRIGATION DISTRICT

**WEST SIDE IRRIGATION DISTRICT,
SOUTH DELTA WATER AGENCY, AND
CENTRAL DELTA WATER AGENCY'S
MOTION TO CONTINUE HEARING DATE**

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18 West Side Irrigation District (“WSID”), South Delta Water Agency (“SDWA”), and
19 Central Delta Water Agency (“CDWA”) respectfully submit this Motion to Continue Hearing
20 Date in the West Side Irrigation District (“WSID”) Cease and Desist Order Hearing proceeding
21 (“CDO”). The hearing is presently scheduled to commence on January 11, 2016.

22 **INTRODUCTION**

23 For the first time in its history, the State Water Resources Control Board (“State Board”)
24 is attempting to define when water was available to divert at specific points of diversion within
25 the Delta, including WSID’s point of diversion. Relying on a tremendous amount of data, not all
26 of which has been provided to WSID, the State Board determined this past summer there was
27 insufficient water available for thousands of Delta water right holders and users, including WSID.

1 opportunity to present and rebut evidence”].

2 “[A] request for a continuance supported by a showing of good cause usually ought to be
3 granted.” Cf. *Hernandez v. Superior Court* (2004) 115 Cal.App.4th 1242, 1246-47, *as modified*
4 *(Feb. 24, 2004)*. “[T]he refusal of a continuance which has the practical effect of denying the
5 applicant a fair hearing is reversible error.’ [Citations.]” *Oliveros v. County of Los Angeles* (2004)
6 120 Cal.App.4th 1389, 1395; see also *Cohen v. Herbert* (1960) 186 Cal.App.2d 488, 493-94 [a
7 court “may deduce that the order [denying a continuance] was not made in the exercise of sound
8 discretion if the record indicates that such order resulted in probable or possible prejudice to a
9 party”]. Good cause supports granting WSID’s requested continuance.

10 **II. WSID will be severely prejudiced if the hearing is not continued**

11 **A. WSID cannot prepare a reasonable defense by the time the hearing is scheduled**
12 **to commence much less by the time witness testimony is due considering the**
13 **highly complex factual and legal issues raised in this proceeding, the outstanding**
14 **discovery, and the very recent initiation of these proceedings**

15 WSID cannot prepare a reasonable defense by January considering the highly complex
16 factual and legal issues raised in this proceeding, the outstanding discovery, and the very recent
17 initiation of these proceedings.

18 **1. The undeniably complex factual and legal issues raised in this proceeding**
19 **cannot be fully investigated, briefed, and resolved a mere five months after**
20 **the initiation of these proceedings**

21 The factual and legal issues raised in this proceeding are undeniably complex. The Board
22 and its predecessors have long recognized that Delta hydrology and water availability in the Delta
23 are exceptionally complex matters. As the Board explained in Decision 900, “[w]ater levels in
24 these [Delta] channels, all at or near sea level, are hydraulically connected and aggregate an open
25 water area of about 38,000 acres (60 square miles).” Decision 900 at 43. Determining water
26 availability at any point in this vast “open water area” thus necessitates an evaluation of all water
27 sources that contribute to the Delta. Considering these facts, the Board had previously concluded
28 that it would be “difficult if not impossible” to estimate a Delta diverter’s effect on “water supply
at any particular point in the delta.” Decision 100 at 11. The Board’s unnecessary attempt

1 undertake this “difficult if not impossible” task with respect to WSID’s diversions in the span of
2 five months fails to provide WSID ““a reasonable opportunity to prepare a defense and respond to
3 the charges.’ [Citation omitted.]” See *People v. Alexander* (2010) 49 Cal.4th 846, 934.

4 The Board’s continued recognition of the difficulty of the issues raised in this proceeding
5 highlights this failure. The Board has acknowledged the complexity of the issues raised here in
6 the state court proceedings that concern the same core issues. The state court proceedings involve
7 several coordinated cases, including one that WSID brought against the Board relating to this
8 year’s curtailment actions. The Board has found that “these cases raise complex issues,” that the
9 claims raised “are diverse, complicated, and raise novel issues of water rights law,” and that “the
10 cases will require . . . ‘management of a large number of witnesses or a substantial amount of
11 documentary evidence. MPA in support of Petition for Coordination at page 5; Petition for
12 Coordination at page 3. The court hearing the Board’s claims agreed, concluding the “actions are
13 complex.” Coordination Order at page 3.

14 Given the conceded complexity of the factual and legal issues raised in this hearing, a
15 continuance would be justified even if WSID had already completed discovery. Compounding the
16 issue, as discussed below, it remains unclear when WSID will have a full opportunity to complete
17 discovery and review the records the Board relied on to make its water availability
18 determinations.

19 **2. Absent a continuance, WSID will not have a reasonable opportunity to**
20 **complete discovery and review, comprehend, and respond to the materials on**
21 **which the Water Board is basing this prosecution action**

22 WSID and BBID requested copies of technical records and other information supporting
23 the Board’s water availability determinations in late July and early August. BBID submitted a
24 Public Records Act (“PRA”) request to the Board on July 21, 2015; WSID submitted Public
25 Records Act requests on July 31, 2015 and August 6, 2015.

26 On October 12, 2015, the Prosecution Team emailed parties that “initial” materials
27 responsive to WSID and BBID’s PRA requests could be obtained at the Board’s office, but noted
28 that it “is in the process of reviewing several thousand additional potentially responsive electronic

1 mail communication records . . .” On October 15, the Prosecution Team added that it “is still
2 reviewing a large number of electronic mail records. . .” See Prosecution Team’s Motion for
3 Protective Order at page 2. It remains unclear when the Prosecution Team will make additional or
4 final disclosures. The Advisory Team’s first response to WSID’s PRA requests did not come until
5 October 30, 2015, and indicated that disclosures will be made “over the next month.”

6 A few weeks after the initial disclosure, WSID is still grasping to understand the materials
7 the Prosecution Team produced and how these materials play into the Board’s water availability
8 determinations. Although WSID has yet to fully understand the Board’s determinations, it is at
9 least clear that the Board relied on a tremendous amount of data—underscoring the complexity of
10 this matter. To estimate water demand, for example, the Board appears to have averaged five
11 years of reporting for 16,022 water rights, or 80,110 reports in total. The Board claims it
12 performed quality control in its review of these reports—all of which were based on self-
13 reporting—but WSID cannot merely rely on the Board’s assurances that it removed duplicative
14 reporting and corrected inaccurate reporting.

15 WSID must be afforded an opportunity to review, comprehend, and respond to the
16 materials on which the Board is basing its enforcement action. To do so, WSID has
17 commissioned experts to review the material and data the State Board relied on to make its water
18 availability determinations. The declarations of WSID’s experts Nick Bonsignore and Thomas
19 Burke are attached hereto as exhibits to this motion. As set forth in both declarations, the analysis
20 conducted by the State Board with respect to the water availability analysis is like nothing either
21 of them has ever seen and raises many questions that only State Board staff and Prosecution team
22 witnesses, if anybody, can answer. Only after all of the documents have been received pursuant to
23 the Public Records Request and the depositions are complete can WSID fully prepare its defense
24 to meet the Prosecution Team’s allegations. WSID is still working to finalize deposition dates.
25 Thus, far they will commence in mid-November and continue until at least December 7, 2015.
26 With both depositions and document production continuing well into December, there is simply
27 no way WSID can be in a position to be prepared for a January 11 hearing date, much less be able
28

1 to meet the initial pre-hearing submittal deadline of December 22, 2015.

2 The January hearing date fails to provide WSID a reasonable amount of time to prepare its
3 defense. That the Board took nearly three months and has not yet provided all of the data on
4 which it based its water availability determination should be warning enough that commencing
5 the hearing in January would fail to provide WSID a reasonable opportunity to prepare a defense
6 and respond to the charges. If the Board, presumably acting diligently, needed nearly three
7 months to provide the materials upon which it based its water availability determinations, it is
8 entirely unrealistic to expect WSID to have time to digest these materials and fully prepare its
9 defense in a shorter amount of time.

10 Finally, further demonstrating the insufficiency of the current schedule is the parties'
11 recent attempts to meet and confer regarding the due date for the case-in-chief—including
12 testimony, exhibits, lists of exhibits, qualifications, and statements of service—and rebuttal
13 materials. Setting an ambitious schedule, WSID initially proposed to have the case-in-chief due at
14 least 20 business days after completion of all requested depositions and the Board's full
15 production under the PRA, and the rebuttal due 20 business days after the case-in-chief. But as
16 the Prosecution Team explained in response, even this speedy schedule would be impossible
17 given the January hearing date.

18 Now that WSID's experts have had time to actually review in detail the information that
19 the SWRCB has only recently produced, the prior proposal was overly optimistic and it is now
20 clear that WSID will need forty five working days after the completion of all requested
21 depositions and the full PRA production to submit a case-in-chief. Thus, WSID will not be in a
22 position to complete its case in chief until January 19, 2016.

23 **B. The Prosecution Team will not be prejudiced by a continuance**

24 Denying a continuance would result in a substantial injustice to WSID. The Prosecution
25 Team, in contrast, would not be prejudiced by a continuance, and if anything, should favor further
26 development of the facts. In considering WSID's request for a continuance, one must consider
27 the practical effect of a ruling from the hearing officer in March or April rather than January.
28

1 Even assuming arguendo the hearing office rules in favor of the Prosecution Team, there can be
2 no prejudice to same if said ruling were to occur in March or April rather than January. This is
3 particularly evident since, to date, the SWRCB has not produced a single document as part of the
4 draft CDO or in response to the PRA request that describes injury to a prior right holder as a
5 result of the alleged threat of unlawful diversion. Indeed, one of the subjects of the CDO - the
6 alleged threat associated with WSID's use of City of Tracy wastewater, did not even occur in
7 2015 and is not currently expected to occur under any set of facts known to the parties.

8 Similarly, there can be no actual prejudice to the Hearing Team's interests from a
9 continuance. The only thing the Hearing Team can be concerned about in this matter is making
10 sure the parties are provided with a fair, complete and efficient hearing. Although WSID
11 understands this, "[e]fficiency cannot be favored over justice." *Estate of Meeker* (1993) 13
12 Cal.App.4th 1099, 1106. "[D]excisions about whether to grant a continuance or extend discovery
13 'must be made in an atmosphere of substantial justice.'" *Hernandez v. Superior Court* (2004) 115
14 Cal.App.4th 1242, 1246, *as modified* (Feb. 24, 2004). And under the facts here, "the interests at
15 stake are too high to sanction the denial of a continuance without good reason" [Citation.]
16 *Chavez v. 24 Hour Fitness USA, Inc.* (2015) 238 Cal.App.4th 632, 643, *review denied* (Sept. 23,
17 2015).

18 It may be true that many Board CDO hearings are appropriately conducted only a few
19 months after a draft CDO is issued, but this is anything but a normal CDO proceeding. The
20 typical case does not, to use the Board's own words, "raise novel issues of water rights law,"
21 implicate thousands of water rights, and involve determinations that the Board had once deemed
22 "difficult if not impossible." Clearly, the issues and stakes involved in this proceeding militate
23 against constricting WSID's ability to fully and adequately prepare for and present its defense.

24 **C. Under comparable circumstances, courts have not hesitated in finding a**
25 **continuance appropriate and even required**

26 Under comparable circumstances, courts have not hesitated in finding a continuance
27 appropriate and even required. Consider the recent case of *Chavez v. 24 Hour Fitness USA, Inc.*
28 (2015) 238 Cal.App.4th 632, 633, *review denied* (Sept. 23, 2015). The case involved a husband

1 and wife's suit against a gym after the wife suffered an injury while using a workout machine—a
2 decidedly less complex case than that here. The decision in *Chavez* considered a lower court's
3 denial of a continuance request. The husband and wife alleged the continuance was necessary to
4 allow them to depose an additional witness. The trial court, however, denied the request,
5 reasoning the couple—who were aware of the witness for six months—should have sought to
6 conduct the deposition at an earlier date. *Id.* at 638-39. The court of appeal reversed, finding a
7 continuance required under the circumstances. It explained among other things that “[t]he case
8 had been pending for just over one year” and that the proposed deponent “likely possesses unique
9 knowledge regarding the primary dispute.” *Id.* at 644.

10 Greater justification supports granting a continuance here. WSID, unlike the plaintiffs in
11 *Chavez*, cannot be accused of being dilatory in its pursuit of conducting discovery. Indeed, had
12 WSID waited six months to move to begin its depositions, the proceedings would already have
13 ended. Moreover, the plaintiffs in *Chavez* were found to deserve a continuance in part because
14 “[t]he case had been pending for just over one year.” On the current schedule, the CDO hearing
15 would be completed in only five months, even though it involves a case that is undeniably more
16 complex.

17 The complexity of the factual and legal issues, the early stage of discovery, and the only
18 recent initiation of these proceedings in mid-July necessitate a continuance. Moving forward with
19 the January hearing under these circumstances would “render [] the entire proceeding unfair and
20 the result unreliable.” *King City v. Community Bank of Central California* (2005) 131
21 Cal.App.4th 913, 931, *as modified on denial of reh'g* (Sept. 1, 2005) [finding denial of a
22 continuance to permit discovery “constituted an abuse of discretion, with the prejudicial effect of
23 rendering the entire proceeding unfair and the result unreliable”]; see also *People v. Fontana*
24 (1982) 139 Cal.App.3d 326, 333 [court abused its discretion in denying continuance when
25 counsel was unprepared to proceed]; *In re Marriage of Hoffmeister* (1984) 161 Cal.App.3d 1163,
26 1171 [reversing trial court's denial of a continuance to allow a party to fully review newly
27 provided materials, and concluding that “it was in our view an abuse of discretion and unjust not
28 to at least grant appellant a brief continuance in order to provide him an opportunity to review the
adverse evidence that was instead permitted to surprise him”]; *Hernandez v. Superior Court*

1 (2004) 115 Cal.App.4th 1242, 1245-46, *as modified* (Feb. 24, 2004) [court abused its discretion
2 in continuing trial date by only month when moving party's initial attorney was too ill to prepare
3 case properly and his prospective attorney required more time]; *Bussard v. Department of Motor*
4 *Vehicles* (2008) 164 Cal.App.4th 858, 860, *as modified* (July 8, 2008) [administrative hearing
5 officer properly granted continuance to allow a new witness to testify].

6 **III. A continuance is necessary to avoid violating WSID's due process rights**

7 Good cause supports a continuance in order to avoid severe prejudice to WSID and
8 violation of fundamental due process protections.

9 The due process clauses of the state and federal constitutions impose constraints on
10 governmental decisions that deprive individuals of life, liberty, or property. U.S. Const., Amends.
11 V, XIV; Cal. Const., art. I, § 7. The fundamental requirement of these clauses is that the
12 government must provide individuals with the opportunity to be heard "at a meaningful time and
13 in a meaningful manner" before taking their property. See, e.g., *Mathews v. Eldridge* (1976) 424
14 U.S. 319, 333. To effectuate this requirement, "'an accused must . . . have a reasonable
15 opportunity to prepare a defense and respond to the charges.' [Citation omitted.]" See, e.g.,
16 *People v. Alexander* (2010) 49 Cal.4th 846, 934, *as modified on denial of reh'g* (Sept. 29, 2010);
17 *Sallas v. Municipal Court* (1978) 86 Cal.App.3d 737, 742 ["due process of law requires that an
18 accused . . . have a reasonable opportunity to prepare and present his defense. . . ."])

19 Requiring WSID to proceed on the current tight time schedule, without a full and fair
20 opportunity to conduct discovery and respond to the evidence on which the Board is basing its
21 prosecution, would be a violation of due process. As the Supreme Court has found, "it is a denial
22 of the accused's constitutional right to a fair trial to force him to trial with such expedition as to
23 deprive him of the effective aid and assistance of counsel." *White v. Ragen* (1945) 324 U.S. 760,
24 764; see also *People v. Crovedi* (1966) 65 Cal.2d 199, 207 ["a myopic insistence upon
25 expeditiousness in the face of a justifiable request for delay can render the right to defend with
26 counsel an empty formality"]; *Hughes v. Superior Court* (1980) 106 Cal.App.3d 1, 4 ["To force
27 an unprepared counsel to proceed to trial regardless of the reasons for the lack of preparedness
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would result in a violation of constitutional rights.”].

CONCLUSION

For these reasons, WSID, SDWA, CDWA respectfully urge the Hearing Team to continue the hearing such that it does not commence before March 2016.

Dated: November 9, 2015

HARRIS, PERISHO & RUIZ

BY  _____

S. DEAN RUIZ, ESQ

Attorney for SDWA

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