

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WRO 2004 - 0034

In the Matter of a Request for Reconsideration of Hearing Officer Ruling
Denying Petition to Disqualify Enforcement Team in
Water Right Proceeding

MORONGO BAND OF MISSION INDIANS,

Requestor

SOURCES: Springs arising in Millard Canyon, tributary to the San Gorgonio River, tributary to
to the Whitewater River

COUNTY: Riverside

ORDER DENYING REQUEST FOR RECONSIDERATION

BY THE BOARD:

1.0 INTRODUCTION

By this order, the State Water Resources Control Board (SWRCB) denies the Morongo Band of Mission Indian's (Morongo Band) request for reconsideration of a ruling made by the hearing officer in a water right proceeding currently pending before the SWRCB. The subject of the hearing is the proposed revocation of the Morongo Band's water right License 659 (Application 553). The SWRCB has separated functions in the hearing, with separate staff serving on an enforcement team, which will advocate for revocation of the license, and a hearing team, which will advise the SWRCB. The hearing officer's ruling denied the Morongo Band's petition to disqualify the enforcement team. The Morongo Band claims that it will be denied a fair hearing because members of the enforcement team advise the SWRCB in unrelated proceedings.

As discussed more fully below, the SWRCB finds that the procedures governing this proceeding satisfy due process requirements and the Morongo Band will be afforded a fair hearing. Accordingly, the Morongo Band's request for reconsideration of the hearing officer's ruling is denied.

2.0 FACTUAL, PROCEDURAL, AND LEGAL BACKGROUND

2.1 Water Right License 659

Water right License 659 authorizes the direct diversion year-round of water from springs arising in Millard Canyon in Riverside County at a rate of 0.16 cubic feet per second (cfs) for purposes of irrigating 13 acres of land. The right has a priority of January 3, 1917. Originally, the right belonged to Southern Pacific Land Company.

2.2 The Proposed Revocation of License 659

Water Code section 1675 provides that the SWRCB may revoke a license if the licensee has ceased to put water to beneficial use as required by the Water Code or if the licensee has not complied with any of the terms and conditions of the license. Under Water Code section 1241, a water right permit or license may be forfeited if water is not beneficially used for a five-year period. Until 1980, section 1241 provided for a three-year forfeiture period. Section 1241 was amended in 1980 to provide for a five-year forfeiture period.

On April 28, 2003, the SWRCB issued a Notice of Proposed Revocation of License 659. The notice informed the licensee that the SWRCB proposed to revoke the license for (1) failure to beneficially use water for five years or more and (2) using water in violation of the license. In support of the second allegation, the notice stated that Reports of Licensee for the period 1991 through 1994 indicated that the licensee had irrigated 200 acres and used water for purposes of stockwatering. Subsequently, the Division received notice that the license had been assigned to the Morongo Band.

2.3 Pending Administrative Hearing on the Proposed Revocation

The Morongo Band objected to the proposed revocation of the license and the SWRCB scheduled a hearing for October 14, 2003. Subsequently, the SWRCB granted the Morongo Band's request to postpone the hearing in order to allow the Morongo Band time to retain an expert in water right law. On March 11, 2004, the SWRCB issued a revised hearing notice, which set the hearing for April 30, 2004.

The revised hearing notice set forth the procedures governing adjudicative proceedings before the SWRCB. SWRCB adjudicative proceedings are conducted in accordance with California Code of Regulations, title 23, sections 648-649.9 and 760, which incorporate most of chapter 4.5 of the Administrative Procedure Act (commencing with Government Code section 11400) (APA); sections 801-805 of the Evidence Code; and section 11513 of the Government Code. (Cal. Code Regs., *supra*, § 648, subds. (b) & (c).) Except in cases where a decision will be made by an officer or employee of the SWRCB pursuant to delegated authority, one or more SWRCB Members serve as the hearing officer or presiding officer. (See Wat. Code, § 183; Gov. Code, § 11405.80.) After the parties to an adjudicative proceeding submit evidence and argument, the hearing officer does not make a final decision on the merits. Instead, the hearing officer provides direction to the hearing team staff in the preparation of a draft order or decision for consideration by the full SWRCB. (Wat. Code, § 183.)

In this proceeding, the hearing officer is SWRCB Member Gary M. Carlton. SWRCB staff assigned to assist the hearing officer in conducting the hearing and preparing an order are Dana Differding, Staff Counsel, and Jean McCue, Water Resources Control Engineer.

The SWRCB has separated its adjudicative function from its investigative and prosecutorial functions in this case. Chapter 4.5 of the APA provides:

(a) A person may not serve as presiding officer in an adjudicative proceeding in any of the following circumstances:

(1) The person has served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage.

(2) The person is subject to the authority, direction, or discretion of a person who has served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage.

(Gov. Code, § 11425.30.) Chapter 4.5 of the APA does not require separation of functions on the staff level, but the SWRCB's practice is to separate functions on the staff level in adjudicative proceedings where staff participation in a prosecutorial or adversarial role is warranted. In this proceeding, the SWRCB assigned Samantha Olson, Staff Counsel, Mark Stretars, Senior Engineer, and Doug Roderick, Water Resources Control Engineer, to serve on an

enforcement team. The March 11, 2004 hearing notice identified the members of the enforcement team and specified that the enforcement team would be treated like any other party to the hearing. The notice provided further that *ex parte* communications between SWRCB members and SWRCB staff on the one hand, and any of the hearing participants, including the enforcement team, on the other hand, regarding substantive or controversial procedural matters within the scope of the hearing were not permitted. The SWRCB is aware of no violations of its *ex parte* restriction in this proceeding.

2.4 The Morongo Band's Petition to Disqualify the Enforcement Team

On March 15, 2004, the Morongo Band filed two petitions. The first petition was to (1) disqualify the enforcement team, (2) conduct discovery regarding activities and communications of the enforcement team, (3) establish a briefing schedule and hearing on the petition for disqualification, and (4) stay the hearing on the merits pending resolution of the petition for disqualification. The Morongo Band cited to *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th [7 Cal.Rptr.3d 896] in support of its argument that it would be deprived of a fair hearing if the enforcement team were allowed to participate in the proceeding because members of the enforcement team provide advice to the SWRCB in unrelated matters.

The Morongo Band's second petition was to (1) continue the hearing on the merits, (2) extend the deadline to submit a Notice of Intent to Appear, (3) extend the deadline to submit exhibits, and (4) establish a discovery schedule. As part of the second petition, the Morongo Band sought discovery "to uncover all of the factual allegations upon which the Enforcement Team will rely."

In a letter ruling dated March 25, 2004, the hearing officer denied the Morongo Band's first petition for disqualification and related matters. The hearing officer based his ruling on the fact that, unlike the situation in *Quintero*, the SWRCB in this case provided for a clear separation of functions between advisers to the SWRCB Members and the enforcement team. With regard to the second petition, the hearing officer granted a continuance and extension of the hearing deadlines in view of the vacation schedule of counsel to the Morongo Band and the relatively

short period of time to prepare for the hearing. The hearing officer rescheduled the hearing for June 15, 2004. The hearing officer denied the Morongo Band's petition to establish a discovery schedule because the discovery that the Morongo Band sought to conduct was unnecessary and would duplicate the hearing procedures.

2.5 The Morongo Band's Request for Reconsideration of the Hearing Officer's Ruling

On April 16, 2004, the Morongo Band filed a request for reconsideration of the hearing officer's March 25, 2004 ruling. The only issue presented by the Morongo Band's request is whether the enforcement team should be disqualified. By letter dated May 13, 2004, the hearing officer notified the parties that the hearing on the proposed revocation was postponed pending SWRCB action on the Morongo Band's request for reconsideration.

The Morongo Band's request is styled as a request for reconsideration pursuant to Water Code section 1122. That section provides in relevant part that the SWRCB "may order a reconsideration of all or a part of a decision or order on the [SWRCB's] own motion or on the filing of a petition of any interested person or entity." In its response to the Morongo Band's request for reconsideration, the enforcement team argues that the request is premature because the hearing officer's ruling is a procedural ruling, not a decision or order within the meaning of section 1122.

We agree that the ruling is procedural in nature. We need not resolve the question of whether a procedural ruling is subject to reconsideration pursuant to section 1122, however, because the SWRCB may, in its discretion, review any delegated action of an officer or employee of the SWRCB, including the hearing officer's procedural ruling. In this case, the hearing officer requested the full SWRCB to review his ruling because the issue presented by the Morongo Band's request for reconsideration has significant implications not only for the ability of the SWRCB to conduct this hearing, but more importantly for the ability of the SWRCB and the nine Regional Water Quality Control Boards (RWQCBs) to conduct all other proceedings that

are prosecutorial in nature using existing staff resources. In view of the significance of this issue, we have chosen to review the ruling. We recognize, however, the potential disruption to adjudicative proceedings that would stem from routine challenges to procedural rulings. Accordingly, we expressly decline to hold that parties to adjudicative proceedings are entitled to interlocutory review of procedural rulings.

3.0 DISCUSSION

The Morongo Band contends that it will not be afforded a fair hearing because at least one member of the enforcement team is currently serving in an advisory role to the SWRCB in an unrelated proceeding. The Morongo Band relies exclusively on *Quintero, supra*, in support of this argument.

3.1 The Quintero Decision

In *Quintero*, the Fourth District Court of Appeal held that the Santa Ana Personnel Board did not provide a fair hearing to the plaintiff, a Santa Ana Police Department employee who had been terminated for repeated sexual activity with a female detention officer while on duty. The Court found that the participation of the deputy city attorney who represented the employer City of Santa Ana in the hearing showed a probability of actual bias in favor of the city because the deputy city attorney had advised the Personnel Board in unrelated matters. (*Id.* at p. 814.) The Court cited a number of occasions upon which the deputy city attorney had acted as the Personnel Board's advisor. (*Id.* at pp. 815-816.) The Court stated that there was no evidence that the deputy city attorney had acted as both the city's attorney and the Personnel Board's advisor in the employee's termination hearing, but the Court concluded nonetheless that the lines between the attorney's roles as advocate and advisor had become blurred. (*Id.* at pp. 814, 817.)

The Court expressly held that its decision was based on the totality of the circumstances, including the frequency of contacts between the deputy city attorney and the Personnel Board. (*Id.* at p. 817.) Despite this holding, the Court also stated that, while a city attorney may serve in an advisory role and subsequently act as a prosecutor, "the attorney may occupy only one

position at a time and must not switch roles from one meeting to the next.” (*Ibid.*) Based on this statement, the Morongo Band argues that it will be deprived of a fair hearing because at least one member of the enforcement team, Samantha Olson, is currently serving in an advisory role to the SWRCB in an unrelated water right proceeding.

3.2 Overview of Due Process Requirements

Contrary to the Morongo Band’s argument, it will not be deprived of a fair hearing. As explained more fully below, the procedures governing this proceeding satisfy Constitutional due process requirements and chapter 4.5 of the APA. As stated above, the holding in *Quintero* was based on the totality of the circumstances of that case. The circumstances of this case are distinguishable. Moreover, the suggestion that the same agency staff may not serve dual functions in unrelated proceedings represents a significant departure from decisional law and chapter 4.5 of the APA.

Preliminarily, a fair hearing before an unbiased decision-maker is a basic due process requirement. (*Burrell v. City of Los Angeles* (1989) 209 Cal.App.3d 568, 577 [257 Cal.Rptr. 427, 432].) The requirement stems from the Fifth and Fourteenth Amendments to the United States Constitution and article I, sections 7 and 15 of the California Constitution, which provide that no person shall be deprived of property without due process of law. In interpreting federal and state due process requirements, the courts have held that a single agency may combine investigative, prosecutorial, and adjudicative functions, provided that the agency provides an appropriate degree of separation between those functions within a given adjudicative proceeding. (See generally 2 Koch, *Administrative Law and Practice* (2d ed. 1997) § 6.11, pp. 309-319.)

Similarly, chapter 4.5 of the APA establishes the general rule that a person may not serve as a presiding officer or decisionmaker in an adjudicative proceeding if the person served as an investigator, prosecutor, or advocate in the same adjudicative proceeding. (Gov. Code, § 11425.30, subd. (a).) It merits note that chapter 4.5 of the APA was adopted upon the recommendation of the California Law Revision Commission after it had conducted an extensive review of the law governing administrative procedures. Except for *Quintero*, we are aware of no

authority for the proposition that the same agency staff or decisionmakers may not serve dual functions in separate and unrelated proceedings.

3.3 *Withrow v. Larkin*

A seminal case on this issue is *Withrow v. Larkin* (1975) 421 U.S. 35 [95 S.Ct. 1456]. In *Withrow*, the U.S. Supreme Court upheld against a due process challenge a Wisconsin statute that authorized a state medical board to investigate whether a physician had violated state law and subsequently hold a hearing on the issue whether to suspend the physician's license to practice medicine based on the alleged violations. (*Id.* at p. 55.)

The Court explained that, under certain circumstances the probability of actual bias on the part of a decisionmaker is too high to be constitutionally tolerable, such as when the decisionmaker has a pecuniary interest in the proceeding. (*Id.* at p. 47.) But the Court went on to explain:

The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudice that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

(*Ibid.*) The Court concluded that the mere fact that the state medical board had investigated the physician's conduct did not present an unacceptable risk that the medical board would be biased against the physician and unable to afford him a fair hearing. (*Id.* at pp. 54-55.)

Consistent with *Withrow*, California courts also have upheld the authority of agency decisionmakers to decide a disputed issue after having conducted a preliminary investigation and rendered a preliminary determination on the merits. (See, e.g., *Griggs v. Board of Trustees* (1964) 61 Cal.2d 93, 97-98 [37 Cal.Rptr. 194, 389 P.2d 722] [board of trustees may conduct inquiry and make preliminary determination to terminate teacher prior to holding formal hearing

on contested termination; *Burrell v. City of Los Angeles*, *supra*, 209 Cal.App.3d at 580-585, [257 Cal.Rptr. at 435-437] [same official who investigated disciplinary proceedings and recommended penalty had final say on severity of penalty]; see also *Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1235-1241 [97 Cal.Rptr.2d 467, 491-495] [city councilman appealed planning commission decision then voted on appeal].)

In line with the case law described above, chapter 4.5 of the APA provides an exception to the general rule that a person may not serve as a presiding officer or decisionmaker in an adjudicative proceeding if the person also served as an investigator, prosecutor, or advocate in the same proceeding. Government Code section 11425.30, subdivisions (b) and (c) provide that a person who has served as a decisionmaker “in a determination of probable cause or other equivalent preliminary determination in an adjudicative proceeding or its preadjudicative stage” may serve as the presiding officer or decisionmaker in the proceeding.

3.4 Combination of Functions on the Staff Level

The provisions of the APA and the cases discussed above address the extent to which a presiding officer or agency decisionmaker may combine functions in a proceeding. Chapter 4.5 of the APA does not address the extent to which agency staff who serve as advisors to agency decisionmakers also may serve as investigators, prosecutors, or advocates. Case law provides some guidance on this issue, but the cases are not uniform and no bright-line rule exists. In the words of the U.S. Supreme Court:

[L]egislators and others concerned with the operations of administrative agencies have given much attention to whether and to what extent distinctive administrative functions should be performed by the same persons. No single answer has been reached. Indeed, the growth, variety, and complexity of the administrative processes have made any one solution highly unlikely. Within the Federal Government itself, Congress has addressed the issue in several different ways, providing for varying degrees of separation from complete separation of functions to virtually none at all.

(*Withrow*, *supra*, 421 U.S. at 51-52.)

In a number of California cases, the courts have held that a proceeding in which agency staff combined functions did not violate due process requirements. (See, e.g., *Greer v. Board of Education of Santa Rosa City School District* (1975) 47 Cal.App.3d 98, 119-120 [121 Cal.Rptr. 542, 556] [same counsel prosecuted teacher termination case before hearing officer and advised decision-maker]; *Chosick v. Reilly* (1954) 125 Cal.App.2d 334, 337-338 [270 P.2d 547] [in license revocation case, staff assistants connected with prosecution before hearing officer also assisted decision-maker]; see also *National Coach Corp. v. Board of Control* (1982) 137 Cal.App.3d 750, 755 [187 Cal.Rptr. 261, 264] [rejecting allegation that participation by agency's in-house legal department in separate functions violated due process requirements].)

In other California cases, however, the courts have held that a proceeding in which agency staff combined functions in the same proceeding violated due process requirements. (See, e.g., *Nightlife Partners v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 94 [133 Cal.Rptr.2d 234, 246] [attorney who assisted city in decision to deny application for business permit also advised hearing officer in hearing on appeal of decision to deny application]; *Midstate Theatres, Inc. v. County of Stanislaus* (1976) 55 Cal.App.3d 864, 870-876 [128 Cal.Rptr. 54, 57-61] [same attorney advised county board of equalization in hearing regarding contested property taxes and represented the county assessor in the hearing]; see also *Rowen v. Workers' Compensation Appeals Board* (1981) 119 Cal.App.3d 633, 640-641 [174 Cal.Rptr. 185, 189] [expressing reservations about the same staff acting as prosecutor and advising decisionmaker but concluding that record did not establish such combination of functions].)

Consistent with the line of cases invalidating proceedings where agency staff combined functions, the Court of Appeal in *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575, 1585-1587 [5 Cal.Rptr.2d 196] held that different attorneys from the county counsel's office could represent the sheriff's department and advise a county employment appeals board in the adjudication of a dispute between the sheriff's department and a deputy sheriff, provided that the attorney advising the appeals board was screened from inappropriate contact with the attorney representing the sheriff's department. (See also *Ford v. Civil Service Comm'n* (1958) 161 Cal.App.2d 692 [327 P.2d 148] [hearing fair and proper where different staff from county

counsel's office represented civil service commission and department defending discharge of employee before commission].)

3.5 The Procedures Governing this Proceeding Satisfy Due Process Requirements

The procedures governing this proceeding are entirely consistent with the authority discussed above. Consistent with *Withrow, supra*, and chapter 4.5 of the APA, it would have been permissible for the hearing officer or SWRCB Members to have made a determination of probable cause to revoke the Morongo Band's water right license, or an equivalent preliminary determination, but neither the hearing officer nor any of the other SWRCB Members have had any previous involvement with this issue. Larry Attaway, Program Manager of the Application and Petition Section of the Division, issued the notice of proposed revocation pursuant to authority delegated by the SWRCB. In addition, although separation of functions on the staff level is not required by chapter 4.5 of the APA and may not be required in order to satisfy due process requirements, the SWRCB has, in an abundance of caution, separated functions on the staff level in this proceeding. Finally, in satisfaction of the holding in *Howitt*, SWRCB staff serving as advisors to the hearing officer and other SWRCB Members have been screened from inappropriate contact with SWRCB staff on the enforcement team through application of the prohibition against *ex parte* communications.

The Morongo Band does not contend that this proceeding will be conducted in a manner inconsistent with chapter 4.5 of the APA or the holding of any case except for *Quintero*. As stated previously, the holding in *Quintero* was based on the totality of the circumstances of that case, and the circumstances of this case are distinguishable. In this case, the SWRCB has

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provided for a clear separation of functions, whereas in *Quintero* the Court stated that the lines between the deputy city attorney's roles as advocate and advisor had become blurred.¹

The Morongo Band interprets *Quintero* to have established the bright-line rule that agency staff may not simultaneously serve in prosecutorial and adjudicatory roles in unrelated proceedings. If this interpretation were correct, this proceeding would not be consistent with *Quintero* because Ms. Olson is simultaneously serving in a prosecutorial role in this proceeding and advising the SWRCB in an unrelated water right proceeding concerning a petition to revise the SWRCB's Fully Appropriated Stream Declaration in order to accept for processing an application to appropriate water from the Lower American River. But the Morongo Band's interpretation of the holding in *Quintero* is inconsistent with the Court's express holding that its decision was based on the totality of the circumstances. In addition, the suggestion that agency staff may not combine functions in unrelated proceedings is inconsistent with the overwhelming weight of authority on this issue.

The presumption that agency decisionmakers necessarily will be biased in favor of agency staff who are serving as advisors to the agency in an unrelated proceeding is contrary to the presumption established in *Withrow* that agency decisionmakers will perform their duties with honesty and integrity. (*Withrow, supra*, 421 U.S. at 47.) Moreover, a "realistic appraisal of psychological tendencies and human weakness," as called for by the Court in *Withrow*, does not

¹ In his ruling denying the Morongo Band's petition to disqualify the enforcement team, the hearing officer noted that, judging from the Court's opinion, it did not appear that an independent attorney had been assigned to advise the Personnel Board. With its request for reconsideration, the Morongo Band submitted the declaration of the attorney who represented the employee in *Quintero*, which states that an independent attorney had in fact been assigned to advise the Personnel Board. This fact is of little value in interpreting the Court's holding because either this fact was not brought to the Court's attention or for whatever reason the Court did not consider it to be important enough to mention in its opinion. (See *Achen v. Pepsi-Cola Bottling Co. of Los Angeles* (1951) 105 Cal.App.2d 113, 124 [233 P.2d 74] [*ratio decidendi* found by taking account of facts treated by judge as material and decision as based on them].) Notwithstanding the fact that an independent attorney had been assigned to advise the Personnel Board, the Court found, based on the totality of the circumstances, that the lines between the deputy city attorney's roles as advocate and adviser had become blurred. That is not the case here.

compel the conclusion that the combination of functions in unrelated proceedings poses an unacceptable risk of actual bias or prejudgment.

The fact that the combination of functions in unrelated proceedings does not present an unacceptable risk of actual bias is particularly evident to the extent that staff combine functions in unrelated proceedings that take place consecutively. The holding in *Quintero* was predicated in large part on instances where the deputy city attorney had advised the Personnel Board in unrelated matters that pre-dated the employee's termination hearing by as many as four years. The Court does not appear to have taken into account the extent to which the individual members of the Personnel Board may have changed because they were serving staggered four-year terms. (See Santa Ana City Charter, §§ 900, 901.) Similarly, SWRCB and RWQCB Members serve staggered four-year terms, which naturally limits the extent to which agency staff advise the same individual SWRCB and RWQCB Members. (See *Blinder, Robinson and Co, Inc. v. Securities and Exchange Com.* (D.C. Cir. 1988) 837 F.2d 1099, 1106 [rejecting argument that “bias spread contagion-like to infect” Commission where only one Commissioner had participated in litigation related to Commission hearing due to staggered terms of Commissioners].)

The suggestion that the combination of functions in unrelated proceedings presents an unacceptable risk of actual bias also conflicts with cases, including *Withrow*, that have permitted agency decisionmakers and staff to combine functions in the same proceeding. In *Withrow*, the U.S. Supreme Court did not presume that the Wisconsin State Medical Board would be biased, even though the Board had made a preliminary determination on the merits of the case it was to decide. The potential for bias is much less under the circumstances presented by this case, where the same agency staff are serving dual functions in entirely unrelated proceedings.

The fact that the SWRCB, as an institution, is not biased in favor of SWRCB staff, even though as a matter of practice SWRCB staff regularly serve different functions in unrelated proceedings, is evidenced by past proceedings in which the SWRCB ruled against SWRCB staff serving in a prosecutorial or adversarial role. (See, e.g., SWRCB Decision 1645, pp. 8-9, 25 [finding that

staff had not met burden of proving that groundwater in Pauma Basin was subterranean stream]; SWRCB Decision 1639, pp. 31-32 [disagreeing with permitting team argument regarding applicability of exception to California Environmental Quality Act exemption]; SWRCB Order WR 2004-04 [dismissing complaint against licensee]; SWRCB Order WR 98-02 [reducing amount of administrative civil liability].)

A final consideration is the impact that adhering to the bright-line rule advanced by the Morongo Band would have on the SWRCB's ability to carry out its statutory duties. The SWRCB and the RWQCBs are charged with implementing various regulatory duties in the complex areas of water quality and water rights. (Wat. Code, §§ 13001, 174.) In carrying out their duties, the SWRCB and RWQCBs exercise a variety of adjudicative functions, such as issuing waste discharge permits and water right permits, and imposing administrative civil liabilities for water quality and water right violations. (*Id.*, §§ 13263, 13377, 1228, 1375, 1380, 13268, 13350, 13385, 1052.) In adjudicative proceedings that are prosecutorial in nature, such as this one, it is common for SWRCB or RWQCB staff to serve as parties before the SWRCB or RWQCB. In these cases, the SWRCB's Office of Chief Counsel, which provides legal advice to the SWRCB and RWQCBs as required by Water Code section 186, assigns separate attorneys to advise staff and the SWRCB or RWQCB Members who will decide the case, respectively. In addition, when the SWRCB is reviewing an action of an RWQCB pursuant to Water Code section 13320, separate attorneys from the SWRCB's Office of Chief Counsel are assigned to advocate for the RWQCB party and advise the SWRCB.

As a practical matter, separating functions in unrelated proceedings would entail an unworkable permanent division of scarce staff resources. The problem would be particularly acute with regard to the SWRCB's Office of Chief Counsel because of the small number of attorneys in that office. For example, only five staff attorneys practice in the area of water rights. Given the number, length and complexity of water right proceedings, at any given time every water right attorney is likely to be serving as an adviser to the SWRCB in at least one ongoing water right proceeding. For example, the Lower American River proceeding in which Samantha Olson advises the SWRCB commenced on March 6, 2002. Accordingly, if rigid separation of

functions in unrelated water right proceedings were required, no attorneys with expertise in water rights would be qualified to advise enforcement staff in a water right proceeding that is prosecutorial in nature.

Proceedings before the SWRCB and RWQCBs that are prosecutorial in nature are too infrequent and sporadic to justify the creation of a separate “enforcement unit” comprised of staff who are qualified to serve a prosecutorial function in any type of proceeding before the SWRCB or RWQCBs. The only other alternative would be to assign staff as needed to serve a prosecutorial function even though they may lack expertise in important areas. In summary, separation of functions in unrelated proceedings would have a significant negative effect on the ability of the SWRCB and RWQCBs to utilize staff resources efficiently, receive advice from their staff attorneys, and provide their staff with experienced legal support. The separation of functions in unrelated proceedings is not warranted given the positive steps that the SWRCB and RWQCBs have taken to avoid the possibility of bias and the significant hardship to the SWRCB and RWQCBs that rigid separation of functions would entail. (See *Blinder, Robinson and Co., supra*, 837 F.2d at 1107 [taking into consideration practical impact to specialized agency created to regulate in difficult area of financial markets and securities in rejecting due process challenge based on agency’s combination of functions].)

4.0 CONCLUSION

For the reasons set forth above, we conclude that the procedures governing this proceeding satisfy due process requirements and the Morongo Band will be afforded a fair hearing. The hearing officer’s ruling denying the Morongo Band’s petition to disqualify the enforcement team was appropriate and proper, and the Morongo Band’s request for reconsideration of the ruling should be denied.

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ORDER

IT IS HEREBY ORDERED:

The Morongo Band's request for reconsideration is denied.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on July 22, 2004.

AYE: Arthur G. Baggett, Jr.
Peter S. Silva
Richard Katz
Gary M. Carlton
Nancy H. Sutley

NO: None.

ABSENT: None.

ABSTAIN: None.


Debbie Irvin
Clerk to the Board