



EDMUND G. BROWN JR.  
GOVERNOR



MATTHEW RODRIGUEZ  
SECRETARY FOR  
ENVIRONMENTAL PROTECTION

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## State Water Resources Control Board

October 30, 2015

### VIA ELECTRONIC MAIL

TO: ENCLOSED SERVICE LIST OF PARTICIPANTS

### **RULING ON MOTION FOR PROTECTIVE ORDER AND OTHER PROCEDURAL ISSUES IN THE MATTER OF THE ADMINISTRATIVE CIVIL LIABILITY COMPLAINT ISSUED AGAINST BYRON-BETHANY IRRIGATION DISTRICT.**

This letter addresses the Division of Water Rights Prosecution Team's (Prosecution Team) Motion for Protective Order and several additional procedural issues.

### **MOTION FOR PROTECTIVE ORDER**

The Prosecution Team filed a motion for protective order on October 15, 2015, in the matters of the Administrative Civil Liability Complaint against Byron-Bethany Irrigation District (BBID) and the Draft Cease and Desist Order against The West Side Irrigation District (WSID and WSID proceeding). I hereby adopt and incorporate by reference the [Ruling on Motion for Protective Order](#) in the WSID proceeding made by Frances Spivy-Weber, Hearing Officer, on October 23, 2015.

In conjunction with Vice Chair Spivy-Weber in her ruling on the motion for protective order, I am very unlikely to allow multiple depositions of the same individual and am likely to limit or prohibit discovery requests in this matter that are duplicative of and not coordinated with requests made or depositions noticed in the WSID proceeding.

### **WSID'S REQUEST TO SUBMIT AN AMENDED NOTICE OF INTENT TO APPEAR**

On September 2, 2015, WSID submitted a Notice of Intent to Appear (NOI) that indicated WSID planned to participate in the hearing by cross-examination or rebuttal only. On October 5, 2015, WSID submitted an amended NOI that indicated its plans to participate in the hearing by presenting a case-in-chief and included its list of witnesses. I will allow WSID to amend its NOI to submit a case-in-chief, but require that the testimony be submitted in writing only. Because of the limited number of days available for this hearing due to the availability of the parties and State Water Board's schedule in other matters, I must maintain the limits on oral testimony presented during the hearing. As an alternative to oral testimony, WSID may seek to submit into evidence in this proceeding relevant portions of the transcript of the hearing in the WSID proceeding.

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

Because WSID's amended NOI and witness list is identical to the NOI and witness list that it filed in the WSID proceeding, I conclude that the amendment will not prejudice the other parties. At this point in the pre-hearing preparation, I am not likely to make a similar finding if a party seeks to amend its NOI or witness list in a manner not previously reflected in either proceeding.

## **PRE-HEARING BRIEFS**

### **Pre-hearing briefing of legal issues:**

In my [October 2, 2015 letter](#), I invited the parties to submit concise statements of legal issues to be addressed in pre-hearing legal briefs. After reviewing the responses submitted by BBID, City and County of San Francisco, Department of Water Resources, WSID, Central Delta Water Agency, South Delta Water Agency and the Prosecution Team, I am requesting briefing of the following legal issues in the context of the facts of this case (please consider the range of disputed facts, both as construed in your favor and in favor of opposing parties):

*Whether, and in what circumstances: (1) does the State Water Resources Control Board have the authority to curtail, and (2) does Water Code section 1052 apply to diversions made under claim of a pre-1914 or riparian water right?*

Your briefing should address the extent to which these legal issues are or are not relevant to and determinative of the Administrative Civil Liability Complaint issued against Byron-Bethany Irrigation District.

Briefing of these legal issues may not exceed ten pages in length. Alternately, parties may file a joint brief of up to twenty pages in length.

Pre-hearing briefing of legal issues are due January 25, 2016.

### **Motions to Dismiss and Motions for Summary Judgment:**

BBID indicated in its letter of October 22, 2015, that it intends to submit a motion to dismiss. BBID may file a motion to dismiss or motion for summary judgment (or a combined motion). The Prosecution Team may also file a motion for summary judgment. BBID and the Prosecution Team may file a brief in response to the other party's motion. The remaining parties may submit responsive briefs in support or in opposition to the motions. The motions, including supporting memoranda of points and authorities, and briefs filed in support or opposition may not exceed ten pages in length. Alternately, parties may file a joint brief of up to twenty pages in length.

Parties should not repeat arguments made in their briefing of the legal issues described above, but may incorporate these arguments by reference into their motions, or briefs in support or opposition.

Motions to dismiss and/or motions for summary judgment are due January 25, 2016. Responsive briefs are due February 22, 2016.

### **Written Opening Statements:**

I will allow the submittal of written opening statements, not to exceed ten pages in length. Alternately, parties may file a joint opening statement of up to twenty pages in length. I will not allow written rebuttal of written opening statements.

Written Opening Statements are due February 29, 2016.

### **HEARING TIME LIMITS**

At this time, I intend to impose the following time limits during the hearing. I may revise these time limits based on discussion during the pre-hearing conference to be held on February 8, 2016, and declaration by the parties of any intent to combine time.

Opening Statements: Opening statements by parties presenting a case-in-chief will be limited to twenty (20) minutes. Opening statements or policy statements by all other parties will be limited to five (5) minutes.

Direct testimony: Oral summaries by the witnesses of direct testimony submitted by parties presenting a case-in-chief will be limited to twenty (20) minutes per witness and up to one (1) hour total to present all of the party's direct testimony. As previously discussed, WSID will not be allowed to present oral direct testimony as part of its case-in-chief. To further streamline the hearing, I may require all parties other than the Prosecution Team and BBID to submit their cases-in-chief solely in writing. If so, the parties will be allowed to offer relevant excerpts from the transcript of the hearing in the WSID proceeding into evidence.

Cross-Examination: Cross-examination will be limited to one (1) hour each for BBID and the Prosecution Team, and 10 minutes each for all other parties, to cross-examine each of the other parties' witnesses or panel of witnesses.

The parties may choose to combine their allowed time for opening statements, presentation of cases-in-chief, or cross-examination, with that of other parties.

### **DISCOVERY REQUESTS**

To facilitate prompt response to discovery disputes that may arise, I am requesting that the parties electronically copy all subpoenas and discovery requests to the hearing team at: <mailto:wrhearing@waterboards.ca.gov>. The parties are also asked to attach copies of the particular discovery requests sought to be limited when filing a motion for protective order (including a motion for a general protective order) or motion to quash. As required by section 2016.040 of the California Code of Civil Procedure, the parties should meet and confer regarding any disputes before filing a motion. I intend to respond to motions regarding discovery as promptly as possible; parties who seek to respond to a motion should do so within five working days of service of the underlying motion.

**EX PARTE COMMUNICATIONS**

I would like to remind the parties that *ex parte* communications concerning substantive or controversial procedural issues relevant to this hearing are prohibited. Please be sure to copy the service list on any correspondence to me, the other Board Members, and the hearing team related to this matter.

Thank you for your continued cooperation. Questions regarding non-controversial procedural matters should be directed to Staff Counsel Nicole Kuenzi at (916) 322-4142 or by email to [Nicole.Kuenzi@waterboards.ca.gov](mailto:Nicole.Kuenzi@waterboards.ca.gov); or to Jane Farwell-Jensen at (916) 341-5349 or by email to [Jane.Farwell-Jensen@waterboards.ca.gov](mailto:Jane.Farwell-Jensen@waterboards.ca.gov). (Gov. Code, § 11430.20, subd. (b).)

Sincerely,

A handwritten signature in black ink, appearing to read "Tam M. Doduc". The signature is fluid and cursive, with a long horizontal stroke at the end.

Tam M. Doduc  
Hearing Officer

Enclosures: Service List

**SERVICE LIST OF PARTICIPANTS  
 BYRON-BETHANY IRRIGATION DISTRICT  
 ADMINISTRATIVE CIVIL LIABILITY HEARING  
 (09/02/15; Revised: 09/10/15; Revised 10/06/15; Revised 10/22/15)**

<b>PARTIES</b>	
<p>THE FOLLOWING <b><u>MUST BE SERVED</u></b> WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (All have AGREED TO ACCEPT electronic service, pursuant to the rules specified in the hearing notice.)</p>	
<p><b>Division of Water Rights</b>            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>Byron Bethany Irrigation District</b>            Daniel Kelly            Somach Simmons &amp; Dunn            500 Capitol Mall, Suite 1000,            Sacramento, CA 95814  <a href="mailto:dkelly@somachlaw.com">dkelly@somachlaw.com</a></p>
<p><b>Patterson Irrigation District            Banta-Carbona Irrigation District            The West Side Irrigation District</b>            Jeanne M. Zolezzi            Herum\Crabtree\Suntag            5757 Pacific Ave., Suite 222            Stockton, CA 95207  <a href="mailto:jzolezzi@herumcrabtree.com">jzolezzi@herumcrabtree.com</a></p>	<p><b>City and County of San Francisco</b>            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>Robert E. Donlan            Ellison, Schneider &amp; Harris L.L.P.            2600 Capitol Avenue, Suite 400            Sacramento, CA 95816            (916) 447-2166  <a href="mailto:red@eslawfirm.com">red@eslawfirm.com</a></p>
<p><b>Central Delta Water Agency</b>            Jennifer Spaletta            Spaletta Law PC            PO 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><b>California Department of Water Resources</b>            Robin McGinnis, Attorney            PO Box 942836            Sacramento, CA 94236-0001  <a href="mailto:robin.mcgininis@water.ca.gov">robin.mcgininis@water.ca.gov</a></p>
<p><b>Richard Morat</b>            2821 Berkshire Way            Sacramento, CA 95864  <a href="mailto:rjmorat@gmail.com">rjmorat@gmail.com</a></p>	<p><b>San Joaquin Tributaries Authority</b>            Valerie Kincaid            O’Laughlin &amp; Paris LLP            2617 K Street, Suite 100            Sacramento, CA 95814  <a href="mailto:vkinaid@olaughlinparis.com">vkinaid@olaughlinparis.com</a>  <a href="mailto:lwood@olaughlinparis.com">lwood@olaughlinparis.com</a></p>

**South Delta Water Agency**

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**State Water Contractors**

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