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13 BEFORE THE
14 STATE WATER RESOURCES CONTROL BOARD

15 In Re Draft Cease and Desist Orders against
16 the United States Bureau of Reclamation
17 and the California Department of Water
18 Resources and Reconsider the Conditional
19 Approval of the April 25, 2005 Water
20 Quality Response Plan for use of Joint
Points of Diversion by the United States
Bureau of Reclamation and the California
Department of Water Resources

**NOTICE OF PETITION AND PETITION
TO DISQUALIFY AND STRIKE
EVIDENCE OFFERED AND PLEADINGS
SUBMITTED BY PROSECUTORIAL
TEAM**

21 **TO INTERESTED PARTIES AND THEIR ATTORNEYS OF RECORD:**

22 **NOTICE IS HEREBY GIVEN** that the San Luis & Delta-Mendota Water Authority
23 (Water Authority), Westlands Water District (Westlands), and the State Water Contractors (Water
24 Contractors) petition the State Water Resources Control Board (Water Board) to disqualify the
25 prosecutorial team (or at least several of its members), strike all evidence offered by it that was
26 accepted by the Water Board, and strike all pleadings filed by it in the above-captioned
27 proceeding - the hearing leading to the issuance of the draft "Order Adopting Cease and Desist
28 Order and Granting Petitions for Reconsideration," initially on December 30, 2005 and amended

1 on January 27, 2006 (Draft Order). Those actions are necessary to rectify the potential injustice
2 caused and undo the potential injury to the due process rights of those who appeared in the above-
3 captioned proceeding.

4 Standing and Timing

5 On August 4, 2005, the Water Board issued a notice of hearing for the above-captioned
6 proceeding. The Water Authority, Westlands, and the Water Contractors each filed notices of
7 intent to appear and each participated extensively in the above-captioned proceeding. The Water
8 Authority, Westlands, and the Water Contractors, like all others who appeared at the hearing, are
9 entitled to a fair proceeding. This petition raises a presumption that the due process rights of
10 those who appeared were infringed.

11 This petition is timely. The Water Board has not acted, legal principles underlying this
12 petition were not applied to the Water Board until earlier this month (*see* discussion below
13 regarding the *Morongo Band Of Mission Indians* case), and the issues raised by this petition
14 concern possible violations of Constitutional rights; issues that should not be dismissed without
15 full consideration by the Water Board.

16 Bases for Petition

17 On January 24, 2005, the Water Authority and Westlands submitted to the Water Board
18 supplemental comments on the Draft Order. The Water Authority and Westlands asked the Water
19 Board to consider possible Constitutional violations involving legal principles established by the
20 courts of California. In particular, those supplemental comments raised concerns with possible
21 due process violations that occurred in the above-captioned hearing. Since the time the Water
22 Authority and Westlands filed their supplemental comments, they, as well as the Water
23 Contractors, have learned that some, and possibly all, of the members of the prosecutorial team
24 acted in the dual capacities precluded by the Constitution, as articulated in *Quintero v. City of*
25 *Santa Ana* (2003) 114 Cal.App.4th 810, and applied by the Superior Court to the Water Board in
26 California Superior Court's January 2006 order in *Morongo Band Of Mission Indians v. State*
27 *Water Resources Control Board*, Case No. 04CS00535.¹

28 ¹ Assuming for the sake of argument that *Morongo Band Of Mission Indians* is not "citable
819011.1

1 The prosecutorial team participated in the above-captioned proceeding, and included
2 Larry Lindsay, Water Resources Control Engineer; Mark Stretars, Senior Water Resources
3 Control Engineer; John O'Hagan, Supervising Water Resources Control Engineer; and Andrew
4 Sawyer and Erin Mahaney, Counsel. No later than August 2005, that team developed draft cease
5 and desist orders that it sought to have the Water Board issue against the United States and the
6 Department of Water Resources. Indeed, the August 4, 2005, notice of public hearing, issued for
7 the above-captioned proceeding, included those draft orders as attachments and designated most
8 the staff identified above as part of the prosecutorial team.² The Water Board issued the Draft
9 Order based in large part on the actions of the prosecutorial team.

10 At the time of the hearing on the draft cease and desist orders offered by the prosecutorial
11 team, members of the prosecutorial team also were advising the Water Board on other issues. For
12 example:

- 13 ◦ Erin Mahaney attended the September 7, 2005 meeting of the Water Board as its
14 counsel;
- 15 ◦ Andrew Sawyer attended the October 20, 2005 meeting of the Water Board as its
16 counsel; and
- 17 ◦ John O'Hagan, and apparently Erin Mahaney and Andrew Sawyer, advised the
18 Water Board on the "FY 05-06 - Final Fee Schedule Summary" and "Final
19 Emergency Regulations - Amendments to Division 3 of Title 23 of the California
20 Code of Regulations (Adopted by SWRCB Resolution No. 2005-0069)", which
21 were adopted by the Water Board in September 2005.

22 *See, e.g., Declaration of Jon D. Rubin, Exhibits 1-4.*³ *See also Declaration of Laura King Moon,*

23 precedent", one would assume that the Water Board would seek to conform its actions to a legal
24 standard articulated and applied to it by the Courts of California. In fact, one would assume that
25 the Water Board, on its own motion, even if not raised through this formal petition, would take
26 affirmative steps to avoid any appearance of conflict by assuring no member of its staff
27 prosecuted an action at the time the same staff member(s) counseled the Water Board on other
28 matters.

² The only exception to that statement is Mr. Sawyer. Although he was not referenced in the
Notice, he did assist in the prosecutorial team's case. *See, e.g., Closing Briefs submitted by State
Water Resources Control Board – Division of Water Rights Enforcement Team.*

³ The Water Authority, Westlands and Water Contractors request that the Water Board take
official notice of Exhibits 1-4, pursuant to California Code of Regulations section 648.2.

1 Paragraphs 1-2. The dual role held by Ms. Mahaney, Mr. Sawyer and Mr. O'Hagan violates all
2 of the defending parties' due process rights.

3 Indeed, the Court of Appeal in *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810,
4 could have been speaking to the Water Board in this instance, when it wrote:

5 [W]e are not attributing bad faith to defendants, the Board, or [Board staff]. But
6 given the frequent contact between [Board staff] and members of the Board, it is
7 only natural for them to have developed a relationship. That is precisely the
8 reason defendants must exercise vigilance and caution, to ensure not only fairness,
but the appearance of fairness. It appears the lines distinguishing [Board staff's]
roles of advocate and adviser have become blurred.

9 *Id.* at 816-17. It was to avoid the appearance of unfairness and avoid even a probability of undue
10 influence on the adjudication that caused the Court of Appeal to conclude:

11 For the Board to allow its legal adviser to also act as an advocate before it creates a
12 substantial risk that the Board's judgment in the case before it will be skewed in
13 favor of the prosecution. The chance that the Board will show a preference toward
Halford, even " 'perhaps unconsciously' " is present and unacceptable.

14 *Id.* at 817.

15 In fact, the Superior Court of California recently applied the *Quintero* ruling to the Water
16 Board.⁴ In *Morongo Band of Mission Indians v. State Water Resources Control Board*, Case No.
17 04CS00535, the Court considered whether to disqualify an enforcement team established by the
18 Water Board based on the undisputed fact that one member of the enforcement team assigned to
19 prosecute the proposed revocation of petitioner's water rights license simultaneously was advising
20 the Water Board in an unrelated matter. The Court stated:

21 [T]he facts fall squarely within *Quintero's* bright-line rule that an attorney may not
22 simultaneously represent both a board and the litigants who appear before it, even
23 on different matters. The evidence shows that at the same time that Ms. Olson
24 [Board staff] was employed in a prosecutorial role as a member of the
Enforcement Team in Petitioner's water rights dispute, she also was acting in an
advisory role.

25 This is precisely the defect that occurred in the above-captioned proceeding. It was found
26 objectionable in *Quintero* and in *Morongo Band of Mission Indians* and must therefore be

27 _____
28 ⁴ See Jon D. Rubin Declaration, Exhibit 5.

1 precluded here.

2 In sum, there appears to be evidence that at the time the prosecutorial team in the above-
3 captioned proceeding pursued issuance of cease and desist orders, several, if not all of its
4 members were also advising the Water Board on other matters. The Water Authority, Westlands,
5 and the Water Contractors do not criticize the Water Board staff for this action, but rather seek to
6 have the Water Board correct the process to ensure those who appeared in the above-captioned
7 proceeding receive due process. The Water Board must follow the law and, unless the evidence
8 presented with this petition is inaccurate, the Water Board must disqualify the prosecutorial team
9 (or at least several members thereof), strike all evidence it offered that was accepted by the Water
10 Board, and strike all pleadings it filed. Because such action would remove any evidence that
11 supports a threatened violation of any term or condition of the water rights held by the United
12 States and DWR, a threshold finding required before a cease and desist order may issue, the
13 Water Board must also withdraw the Draft Order. And, if it decides that cease and desist orders
14 may still be appropriate, the Water Board must notice a new hearing. To do otherwise will thwart
15 the due process rights of all.

16 Dated: January 31, 2006

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD,
A Professional Corporation

17
18 By 

19 Jon D. Rubin

20 Attorneys for San Luis & Delta-Mendota Water
Authority and Westlands Water District

21 Dated: January 31, 2006

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22
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