

## Farwell Jensen, Jane@Waterboards

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**From:** Tauriainen, Andrew@Waterboards  
**Sent:** Tuesday, January 26, 2016 6:01 PM  
**To:** Unit, Wr\_Hearing@Waterboards; Dan Kelly (dkelly@somachlaw.com); Jeanne Zolezzi; kharrigfeld@herumcrabtree.com; Janelle Krattiger; Jonathan Knapp (jonathan.knapp@sfgov.org); Rob Donlan; 'Jennifer Spaletta' (jennifer@spalettalaw.com); ngmplcs@pacbell.net; "Dante Nomellini, Jr." (dantejr@pacbell.net); McGinnis, Robin C.@DWR; rjmorat@gmail.com; Valerie Kincaid; Linda Wood (lwood@olaughlinparis.com); Tim O'Laughlin; Herrick, John @aol.com; Dean Ruiz (dean@hprlaw.net); Stefanie Morris (smorris@swc.org); O'Hanlon, Daniel; Akroyd, Rebecca@KMTG; Philip Williams (pwilliams@westlandswater.org)  
**Cc:** Kuenzi, Nicole@Waterboards; Farwell Jensen, Jane@Waterboards; Mona, Ernie@Waterboards; Buckman, Michael@Waterboards  
**Subject:** BBID ACL and WSID CDO Hearings  
**Attachments:** 20150125 PT Objection BBID Motions.pdf; 20150125 PT Objection WSID Motions.pdf; 20150123 PT WSID NOI Objections and Subpoena.pdf; WSID Response to Prosecution Team Objections.pdf

### TO THE BBID ACL AND WSID CDO HEARING TEAMS AND PARTIES:

#### 1. Request for Expedited Ruling on Prosecution Team's Objection Regarding Karna Harrigfeld Testimony and WSID's January 19 Amended Notice of Intent to Appear

The Prosecution Team requests that the Hearing Officers rule as quickly as possible on the threshold issue raised in the Prosecution Team's January 23, 2016, email objections to WSID's January 19 Amended Notice of Intent to Appear. Namely, the Prosecution Team asks that the Hearing Officers strike Karna Harrigfeld's written testimony, along with the exhibits she purports to authenticate in her testimony, as untimely.

As the January 23 email describes, and as Ms. Zolezzi's letter of earlier today confirms, the Prosecution Team and WSID have a significant difference of opinion over the efficacy and effect of WSID's late addition of Ms. Harrigfeld, who is WSID's General Counsel and a partner or shareholder at Herum/Crabtree/Suntag. I have attached copies of the January 23 email and Ms. Zolezzi's letter here for reference.

There is ample authority holding that a party who places their attorney on the witness stand waives the attorney-client communication privilege, and the attorney waives the work product privilege where necessary to allow the other parties to prepare effective cross-examination. The Prosecution Team will brief this authority on a motion to compel, if necessary. But an expedited ruling on the Prosecution Team's objection to Ms. Harrigfeld's witness statement may obviate that need.

The urgency of this request reflects the substantial prejudice caused to the Prosecution Team by WSID's attempt to amend its Notice of Intent to Appear at this late date. There can be no doubt that attorney-client communications between WSID and Ms. Harrigfeld, if waived, might be directly relevant or could lead to relevant evidence in the Prosecution Team's case-in-chief. The Prosecution Team most certainly would have sought discovery on Ms. Harrigfeld's records, and perhaps her deposition, in advance of the case-in-chief. By adding Ms. Harrigfeld to their witness list on the same day the parties submitted their cases-in-chief, WSID cut off all potential discovery in advance of the case-in-chief deadline. Moreover, Ms. Harrigfeld's written testimony addresses relevant substantive issues, for which discovery is necessary to allow the Prosecution Team to prepare effective cross-examination. WSID's late addition leaves nearly no time to conduct discovery in advance of the rebuttal deadline. There will be even less time if the parties must first brief and oppose a Prosecution Team motion to compel, and wait for the Hearing Officers' ruling.

Ms. Zolezzi improperly compares WSID's January 19 Amended Notice of Intent to Appear with other amended notices by the parties in these proceedings. The Department of Water Resources and the San Joaquin Tributaries Authority each amended their notices on January 19 to remove all witnesses, and to state their intention to go from case-in-chief parties to cross-examination or rebuttal only. These amendments do not prejudice any other party. Prior to that, WSID submitted an Amended Notice of Intent to Appear in the BBID matter on October 5, 2015. That amendment aligned WSID's witness list in the BBID matter with its October 2, 2015, Notice of Intent to Appear in the WSID matter (except the October 2 notice also lists David Kaiser). BBID and CDWA submitted amended notices in the BBID matter on October 22, 2015, as directed by the Hearing Officer. SDWA submitted an amended notice in the BBID proceeding on October 28, but that notice only added counsel, it did not change witnesses. In other words, no party has added witnesses in the last three months, and only WSID attempted to add significant new witnesses on the same day as the case-in-chief submittal. WSID appears to be more interested in flouting procedure than providing fair hearing for all parties.

In the interest of reaching a fair and rapid resolution, the Prosecution Team would not object if the Hearing Team strikes Ms. Harrigfeld's testimony but allows WSID to identify another witness, not an attorney, who can authenticate the exhibits referenced in Ms. Harrigfeld's testimony. Surely WSID has a custodian of records or other staff who would be able to authenticate items from WSID's files. Such a witness should not be allowed to submit any substantive testimony, as that would also be untimely and prejudicial.

Finally, the Prosecution Team notes that although CDWA and SDWA jointly filed a case-in-chief along with WSID, neither appear to have submitted an Amended Notice of Intent to Appear to add Ms. Harrigfeld. The Prosecution Team's objections and requests here apply equally to any such effort on their part to do so.

## **2. Request for Ruling on Prosecution Team's Objections to BBID and WSID Excessive Motion Briefing**

The Prosecution Team reiterates its objections raised in separate emails on January 25, 2015, to the attempts by BBID and WSID to submit multiple motions to dismiss and/or motions for summary judgment cumulatively well in excess of the 10-page briefing limit. I have attached copies of those emails here for reference. The Prosecution Team requests ruling on these objections as soon as possible, because all parties who might oppose those motions face a February 22 deadline.

## **3. Prosecution Team Objection to WSID addition of Greg Young**

Ms. Zolezzi's letter appears to confirm that WSID, BBID, SDWA and CDWA are coordinating their hearing time limits, at least in some phase of these proceedings. If so, the Prosecution Team agrees that the time limits and related matters may be addressed at the February 8 pre-hearing conference. The Prosecution Team maintains its position that the coordinated WSID/BBID/SDWA/CDWA group must not receive more time than the Prosecution Team or other coordinated groups. The Hearing Officers' ruling to that effect would assuage the Prosecution Team's concerns regarding the Greg Young testimony described in the January 23, 2015, email.

## **4. Prosecution Team Request for Clarification Regarding Online Storage Service**

Finally, in the interest of bringing all pending issues under one email heading, the Prosecution Team reiterates its request for clarification regarding online storage electronic service, such as that proffered by BBID for its case-in-chief and motions. The Prosecution Team does not object to this method, and would like to use it for future filings, but seeks the Hearing Team's guidance.

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## **Tauriainen, Andrew@Waterboards**

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**From:** Tauriainen, Andrew@Waterboards  
**Sent:** Monday, January 25, 2016 12:27 PM  
**To:** Dan Kelly; Unit, Wr\_Hearing@Waterboards  
**Cc:** Yolanda De la Cruz; Michael Vergara; Herrick, John @aol.com; Jennifer L. Spaletta; Valerie Kincaid; Jeanne Zolezzi; Tim O'Laughlin; kharrigfeld@herumcrabtree.com; Jonathan Knapp; Richard Morat; McGinnis, Robin C.@DWR; Stefanie Morris; Rick Gilmore; Janelle Krattiger; Daniel O'Hanlon; Akroyd, Rebecca@KMTG; Philip Williams; ngmplcs@pacbell.net; Dante Nomellini Jr.; Michelle Bracha; Uoxina Santos-Aguirre; Kuenzi, Nicole@Waterboards; Farwell Jensen, Jane; Mona, Ernie@Waterboards; Buckman, Michael@Waterboards  
**Subject:** RE: BBID/WSID Hearings

The Prosecution Team does not object to BBID's service via online storage today, or last Tuesday. The Prosecution Team seeks clarification from the Hearing Team that all parties may use this method going forward, because the Hearing Notice and subsequent Hearing Team communications are silent.

The Hearing Officers' direction regarding pre-hearing briefing has been clear. BBID and others requested the opportunity for pre-hearing briefing. The Hearing Officers granted leave for BBID and WSID to each file one motion to dismiss, motion for summary judgment, or a combined motion, not to exceed ten pages. BBID Hearing Officer Doduc granted leave for the BBID parties to submit one brief on specific legal issues, not to exceed ten pages, or a combined brief not to exceed twenty pages. BBID and WSID ignored this direction. Moreover, BBID filed five separate motions to dismiss, but does not appear to have submitted a brief on the specific legal issues requested by Hearing Officer Doduc.

BBID's insistence that the issues framed in the separate litigation are appropriate for adjudication in the ACL proceeding is misplaced. The ACL Complaint frames the issues, and neither the Hearing Team nor the Prosecution Team have indicated that separate issues framed in the litigation are appropriate here. Nevertheless, BBID had the opportunity to raise and brief any such issues within the scope of a single, ten-page, motion to dismiss and/or motion for summary judgment. There is no need for separate formal hearing on the Prosecution Team's request to strike BBID's and WSID's excessive motion briefing.

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**From:** Dan Kelly [mailto:dkelly@somachlaw.com]  
**Sent:** Monday, January 25, 2016 11:59 AM  
**To:** Unit, Wr\_Hearing@Waterboards

**Cc:** Tauriainen, Andrew@Waterboards; Yolanda De la Cruz; Michael Vergara; Herrick, John @aol.com; Jennifer L. Spaletta; Valerie Kincaid; Jeanne Zolezzi; Tim O'Laughlin; kharrigfeld@herumcrabtree.com; Jonathan Knapp; Richard Morat; McGinnis, Robin C.@DWR; Stefanie Morris; Rick Gilmore; Janelle Krattiger; Daniel O'Hanlon; Akroyd, Rebecca@KMTG; Philip Williams; ngmplcs@pacbell.net; Dante Nomellini Jr.; Michelle Bracha; Uoxina Santos-Aguirre  
**Subject:** Re: BBID/WSID Hearings

Hearing Team:

First, all parties agreed to accept electronic service. Due to size limitations for email submittals, BBID utilizes a file sharing service for the electronic service of documents. BBID served its Case-in-Chief submittal using this method - and no party objected. It is unclear why the Prosecution Team now objects to being served electronically through a file sharing service.

Second, regarding briefing, the Hearing Officer's October 30, 2015 Ruling provides, in pertinent part:

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

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?

\* \* \*

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.

**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 Hearing Officer's October 30, 2015 expressly provides for more than a single brief. In addition, and as discussed at the September 25, 2015 prehearing conference, BBID noted that the SWRCB represented to the Santa Clara Superior Court that BBID would have a full opportunity to raise *all* issues, including due process issues, before the SWRCB. The SWRCB made similar representations in its recent filed demurrer in the Santa Clara Superior Court. BBID briefed the legal issues as directed by the Hearing Officer, and also filed its Motion to Dismiss. The remaining briefs raise the due process issues that the SWRCB assured the Santa Clara Superior Court that BBID could bring before the SWRCB.

It is worth noting that the attachments to the declarations submitted with BBID's briefs attach, with very limited exception, documents previously submitted as part of BBID's Case-in-Chief submittal. Because they have not yet been accepted into evidence, BBID provided them again - cross referencing the prior Exhibit numbers.

To the extent the Hearing Team is going to consider the Prosecution Team's objection or motion to strike, BBID request a formal hearing on the objection / motion to strike in order to develop a proper record for judicial review.

Regards,  
Dan Kelly



**Daniel Kelly** | *Attorney*

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On Jan 25, 2016, at 11:13 AM, Tauriainen, Andrew@Waterboards  
<[Andrew.Tauriainen@waterboards.ca.gov](mailto:Andrew.Tauriainen@waterboards.ca.gov)> wrote:

1. The Prosecution Team requests clarification regarding BBID's method of service. The Hearing Notices in the BBID and WSID matters do not appear to contemplate service via online document storage. If appropriate, the Prosecution Team requests guidance on how all parties may utilize this method of service.
2. Hearing Officer Doduc's October 30, 2015, ruling provides that "BBID may file a motion to dismiss or motion for summary judgment (or a combined motion)... The motions, including supporting memoranda of points and authorities, and briefs filed in support or opposition may not exceed ten pages in length." This ruling has not been changed, and the page limit was reiterated in the Hearing Team's email dated January 14, 2016. BBID appears to seek to file five (5) separate motions to dismiss, each at or near ten pages of briefing. The Prosecution Team objects to this attempted submittal and requests that the Hearing Team strike all but the first ten pages of BBID's total motion briefing. The Prosecution Team will rescind this request if BBID replaces the five separate motions with one combined motion, not exceeding ten pages in length, before today's noon deadline.

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**From:** Yolanda De La Cruz [<mailto:ydelacruz@somachlaw.com>]

**Sent:** Monday, January 25, 2016 10:37 AM

**To:** Unit, Wr\_Hearing@Waterboards

**Cc:** Michael Vergara; Dan Kelly; Herrick, John [@aol.com](mailto:John.Herrick@aol.com); Jennifer L. Spaletta; Valerie Kincaid; Jeanne Zolezzi; Tim O'Laughlin; [kharrigfeld@herumcrabtree.com](mailto:kharrigfeld@herumcrabtree.com); Tauriainen, Andrew@Waterboards; Jonathan Knapp; Richard Morat; McGinnis, Robin [C.@DWR](mailto:Robin.McGinnis@DWR.ca.gov); Stefanie Morris; Rick Gilmore; Unit, Wr\_Hearing@Waterboards; Janelle Krattiger; Daniel O'Hanlon; Akroyd, Rebecca@KMTG; Phillip Williams; [ngmplcs@pacbell.net](mailto:ngmplcs@pacbell.net); Dante Nomellini Jr.; Michelle Bracha; Uoxina Santos-Aguirre

**Subject:** BBID/WSID Hearings

SWRCB Hearing and Parties:

Please be advised that we are sending you the following Motions and Declarations along with exhibits by HIGHTAIL.

1. NOTICE OF POSITION REGARDING THE STATE WATER RESOURCES CONTROL BOARD AUTHORITY TO ISSUE CURTAILMENTS
2. DECLARATION OF LAUREN D. BERNADETT IN SUPPORT OF BYRON-BETHANY IRRIGATION NOTICE OF POSITION REGARDING THE STATE WATER RESOURCES CONTROL BOARD AUTHORITY TO ISSUE CURTAILMENTS
3. MOTION TO DISMISS ADMINISTRATIVE CIVIL LIABILITY PROCEEDING IN ENF01951 FOR LACK OF STATUTORY AUTHORITY UNDER WATER CODE SECTION 1052
4. DECLARATION OF LAUREN D. BERNADETT IN SUPPORT OF MOTION TO DISMISS ADMINISTRATIVE CIVIL LIABILITY PROCEEDING IN ENF01951 FOR LACK OF STATUTORY AUTHORITY UNDER WATER CODE SECTION 1052
5. MOTION TO DISMISS ADMINISTRATIVE CIVIL LIABILITY COMPLAINT IN ENF01951 FOR LACK OF DELEGATION AUTHORITY
6. DECLARATION OF LAUREN D. BERNADETT IN SUPPORT OF MOTION TO DISMISS ADMINISTRATIVE CIVIL LIABILITY COMPLAINT IN ENF01951 FOR LACK OF DELEGATION AUTHORITY
7. MOTION TO DISMISS ADMINISTRATIVE CIVIL LIABILITY COMPLAINT IN ENF01951 FOR VIOLATION OF DUE PROCESS

8. DECLARATION OF LAUREN D. BERNADETT IN SUPPORT OF MOTION TO DISMISS ADMINISTRATIVE CIVIL LIABILITY COMPLAINT IN ENF01951 FOR VIOLATION OF DUE PROCESS

9. MOTION TO DISMISS ADMINISTRATIVE CIVIL LIABILITY PROCEEDING IN ENF01951 STATE WATER RESOURCES CONTROL BOARD'S METHOD OF DETERMINING WATER AVAILABILITY IS AN UNLAWFUL UNDERGROUND REGULATION

10. DECLARATION OF LAUREN D. BERNADETT IN SUPPORT OF MOTION TO DISMISS ADMINISTRATIVE CIVIL LIABILITY PROCEEDING IN ENF01951 SWRCB'S METHOD OF DETERMINING WATER AVAILABILITY IS AN UNLAWFUL UNDERGROUND REGULATION

11. MOTION TO DISQUALIFY HEARING OFFICER

12. DECLARATION OF LAUREN D. BERNADETT IN SUPPORT OF MOTION TO DISQUALIFY HEARING OFFICER

<image001.gif>

**Yolanda De La Cruz** | *Legal Secretary*  
to Daniel Kelly and Aaron A. Ferguson

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## **Tauriainen, Andrew@Waterboards**

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**From:** Tauriainen, Andrew@Waterboards  
**Sent:** Saturday, January 23, 2016 11:30 PM  
**To:** wrhearing@waterboards.ca.gov; Dan Kelly (dkelly@somachlaw.com); Jeanne Zolezzi; Karna Harrigfeld; Janelle Krattiger; Jonathan Knapp (jonathan.knapp@sfgov.org); Rob Donlan; 'Jennifer Spaletta' (jennifer@spalettalaw.com); ngmplcs@pacbell.net; "Dante Nomellini, Jr." (dantejr@pacbell.net); McGinnis, Robin C.@DWR; rjmorat@gmail.com; Valerie Kincaid; Linda Wood (lwood@olaughlinparis.com); 'towater@olaughlinparis.com'; Herrick, John @aol.com (jherrlaw@aol.com); Dean Ruiz (dean@hprlaw.net); Stefanie Morris (smorris@swc.org); O'Hanlon, Daniel; Akroyd, Rebecca; Philip Williams (pwilliams@westlandswater.org); Kuenzi, Nicole@Waterboards; Farwell Jensen, Jane; Mona, Ernie@Waterboards; Buckman, Michael@Waterboards  
**Subject:** WSID CDO Hearing BBID ACL Hearing - PT Objections to WSID Amended NOI  
**Attachments:** wr\_subpoena\_harrigfeld.pdf

### **TO THE HEARING TEAMS AND PARTIES IN THE WSID CDO AND BBID ACL PROCEEDINGS:**

The Prosecution Team objects to the Amended Notice of Intent to Appear submitted by the West Side Irrigation District (WSID) on January 19, 2015. WSID's Amended Notice of Intent to Appear lists Greg Young and Karna Harrigfeld, neither of whom were on WSID's original Notice of Intent to Appear in the WSID CDO matter. This is the first indication at any point in either the WSID CDO proceeding or the BBID ACL proceeding that WSID seeks to call Mr. Young or Ms. Harrigfeld as witnesses. The deadline for submitting the WSID CDO Notice of Intent to Appear was October 2, 2015. As a general matter, the Hearing Team should not allow any party to so blatantly disregard Hearing Notice deadlines.

#### **Objection to Greg Young**

The Prosecution Team specifically objects to the addition of Greg Young because it appears that WSID seeks to add Mr. Young for the sole purpose of providing more time for his direct testimony. Mr. Young has been listed as a BBID witness in the BBID ACL proceeding since October 22, 2015. WSID has not submitted any testimony or exhibits for Mr. Young. Instead, WSID claims in its January 19 cover letter to have reached an agreement regarding sharing Mr. Young's testimony with BBID, and also claims to have a general coordination agreement with BBID, CDWA and SDWA regarding submittal of exhibits offered by any of those parties. If those parties have agreed to coordinate their witnesses and evidence, they should be required to coordinate their direct testimony and cross examination time, and be together subject to the same time limits imposed on the Prosecution Team or any of the other party groups. It would be prejudicial to the Prosecution Team and the other party groups to allow WSID, BBID, SDWA and CDWA others to expand witness examination time by agreeing to share witnesses and exhibits without also sharing time limits.

The Prosecution Team respectfully requests that the Hearing Team require WSID, BBID, SDWA and CDWA to coordinate their direct and cross examination time, and limit that time to the amount granted to the Prosecution team and any other party group. In the alternative, the Prosecution Team requests that the Hearing Team deny WSID's request to add Mr. Young as a witness. WSID would be able to elicit testimony from Mr. Young on cross examination, if so desired.

#### **Objection to Karna Harrigfeld**

The Prosecution Team specifically objects to the addition of Karna Harrigfeld because the late addition seems to be aimed squarely at preventing the Prosecution Team from conducting effective discovery. Ms. Harrigfeld is an attorney at Herum\Crabtree\Suntag, and also apparently serves as WSID's general counsel. It is highly unusual for a party to place its attorney on the witness stand in a contested proceeding. Ms. Harrigfeld's proposed testimony covers a wide

range of topics, including WSID's jurisdictional area, facilities, water right and operations. Government Code section 11513, subdivision (b), provides that parties may cross examine opposing witnesses on any relevant topic, whether or not that topic was part of the direct testimony. Moreover, when a party places its attorney on the witness stand, that party waives the attorney-client communication privilege, and the attorney waives the work product privilege where necessary to allow other parties to effectively prepare cross-examination. (*Handgards, Inc. v. Johnson & Johnson* (1976) 413 F.Supp. 926, 929-931.) Had WSID listed Ms. Harrigfeld as a witness in a timely manner, the Prosecution Team certainly would have sought discovery of her records, and likely sought deposition. At this late date, the Prosecution Team is severely prejudiced in its ability to prepare effective rebuttal or cross-examination of Ms. Harrigfeld.

The Prosecution Team respectfully request that the Hearing Team deny WSID's request to add Ms. Harrigfeld as a witness, and that the Hearing Team strike Ms. Harrigfeld's proposed testimony and referenced exhibits from WSID's proposed exhibits. In the meantime, the Prosecution Team has no choice but to serve the attached Subpoena *duces tecum* on Ms. Harrigfeld and WSID via this message. The Subpoena provides WSID ten working days to disclose the responsive documents, which is exceedingly fair given the rapidly approaching hearing date.

This message is served to the Hearing Team and the Parties in the BBID and WSID Service Lists.

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## Tauriainen, Andrew@Waterboards

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**From:** Tauriainen, Andrew@Waterboards  
**Sent:** Monday, January 25, 2016 11:27 AM  
**To:** 'Jeanne Zolezzi'; 'Diana Martin'; Unit, Wr\_Hearing@Waterboards; kharrigfeld@herumcrabtree.com; Janelle Krattiger; smorris@swc.org; dohanlon@kmtg.com; Akroyd, Rebecca@KMTG; pwilliams@westlandswater.org; Herrick, John @aol.com; jonathan.knapp@sfgov.org; McGinnis, Robin C.@DWR; dkelly@somachlaw.com; ngmplcs@pacbell.net; dantejr@pacbell.net; rjmorat@gmail.com; dean@hprlaw.net; vkincaid@olaughlinparis.com; lwood@olaughlinparis.com; red@eslawfirm.com; Jennifer Spaletta; Kuenzi, Nicole@Waterboards; Mona, Ernie@Waterboards; Buckman, Michael@Waterboards  
**Subject:** RE: WSID Filings in ENFORCEMENT ACTION ENFO1949

WSID seeks to submit two motions to dismiss plus one motion for summary judgment, each at or near 10 pages of briefing (one of WSID's motions is 2 pages, but incorporates by reference one of BBID's proposed motions, which itself is at or near 10 pages), plus a statement of undisputed facts supporting the summary judgment motion totaling 7 pages. The Hearing Team's January 14, 2016, email provides that WSID may submit a motion to dismiss or motion for summary judgment, or a combined motion, not exceeding ten pages of total briefing. The Prosecution Team objects to WSID's attempted submittals and requests that the Hearing Team strike all but the first ten pages of WSID's total motion briefing. The Prosecution Team will rescind this request if WSID replaces the separate motions with one combined motion, not exceeding ten pages in length, before today's noon deadline.

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**From:** Jeanne Zolezzi [<mailto:JZOLEZZI@herumcrabtree.com>]  
**Sent:** Monday, January 25, 2016 10:36 AM  
**To:** 'Diana Martin'; Unit, Wr\_Hearing@Waterboards; Tauriainen, Andrew@Waterboards; [kharrigfeld@herumcrabtree.com](mailto:kharrigfeld@herumcrabtree.com); Janelle Krattiger; [smorris@swc.org](mailto:smorris@swc.org); [dohanlon@kmtg.com](mailto:dohanlon@kmtg.com); Akroyd, Rebecca@KMTG; [pwilliams@westlandswater.org](mailto:pwilliams@westlandswater.org); Herrick, John @aol.com; [jonathan.knapp@sfgov.org](mailto:jonathan.knapp@sfgov.org); McGinnis, Robin C.@DWR; [dkelly@somachlaw.com](mailto:dkelly@somachlaw.com); [ngmplcs@pacbell.net](mailto:ngmplcs@pacbell.net); [dantejr@pacbell.net](mailto:dantejr@pacbell.net); [rjmorat@gmail.com](mailto:rjmorat@gmail.com); [dean@hprlaw.net](mailto:dean@hprlaw.net); [vkincaid@olaughlinparis.com](mailto:vkincaid@olaughlinparis.com); [lwood@olaughlinparis.com](mailto:lwood@olaughlinparis.com); [red@eslawfirm.com](mailto:red@eslawfirm.com); Jennifer Spaletta  
**Subject:** WSID Filings in ENFORCEMENT ACTION ENFO1949

Attached please find the following documents:

1. The West Side irrigation District Motion for Summary Judgment
2. The West Side irrigation District Statement of Undisputed Material Facts
3. The West Side irrigation District Motion to Dismiss based upon Due Process

4. The West Side irrigation District Motion to Dismiss based upon Violation of APA

*Jeanne M. Zolezzi*



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Attorney-at-Law

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VIA EMAIL

January 26, 2016

Hearing Officer Frances Spivy-Weber  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-2000

Re: The West Side Irrigation District Cease and Desist Order Hearing

Dear Hearing Officer Spivy-Weber:

The purpose of this letter is to respond to the following Prosecution Team emails:

- January 23, 2016 at 11:30 p.m.
- January 23, 2016 at 11:51 p.m.
- January 25, 2016 at 11:27 a.m.
- January 25, 2016 12:37 p.m.

As illustrated by the Prosecution Team's flurry of emails, it appears to be more interested in procedure and harassment than addressing the key issues in the hearing.

### **Objection to WSID Amended NOI**

The Prosecution Team objects to WSID's amended NOI because the deadline for submitting the WSID CDO Notice of Intent to Appear was October 2, 2015. The objection lacks merit. WSID filed its original notice of intent to appear in October including all witnesses that it was aware of at that time. It also reserved "the right to amend or supplement this draft witness list any time prior to the hearing based upon relevant information discovered or developed subsequent to the submittal of this draft witness list". The amendment was necessary in order to (1) ensure the witnesses that testify have the required factual knowledge regarding WSID operations, and (2) coordinate expert testimony with BBID for the Phase 1 hearing to avoid duplication and improve efficiency.

WSID notes that other parties have filed amended Notices of Intent without objection. The Prosecution Team has not provided any evidence that it is prejudiced from WSID's amended witness list, and neither the Prosecution Team nor any other party is so prejudiced, nor can it.

### **Objection to Greg Young**

As noted in the email, WSID's Amended Notice of Intent to Appear lists Greg Young and Karna Harrigfeld, neither of whom were on WSID's original Notice of Intent to Appear in the WSID CDO matter. The Prosecution Team objects to the addition of Greg Young because it believes that WSID's sole purpose in adding Mr. Young is to obtain more time for his direct testimony. WSID has no such intention. In fact, despite adding witnesses to its list, WSID has reduced the time of testimony for its other witnesses so that the time requested for testimony has increased only 5 minutes.

WSID includes Mr. Young as a witness only to clarify that he will be providing direct testimony on the issue of water availability as to *both* BBID and WSID. As has been represented to the Hearing officer and the Prosecution Team since the first pre-hearing conference, BBID and WSID intend to coordinate their direct testimony and cross examination. As set forth in the December 16, 2015 Procedural Ruling from Hearing Officers Spivy-Weber and Doduc, hearing time limits will be addressed at the Second Pre-hearing Conference on February 8, 2016 and the Prosecution Team's attempt to limit testimony at this time is premature.

### **Objection to Karna Harrigfeld**

WSID is taken aback by the Prosecution Team's allegation that its intention in adding Ms. Harrigfeld as a witness "seems to be aimed squarely at preventing the Prosecution Team from conducting effective discovery," as this allegation makes little sense.

- Ms. Harrigfeld is an attorney at Herum\Crabtree\Suntag, and is WSID's general counsel. WSID originally listed its part-time General Manager Dave Kaiser as its witness on factual issues in its NOI. However, when preparing direct testimony WSID learned that Mr. Kaiser, who has been with the district for less than 3 years, did not have the requisite factual knowledge regarding the district's day-to-day operations or history. As a result, in order to provide factual testimony regarding the district's day to day operations WSID listed its operations manager, Rick Martinez, as a factual witness, and in order to provide factual testimony regarding the district's historical operations, WSID listed its general counsel Karna Harrigfeld. Ms. Harrigfeld's written testimony is expressly limited to factual testimony and without her as a witness, WSID does not have another witness to provide this testimony.
- Despite the Prosecution Team's assertions, it is not unusual for a party to place its attorney on the witness stand in a contested proceeding to testify on factual issues. Rather, a general counsel who has significant institutional knowledge regarding an entity is often required to do so.
- The Prosecution Team correctly states that Government Code §11513(b), provides that parties may cross examine opposing witnesses on any relevant topic, whether or not that topic was part of the direct testimony. However, the Prosecution Team fails to mention subdivision (e) which reads "The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing." Therefore, even if a witness is allowed to be cross-examined, the attorney-client privilege is not extinguished and can still be invoked.
- The Prosecution Team misstates the law when it asserts that when a party places its attorney on the witness stand that party waives the attorney-client communication privilege, and the attorney waives the work product privilege where necessary to allow other parties to

effectively prepare cross-examination. This is simply not the rule. The case cited by the Prosecution Team, *Handgards, Inc. v. Johnson & Johnson* (1976) 413 F.Supp. 926, does not support this proposition, and is inapplicable as WSID is not asserting an issue or defense based on advice or communication by counsel. *Wellpoint Health Networks v. Superior Court*, 59 Cal. App. 4th 110, 127 (1997); *S. Cal. Gas Co. v. Pub. Utils. Com.*, 50 Cal. 3d 31, 43 (1990); *Transamerica Title Ins. Co. v. Superior Court*, 188 Cal. App. 3d 1047, 1053 (1987).

First, *Handgards* addresses only attorney-client privilege, holding that a “waiver of the attorney-client privilege does not necessarily mean that the protection afforded by the work product doctrine is also breached.” (*Id.* at 929). The intent of the work product doctrine under California law is to allow attorneys to “prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of their cases” as well as to “prevent attorneys from taking undue advantage of their adversary’s industry and efforts. CCP §2018.020. Its purpose is to (2018.020(a)), and to “[p]revent attorneys from taking undue advantage of their adversary’s industry and efforts.” Any “writing that reflects an attorney’s impressions, conclusions, opinion, or legal research or theories” is not discoverable under any circumstances. Section 2018.030(a).

Second, *Handgards* addressed a situation of an implied waiver of the privilege, not present here, and found that waiver only:

where a party asserts that it relied on the advice of counsel or counsel's conduct, thus putting the attorney's state of mind or otherwise privileged communication directly at issue. See *Weil v. Investment/Indicators, Research and Management, Inc.*, 647 F.2d 18, 24-25 (9th Cir. 1981); see *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926, 929 (N.D. Cal. 1976) (“The deliberate injection of the advice of counsel into a case waives the attorney-client privilege as to communications and documents relating to the advice”). “[T]he person or entity seeking to discover privileged information can show waiver by demonstrating that the client has put the otherwise privileged communication directly at issue and [9] that disclosure is essential for a fair adjudication of the action.” *S. Cal. Gas Co. v. Pub. Util. Comm’n*, 50 Cal.3d 31, 40, 265 Cal. Rptr. 801, 784 P.2d 1373 (1990).

The scope of either a statutory or implied waiver is narrowly defined and the information required to be disclosed must fit strictly within the confines of the waiver.” *Transamerica Title Ins. Co.*, 188 Cal.App.3d at 1052-1053.

*Liberty Mut. Ins. Co. v. Cal. Auto. Assigned Risk Plan* U.S. Dist. LEXIS 34547, 2012 WL 892188 (N.D. Cal. Mar. 14, 2012).

WSID has not waived the attorney-client privilege. Under Evidence Code § 912, it is the holder of the privilege who may waive the privilege, either by disclosing a significant part of the communication in question *or* by manifesting through words or conduct consent that the communication may be disclosed by another. WSID has not placed any legal advice communication between WSID and its attorneys at issue, and there is no “waiver of the attorney-client privilege where the substance of the protected communication is not itself tendered in issue, but instead simply represents one of several forms of indirect evidence in the matter.” *S. Cal. Gas Co.*, 50 Cal.3d at 41. Implied waivers are limited to situations where the client has placed into issue the decisions, conclusions, and mental state of the attorney who will

be called as a witness to prove such matters. However, WSID does not waive the attorney-client privilege where it is not defending itself on the basis of the advice it received. *Transamerica Title Ins. Co.*, 188 Cal.App.3d at 1048.

The burden of overcoming the privilege lies with the Prosecution Team. The party opposing the attorney-client privilege bears the burden of showing that the claimed privilege does not apply or that an exception exists or that there has been an expressed or implied waiver. *Wellpoint Health Networks v. Superior Court*, 59 Cal. App. 4th 110, 114 (1997). Where there is doubt about its application, we will construe it liberally. *Kroll & Tract v. Paris & Paris*, 72 Cal. App. 4th 1537, 1545 (1999). Under the theory of implied waiver of attorney-client privilege, the person or entity seeking to discover privileged information can show waiver by demonstrating that the client has put the otherwise privileged communication directly at issue and that disclosure is essential for a fair adjudication of the action. There is no waiver of the attorney-client privilege where the substance of the protected communication is not itself tendered in issue, but instead simply represents one of several forms of indirect evidence in the matter. *S. Cal. Gas Co.*, 50 Cal. 3d at 34.

- The Prosecution Team asserts that had WSID listed Ms. Harrigfeld as a witness in a timely manner, the Prosecution Team certainly would have sought discovery of her records. In fact, the Prosecution Team has conducted discovery of all relevant WSID records, which included all records held by Herum\Crabtree\Suntag that are not protected by privilege. The Prosecution Team is entitled to nothing more; Government Code §11507.6 states that “Nothing in this section shall authorize the inspection or copying of any writing or thing which is privileged from disclosure by law or otherwise made confidential or protected as the attorney's work product.” There has been no waiver of this protection.
- The Prosecution Team also indicates that had WSID listed Ms. Harrigfeld as a witness in a timely manner, the Prosecution Team “likely” would have sought deposition, and argues that because it was not able to do so it is “severely prejudiced in its ability to prepare effective rebuttal or cross-examination of Ms. Harrigfeld”. To the contrary, the Prosecution Team has not sought deposition of any witnesses listed by WSID, and has previously indicated to WSID that it did not intend to conduct deposition until after witness statements were submitted. Ms. Harrigfeld, along with other witnesses listed by WSID, is available for deposition.

WSID is interested in nothing more than insuring it receives a fair hearing before the State Water Resources Control Board, and that includes an opportunity to present the witnesses necessary to present its defense. WSID has no intentions of playing games, or making it difficult for any party to obtain information or conduct discovery. Once again, other than blustering, the Prosecution Team has not provided any evidence that it is prejudiced from WSID’s witnesses, nor can it. To the contrary, denying WSID’s requests to add Ms. Harrigfeld as a witness, and striking her testimony would severely prejudice WSID and prevent it from providing required factual testimony.

## **Motions**

The Prosecution Team also objects to WSID’s submittal of two motions to dismiss and its motion for summary judgment and statement of undisputed facts supporting the summary judgment motion. The Prosecution Team asserts that the Hearing Team’s January 14, 2016, email provides that WSID “may submit a motion to dismiss or motion for summary judgment, or a combined motion, not exceeding ten pages of total briefing”. Actually, the January 14, 2016 email provides:



**(1) Motions to dismiss and/or motions for summary judgment.**

Motions to dismiss or motions for summary judgment may be submitted by BBID in the BBID proceeding and by WSID in the WSID proceeding. The Prosecution Team may file a motion for summary judgment in both proceedings. The motions must be received by the Board by Noon, January 25, 2016. The briefs may not exceed ten pages in length. The motions may include a motion for summary judgment. . . .

The language is clear that the Board anticipated “motions” would be filed, and that it anticipated both motions to dismiss “and/or” motions for summary judgment would be filed. The page limit is expressly applicable to “briefs” – in the plural – and does not state that all motions must be presented in one combined brief, nor would that make any sense.

In addition, and as discussed at the September 25, 2015 prehearing conference, the State Board represented to the Santa Clara Superior Court that WSID would have a full opportunity to raise *all* issues, including due process issues, before the State Board at its Enforcement Hearing. However, to the extent the Hearing Team considers the Prosecution Team’s objection or motion to strike, WSID requests a formal hearing on the objection / motion to strike in order to develop a proper record for judicial review.

**Subpoena Duces Tecum**

All nonprivileged records of Herum\Crabtree\Suntag have already been reviewed and disclosed to comply with the October, 2015 subpoena served by the Prosecution Team. There is nothing further to be disclosed by WSID or Herum\Crabtree\Suntag in response to the Subpoena served by the Prosecution Team on January 25, 2016. The subpoena’s direction to “produce all DOCUMENTS responsive to this Subpoena *duces tecum*, regardless of any claim of attorney-client communication and/or attorney work product privilege” is outrageous, and would subject the Prosecution Team to sanctions in a court of law. Neither Ms. Harrigfeld nor WSID has waived the attorney client privilege or the attorney work-product doctrine simply by submitting Ms. Harrigfeld’s testimony on factual circumstances surrounding WSID.

**Conclusion**

WSID respectfully request that the hearing officer dismiss the Prosecution Team’s objections and allow WSID to proceed with the merits of its case.

Very truly yours,



JEANNE M. ZOLEZZI  
Attorney-at-Law

**SERVICE LIST OF PARTICIPANTS  
 THE WEST SIDE IRRIGATION DISTRICT  
 CEASE AND DESIST ORDER HEARING  
 (October 8, 2015)**

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