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Edmund G. Brown Jr.
Governor

May 19, 2011

To: Enclosed Big Sur River Hearing Service List

WATER RIGHT HEARING ON APPLICATION 30166: RULING ON THE DEPARTMENT OF FISH & GAME'S MOTION AND EX PARTE APPLICATION CONCERNING NOTICES OF DEPOSITION BY THE APPLICANT

This letter addresses pre-hearing discovery actions by the Applicant, Mr. James J. Hill III, and the Department of Fish and Game (Department). For the reasons discussed below, the Department's motion to quash the depositions is granted.

On May 11, 2011, the Applicant issued Notices of Deposition to the Department in the matter of water right application No. 30166, seeking to depose three of the Department's employees: Kit Custis, Debra [sic] Hillyard, and Robert G. Titus. The notices set the date of deposition of Mr. Custis for May 25, 2011, of Ms. Hillyard for June 1, 2011, and of Mr. Titus for June 2, 2011. The Applicant also requested the production of documents utilized or relied on to create, formulate, or prepare the witnesses' written testimony, conclusions, reports, or opinions in this matter.

On May 13, 2011, the Department submitted a Motion to Quash the Notices of Deposition of Kit Custis, Deborah Hillyard, and Robert Titus and for a Protective Order to Limit Discovery. The Department also submitted an Ex Parte Application for Order Shortening Time for Notice and Service of Motion to Quash. The Department states that it waives its right to a hearing on its Ex Parte Application if the State Water Board determines that a hearing is not necessary for its decision on the application, and that decision occurs before May 20, 2011. We provided the Applicant with an opportunity to respond to the Department's motion and application by noon on May 18, 2011. The Applicant timely responded.

In general, the Department alleges that the notices of deposition were not properly served,¹ that time limitations under the Civil Discovery Act were not met, that the discovery sought is unreasonably cumulative and duplicative, is obtainable from another source that is more convenient, and is overly burdensome to the Department. If the State Water Board declines to quash the notices, or order the notices quashed but allows for re-noticing, the Department asks the board to issue a protective order directing that the depositions not be taken and the documents not be produced. Alternatively, the Department requests the State Water Board to order the depositions to be limited to two hours per person and direct that the documents need

¹ The Department contends that the Applicant failed to comply with the provisions of the Civil Discovery Act (tit. 4 [commencing with § 2016.010] of part 4 of the Code of Civil Procedure) in serving the notices of deposition. Code of Civil Procedure section 2025.240, subdivision (a) requires a party who prepares a notice of deposition to give the notice to every other party who has appeared in the action. On May 11, 2011, the Applicant did not serve all of the parties on the service list for this proceeding, and subsequently, on May 14, 2011, the Applicant issued amended proofs of service.

only be produced if the Applicant or his representatives do not already possess them or they are not readily available from another source.

The Applicant asserts that the deposition notices and accompanying document requests were made to ensure a fair hearing and effective review of the Department's studies and analyses. He further contends that due process requires that he be given a meaningful opportunity to fully examine the scientists who conducted the study and analyses prior to the hearing and defend against it and any other materials on which the Department will proffer.

As a threshold matter, adjudicative proceedings before the State Water Board are governed by the board's regulations and certain provisions of chapter 4.5 of the Administrative Procedure Act. (Cal. Code Regs., tit. 23, §§ 648-648.8, 649.6, and 760; Gov. Code, § 11400 et seq.) The State Water Board conducts its proceedings in a manner deemed most suitable to a particular case in an effort to secure relevant information expeditiously without unnecessary delay and without unnecessary expense to the parties.

Ordinarily, the State Water Board's procedures for processing water right applications and petitions, and for the conduct of any necessary hearing, should obviate the need for some of the traditional discovery tools afforded to litigants under the Civil Discovery Act. In addition to application and petition processing procedures that include noticing, protests, protest negotiations and circulation for public comment of any necessary environmental documentation, the State Water Board's hearing procedures include a requirement that parties exchange written testimony and exhibits prior to the hearing. These procedures should make it unnecessary for a party to depose an opposing party's witnesses or potential witnesses in most cases, although they do not necessarily preclude the taking of depositions in appropriate circumstances.

It is highly unusual for witnesses to be deposed in connection with an adjudicative proceeding before the State Water Board. When depositions have been taken there ordinarily are reasons, such as preserving the testimony of a terminally ill witness, that do not appear to be present here. Citing other rulings in other State Water Board proceedings, the Applicant asserts that he is "not aware of any instance in which a request to take depositions has been denied." In fact, the other rulings cited by the Applicant were rulings denying the discovery requests before the presiding officer at the hearing. In both the Cachuma Project hearing and the hearing on the proposed cease and desist order against Millview County Water District et al., the State Water Board denied the requests to conduct pre-hearing discovery at that stage of the proceedings, but left open the possibility that the discovery or depositions could be rescheduled. They never were. As such, those rulings merely reaffirm the principle that depositions and similar discovery ordinarily is unnecessary in a water right proceeding before the State Water Board, but may be permitted based on the particular circumstances of a specific discovery request.

Water Code section 1100 authorizes parties to adjudicative proceedings before the State Water Board to take depositions in the manner prescribed by the Civil Discovery Act. Pursuant to the Civil Discovery Act, a protective order prohibiting or limiting depositions may be issued to protect a party or deponent from undue burden or expense. (Code Civ. Proc. § 2025.420, subd. (b).) Similarly, a protective order may be issued if the "discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive." (*Id.*, § 2019.030, subs. (a) & (b).) A protective order may,

among other things, direct that a deposition not be taken at all, direct that it be taken at a different time, limit the scope of the deposition, or direct that certain documents not be produced. (*Id.* § 2025.420, subd. (b).)

The Department's Ex Parte Application for Order Shortening Time for Notice and Service of Motion to Quash is granted. The Applicant responds that he does not oppose the request to have the issue determined on an expedited basis. A hearing on the application is not necessary for the State Water Board's decision in this matter given that the parties have had an opportunity to brief the board through their written filings. Moreover, in this case, following the normal rule requiring a motion to be served and filed at least 21 days before a hearing on the motion would preclude a meaningful disposition of the Department's motion.

The Department's Motion to Quash the Notices of Deposition and for a Protective Order to Limit Discovery is granted with respect to Ms. Hillyard. Ms. Hillyard is not listed as a witness on the Department's Notice of Intent to Appear in this proceeding. Because Ms. Hillyard is not appearing in this proceeding, it would be unduly burdensome and expensive for her to be deposed. (*Id.*, §§ 2019.030, subd. (a), 2025.420, subd. (b).) Although the Applicant notes that Ms. Hillyard is not precluded from being called as a rebuttal witness, speculation about potential rebuttal witnesses does not support a conclusion that the deposition should be allowed.

Moreover, the Applicant failed to comply with the time limitations contained in the Civil Discovery Act. The Act requires discovery proceedings to be completed 30 days before the initial hearing date. (*Id.* § 2024.020, subd. (a).) The hearing is scheduled to begin on June 16, 2011. Thus, discovery proceedings must be completed by May 17, 2011. The Applicant, however, noticed the deposition of Ms. Hillyard for June 1, 2011, which is well within the Act's 30-day timeframe. The Department acknowledges that the 30-day limitation may not apply to expert witnesses. (*Id.*, § 2024.030.) Nonetheless, Ms. Hillyard is not being called as a witness, much less an expert witness, in this proceeding.

The Department's Motion to Quash the Notices of Deposition and for a Protective Order to Limit Discovery also is granted with respect to Mr. Custis and Mr. Titus. The information that the Applicant seeks to obtain is related to the witnesses' testimony that will be provided to the Applicant through the State Water Board's hearing procedures prior to the hearing. The Department will serve the Applicant with its written testimony and exhibits on May 19, 2011, well in advance of the June 16 hearing. Thus, this information will be made available to the Applicant without the need for formal discovery. Accordingly, the information that Applicant seeks may be duplicative or may be obtainable from other sources that are more convenient, less burdensome, or less expensive than the depositions. In contrast, the discovery request would subject the Department to undue burden and expense by requiring it to redirect time and resources to prepare for the depositions right before the hearing, diverting the Department from its own hearing preparation. Mere speculation that conducting the depositions would better allow effective review of the Department's studies and analyses does not suffice to overcome the burden on the Department.

The Applicant recognizes that the State Water Board has discretion whether to permit depositions, but contends discovery may be required to assure due process in appropriate circumstances. The requirements of procedural due process depend on the particular

circumstances, and focus on whether a party has a fair opportunity to prepare and present its case. Due process does not require a particular form of discovery in administrative procedures, such as depositions, so long as there is a fair hearing process. Absent unusual circumstances that have not be shown to be present here, the State Water Board's application and petition processing processes and water right hearing procedures should be more than adequate to enable parties to prepare and present their cases, including preparation to respond to evidence presented by other parties.² Moreover, this proceeding involves an application for a water right permit – a proceeding where the applicant is seeking to obtain a water right – not a revocation proceeding or other action that deprives the applicant of property right or statutorily conferred benefit. (See *Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 853 [A person seeking a governmental approval has a property interest for purposes of procedural due process only if the person has a legitimate claim of entitlement to the approval].)

In keeping with the State Water Board's traditional hearing procedures, the Applicant has an opportunity to review the Department's testimony and exhibits prior to the hearing. The Applicant cites no compelling reason why he should be provided an additional opportunity before the hearing to depose the scientists who conducted the studies and analyses at issue and, under the circumstances presented here, the depositions would be unnecessarily duplicative, burdensome and costly.

If you have any questions about this letter, please contact Erin Mahaney, Senior Staff Counsel, at (916) 341-5187 or emahaney@waterboards.ca.gov.

Sincerely,



Tam M. Doduc
Hearing Officer

cc: Charles R. Hoppin, Chairman
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² The Applicant observes that if he waits until receipt of the direct testimony of the Department's witnesses, very little time will remain to notice depositions of the witnesses. The Applicant provides no explanation as to why receipt of the witnesses' direct testimony might be insufficient to provide a fair opportunity to prepare for the hearing. Rather, Applicant's argument seems to be that it will be difficult to correct the problem if that turns out not to be the case. The mere possibility that later developments might occur does not change the conclusion, based on the circumstances as currently presented, that the requested deposition testimony is unnecessary in light of the other procedures that apply. If, due to unforeseen circumstances, the current hearing procedures are inadequate, the presiding officer will entertain a motion to continue the hearing, allow deposition testimony or other means for preparing for the hearing, or make other changes as appropriate.

**-HEARING REGARDING WATER RIGHT APPLICATION 30166 FILED BY EL SUR RANCH
(BIG SUR RIVER) – MONTEREY COUNTY**

**SCHEDULED TO COMMENCE ON
JUNE 16, 2011**

**SERVICE LIST
(March 1, 2011)**

PARTICIPANTS TO BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (Note: The participants listed below agreed to accept electronic service, pursuant to the rules specified in the hearing notice.)

<p>EL SUR RANCH c/o Janet Goldsmith & Tom Berliner Kronick, Moskovitz, Tiedmann & Girard 400 Capitol Mall, 27th Floor Sacramento, CA 95814 jgoldsmith@kmtg.com tberliner@duanemorris.com (916) 321-4500</p>	<p>CALIFORNIA DEPARTMENT OF FISH & GAME c/o Kevin Takei & Chandra Ferrari 1416 Ninth Street, 12th Floor Sacramento, CA 95814 KTakei@DFG.ca.gov CFerrari@DFG.ca.gov (916) 653-3715</p>
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