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State Water Resources Control Board

June 3, 2016

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
PO Box 100
Sacramento, CA 95812-0100



Submitted via email to Commentletters@waterboards.ca.gov with executed original delivered by hand

Re: COMMENT LETTER – 06/07/16 BOARD MEETING: BBID ACL and WSID CDO HEARINGS.

To the Honorable Members of the State Water Resources Control Board,

Introduction

The Prosecution Team (PT) respectfully submits these comments on the Proposed Order Dismissing the Administrative Civil Liability Complaint against Byron-Bethany Irrigation District and Dismissing the Draft Cease and Desist Order against the Westside Irrigation District (Proposed Order).

The PT acknowledges the Proposed Order's determination that the PT failed to carry its burden of proof both because of flaws in our analysis and weakness in our proffered oral testimony.

The PT supports the Proposed Order insofar as it clearly articulates the Board's authority to issue cease and desist orders or to impose administrative civil liabilities for unlawful diversion of water, regardless of the basis of the claimed water right, under Water Code §1052.

The PT also supports the Proposed Order's finding that the evidentiary standard for proving unlawful diversion is "preponderance of the evidence."

Issues Demanding Resolution in the Final Order

However, the Proposed Order fails to adequately address three critical issues squarely presented and ripe for determination in these proceedings. The three issues are:

1. Whether it is necessary to allege and prove harm to a specific water right holder in order to sustain enforcement against an unlawful diversion as a trespass under Water Code §1052.

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

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2. What standard does a hearing officer apply to evaluate evidence when considering a motion for judgment?
3. Whether an action to enforce against unlawful diversion based on unavailability of water at a specific priority may be sustained on an accurate watershed-wide availability analysis, or only on a case-by-case, after-the-fact, specific-point-of-diversion analysis.

These are pure legal issues deeply embedded in these proceedings. None of these issues, however, is dependent on evaluation of evidence or on findings of fact. Each of these issues is the subject of at least one pre-hearing motion; each has been fully briefed; and each is ripe for decision in a final order in these proceedings. Failure to explicitly rule on these issues wastes the time, effort and considerable expertise of all parties, unnecessarily deferring resolution of matters properly presented in these proceedings. Most importantly, failure to address these issues will (1) preserve ambiguities in the administration of water rights in times of shortage that have been brought to light by these proceedings and (2) prejudice the public and parties to future proceedings by inhibiting the predictability and transparency of those proceedings.

The PT recognizes and appreciates that “[t]he Board intends to hold a future workshop about best practices for conducting water availability analyses for purposes of administering the water rights priority system and other regulatory approaches to the administration of water rights during shortage.” [Fact Sheet, May 26, 2016.] Nonetheless, the Board would be remiss in its duty to adjudicate water rights proceedings if it fails to address the foregoing issues.

Discussion

1. There is no need to allege harm to another water right in order to prove a trespass by unlawful diversion.

The Central Delta Water Agency (CDWA), the City and County of San Francisco (CCSF) and the San Joaquin Tributaries Authority (SJTA) all variously argued in their January 25, 2016 Pre-Hearing Briefs of Legal Issues, that prosecution under Water Code §1052 requires proof of harm to either post-1914 diverters or senior diverters. The PT addressed these arguments in our February 22 Response to Pre-Hearing Briefs, and in our March 4 Response to SJTA’s Pre-Hearing Brief. The moving parties to the nonsuit argued that the PT failed to meet its burden because it did not prove harm to any senior water right holder. The PT addressed these arguments in our March 23 Opposition. As described in the PT’s responses, Water Code §1052 does not require harm in order to demonstrate trespass. Thus, this issue was ripe for decision on a pre-hearing basis and remains so even now, after the conclusion of the truncated proceedings. It was a mistake not to dispose of this issue prior to the hearing and it would compound the error to avoid disposing of it in a final order. If the Board does not dispose of the issue now, it will certainly be briefed and argued again wasting time and expense by future parties and the Board.

Board precedent going back at least ten years shows that the Board considers harm in unauthorized diversion cases, if at all, only in the context of weighing the penalty amount factors under Water Code §1055.3. Board precedent thus makes the issue particularly susceptible to disposal on motion practice. But the Proposed Order leaves this important issue unaddressed, leaving water practitioners to wonder whether the Board is reconsidering a matter of settled Board jurisprudence. Failing to address the

issue in the order disposing of these cases would also affect the ability to assess whether to bring future potential enforcement actions. Such failure here would undoubtedly require duplication of the significant briefing and argument that has occurred here should the Division of Water Rights (Division) or the Delta Watermaster bring future enforcement actions under Water Code §1052.

2. The hearing officer should evaluate evidence most favorably to the proponent when considering whether to grant a motion for judgment.

The Hearing Officers decided to proceed on their “own motion as a motion for judgment” [Proposed Order at 12.] The PT is unable to locate any guiding standard for a motion for judgment in enforcement proceedings before the Board. Therefore, the Proposed Order should make clear the standard the Hearing Officers actually applied to determine that the PT case-in-chief failed to carry its burden of proof. Again, the PT is not challenging the implicit finding that our case-in-chief was inadequate to sustain these enforcement actions, and our comments are not aimed at evading that central determination. Making clear the precise standard the Hearing Officers applied, however, provides invaluable guidance for Board staff and the regulated public.

Because the PT is unable to identify directly relevant standards in the unusual circumstance of the Hearing Officers making their own “motion for judgment,” we suggest analogy to a court’s evaluation of motions for nonsuit (the actual motion proffered by Mr. O’Laughlin in these proceedings), motions for directed verdict and motions for judgment notwithstanding the verdict. While such motions are made at different times in judicial proceedings, such motions are analytically similar, and courts evaluate evidence according to the same standards. Thus, in the interests of transparency and predictability, we respectfully request that the final order define the standard the Hearing Officers actually applied in making the finding which supports disposition of the motion.

The PT urges the final order in this case to confirm that the Hearing Officers applied the standard enunciated in 1961 and consistently applied by California courts ever since: a motion for nonsuit is warranted “when, and only when, disregarding conflicting evidence, and giving plaintiff’s evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff.” [*Keller v. Pacific Turf Club* (1961) 192 Cal.App.2d 189, 190.]

The Proposed Order itself hints at the mischief that may be expected in future cases based on the unusual decision to make and rule on the Hearing Officers’ own motion for judgment in this enforcement action: “We discourage any parties to a future proceeding before the Board from attempting to [dispose of the proceeding through a motion for judgment].” [Proposed Order at 12.] Going beyond that caution (which zealous lawyers are likely to disregard), the Board would help to avoid the needless expenditure of future time and effort by clearly articulating the standard the Board applied in these cases.

3. An accurate watershed-wide water availability analysis is sufficient to sustain a finding of unavailability of water in a watershed at a specified priority, without the need for a supplementary point-of-diversion analysis.

The Proposed Order, at section 4.2, discusses the Board's findings with respect to the Division's water supply and demand analysis, and the application of that analysis in the PT's case-in-chief. By these comments, the PT does not dispute the findings in the Proposed Order that the PT failed to carry its burden of proof because of (1) defects and inconsistencies in the water availability analysis, (2) inclusion of certain updated data sets only in our rebuttal evidence, and (3) inadequacies in oral testimony and responses on cross-examination. However, the Proposed Order hints at deeper, more fundamental faults in the water supply and demand methodology that deserve to be more fully explicated in this dispositive order.

Based on arguments made by the parties in these proceedings and ambiguity in the Proposed Order, it is likely that future Delta defendants would identify faults in any watershed-level water availability analysis, particularly one developed in response to an urgent and rapidly changing drought emergency. Vagaries of intraday tidal fluctuations, interactions among the timing of neighboring diversions, irrigation patterns and return flows would all be advanced to undermine enforcement of the priority system based on even an adequate analysis supporting a finding that there is no water available to serve specific water right priorities. Thus, the order disposing of these cases should directly address whether any watershed-wide availability analysis—even one with the weaknesses identified in these proceedings adequately addressed—will ever be a sufficient basis for an enforcement action.

Various parties in these proceedings argue that the Division should have employed a specific point-of-diversion water availability analysis such as those prepared for water right permits. (See, e.g., SJTA's January 25 Pre-Hearing Brief.) The PT explicitly rejected the demand for a point-of-diversion analysis. The issue is ripe for determination in these proceedings. Failure to articulate the Board's determination of this purely legal issue would leave Board staff ill-prepared to decide whether and how to proceed with enforcement actions, and diverters similarly ill-prepared to determine whether to stop diverting when notified of the Board's determination that there is insufficient supply to meet demands at their priorities.

The order disposing of these cases should make clear that an adequate watershed-wide water availability analysis is sufficient to determine whether there is water to satisfy apparent demands in the watershed—and, if there is inadequate water to meet all demands, at what priority curtailments should be ordered and enforced. Without that clarity, the Division's and the Delta Watermaster's ability to protect senior water rights will be seriously compromised. Without that clarity, there will be no practical way to protect releases of previously stored water to meet their intended downstream uses. More importantly, water right claimants will be forced to make critical, time-sensitive diversion decisions without the predictability and transparency of enforceable guidance of continuously refined and improved watershed-wide analyses published by the Division.

Request for Clarification Prior to Adoption

The PT respectfully requests that the Board either (1) remand the Proposed Order to the Hearing Officers with instructions to address these three critical issues, or (2) amend the Proposed Order to address these three issues, which are all ripe for determination and necessary to support a properly dispositive order in these cases.

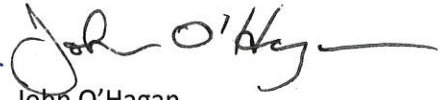
Sincerely,



Cris Carrigan,
Director, Office of Enforcement



Michael Patrick George,
Delta Watermaster



John O'Hagan,
Assistant Deputy Director,
Division of Water Rights

cc: Distribution and Service List