
State Water Resources Control Board

October 2, 2015

VIA ELECTRONIC MAIL

TO: ENCLOSED SERVICE LIST OF PARTICIPANTS

PRE-HEARING CONFERENCE IN THE MATTER OF ALLEGED UNAUTHORIZED DIVERSION BY BYRON-BETHANY IRRIGATION DISTRICT

This letter addresses the procedural issues that were raised during the pre-hearing conference on this matter held on September 25, 2015.

Requests for Postponement of Hearing and Revised Hearing Dates, Times, and Submittal Deadlines

Byron-Bethany Irrigation District (BBID), Central Delta Water Agency (CDWA), and South Delta Water Agency requested that the State Water Board postpone the hearing in this matter (1) in deference to pending litigation filed by BBID and others against the State Water Board; (2) to allow the parties additional time to conduct discovery; and (3) to allow the parties additional time to prepare expert testimony. To accommodate the parties' schedules, and allow additional time to develop their cases-in-chief, I requested the parties advise me of their availability during the months of December and January. Given the inability of all of the parties and their witnesses to be available in either December or January and to grant parties' request for an additional pre-hearing conference while providing a substantial increase in the amount of time for parties to prepare for the hearing, I am postponing the hearing until March 2016. An updated notice with the new dates and location of the second pre-hearing conference and hearing will be issued in the near future. Because of the significant delay of the hearing and the amount of time until the hearing, all parties and their witnesses should reasonably be able to accommodate these new hearing dates or make other arrangements necessary to be prepared for the hearing. Therefore, I am unlikely to make any further adjustments to the schedule.

The rescheduled hearing dates will be **Monday, March 21, 2016, through Friday, March 25, 2016**. For the reasons detailed below, I have determined that further postponement is not appropriate.

BBID and several other parties in this matter filed actions against the State Water Board challenging the Board's notification of water availability in the Sacramento and San Joaquin River watersheds (*California Water Curtailment Cases*, Santa Clara Superior Court, Case No. 1-15-CV-285182). On September 24, 2015, the court denied BBID's motion to stay or enjoin this proceeding pending resolution of the litigation. Given the court's conclusion and my own consideration of the matter, I find that the pending litigation does not justify postponement of this hearing.

The State Water Board is the state agency charged with the “orderly and efficient administration” of water rights. (Wat. Code, § 174.) The Board is directed to take vigorous action to prevent the unlawful diversion of water. (*Id.*, § 1825.) The complaint issued by the Prosecution Team raises factual and legal questions regarding water availability and the application and administration of water rights that are within the Board’s particular expertise and delegated responsibility under the Water Code. It is appropriate for the Board to consider these factual and legal questions in the first instance. The severity of the current drought also lends urgency to the proper administration of water rights, including consideration by the Board of enforcement actions brought by the Division of Water Rights. A timely hearing and determination of the facts and law in question will assist the Board in administering water rights in the coming water year. Therefore, this hearing should be held in a timely manner and a ruling issued, if possible, prior to commencement of the irrigation season; however, in order to accommodate the parties schedules and in particular, BBID’s witness Mr. Gilmore, this may no longer be feasible.

The parties request additional time prior to the hearing to engage in discovery. The postponement of the hearing until March 21, 2016 will provide that additional time. However, the parties should be aware that several factors weigh against any further delay for discovery. The Prosecution Team provided the legal and factual bases for the proposed civil liability in the complaint issued to BBID on August 19, 2015, and identified its witnesses on the Notice of Intent to Appear filed on September 2, 2015. The Prosecution Team has stated that the technical data on which its water availability analysis is based is available to the public via the State Water Board’s website, and that it will complete substantive document disclosures in response to BBID’s request for records under the Public Records Act on or before October 12, 2015. Each party to the proceeding must serve the other parties with their written testimony and exhibits by **January 18, 2016**. During the hearing, the parties will have an opportunity to cross-examine witnesses and may subpoena involuntary witnesses to obtain their testimony. Given the extensive disclosure of documents and testimony, and the ability to subpoena and examine involuntary witnesses during the hearing, the justification for the burden of any additional discovery would have to be significant.

The parties also request additional time to engage expert witnesses and for those experts to review the water availability analysis underlying the allegations in the complaint, conduct independent modeling of water availability, and determine the injury, if any, to downstream right holders or other harm resulting from the allegedly unauthorized diversions. I have carefully considered the parties’ request for postponement to allow additional time to develop expert testimony, and weighed the requests against the interest of the state in issuing a timely ruling upon the legal and factual issues presented in this proceeding, and determined that the delay of the hearing and corresponding deadlines as discussed above is more than sufficient.

Further delay is not warranted given the availability of the technical information underlying the complaint at the time of and prior to the initiation of this proceeding, and the strong interest of the state to promptly address allegations of unauthorized diversions during the drought emergency conditions.

Revised Notices of Intent to Appear Witness lists

BBID and CDWA must submit revised witness lists that identify all witnesses that they intend to call at the hearing no later than **October 22, 2015**.

Revised Exhibit Deadline:

Copies of all parties' testimony, exhibits, lists of exhibits, qualifications and statements of service must be received by the State Water Board and served on each of the parties who have indicated their intent to appear, no later than **January 18, 2016**.

Second Pre-Hearing Conference

A second pre-hearing conference is set for **February 8, 2016**. All parties must attend this pre-hearing conference. Failure to attend the pre-hearing conference may result in exclusion from participation in the hearing. The pre-hearing conference will not be used to hear arguments on or determine the merits of any hearing issues other than procedural matters, unless the parties agree to resolve a hearing issue by stipulation. If I find that this second pre-hearing conference is unnecessary or unlikely to be productive, the conference will be cancelled.

Pre-Hearing Briefing of Legal Issues

During the pre-hearing conference, some parties requested the opportunity to provide written pre-hearing briefs on legal issues. The parties are invited to identify and submit to the State Water Board and served on each of the parties by **October 22, 2015**, a concise statement of legal issues that the parties would like to address in pre-hearing legal briefs. After my receipt and consideration of these submittals, I will notify the parties as to the issues to be briefed, page limitations, and deadlines for submittal.

Stipulations as to Matters not in Dispute

The Division of Water Rights Prosecution Team (Prosecution Team) and BBID shall continue to confer regarding stipulations as to undisputed facts so as to streamline the hearing process. Stipulations should be submitted as soon as possible to eliminate unnecessary testimony.

Tentative Order of Presentation of Cases in Chief

The tentative Order of Presentation at the hearing will be:

1. Prosecution Team
2. Byron-Bethany Irrigation District
3. South Delta Water Agency
4. Central Delta Water Agency
5. City and County of San Francisco
6. San Joaquin Tributaries
7. California Department of Water Resources
8. Richard Morat

Tentative Order of Presentation of Cross

The tentative Order of Cross Examination of Witnesses at the hearing will be:

1. Prosecution Team
2. Byron-Bethany Irrigation District
3. South Delta Water Agency
4. Central Delta Water Agency
5. Patterson Irrigation District

6. Banta-Carbona Irrigation District
7. The West Side Irrigation District
8. San Joaquin Tributaries
9. City and County of San Francisco
10. State Water Contractors
11. California Department of Water Resources
12. Richard Morat

Scope of Cross Examination

Cross examination is not limited to the scope of direct testimony. (Cal. Code Regs., tit. 23, § 648.5.1; Gov. Code, § 11513, subd. (b).) Cross-examination should, however, be limited to the factual issues in dispute. I will not permit the parties to attempt to make legal or policy arguments during the evidentiary portion of the hearing through cross-examination, the presentation of direct testimony, or otherwise. The scope of cross-examination of any redirect, if allowed, or rebuttal testimony will be limited to the scope of the redirect or rebuttal testimony, respectively.

Rebuttal Testimony

I am requiring parties to submit written rebuttal testimony in advance of the hearing. To be received into evidence, written rebuttal testimony must be received by the State Water Board and served on each of the parties by **February 22, 2016**. Parties may only present rebuttal evidence during the hearing, which could not have reasonably been submitted in advance of the hearing, after all parties have presented their cases-in-chief and their witnesses have been cross-examined.

Rebuttal evidence is limited to evidence that is responsive to evidence presented in connection with another party's case-in-chief, and it does not include evidence that should have been presented during the case-in-chief of the party submitting rebuttal evidence. It also does not include repetitive evidence.

Redirect and Recross Examination

At my discretion, I may allow redirect examination upon an offer of proof as to the substance, purpose, and relevancy of the expected testimony. Any redirect examination and recross examination that I allow will be limited to the scope of the cross-examination and the redirect examination, respectively.

Time Limits

I may set additional time limits beyond those identified in the hearing notice enclosure at a future date.

Closing Briefs

I will set the deadline and page limits for closing briefs at the end of the hearing.

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; or to Jane Farwell-Jensen at (916) 341-5349 or by email to Jane.Farwell-Jensen@waterboards.ca.gov. (Gov. Code, § 11430.20, subd. (b).)

Sincerely,



Tam M. Doduc
Hearing Officer

Cc:
Enclosures: Service List

**SERVICE LIST OF PARTICIPANTS
BYRON-BETHANY IRRIGATION DISTRICT
ADMINISTRATIVE CIVIL LIABILITY HEARING
(09/02/15; Revised: 09/11/15)**

| PARTIES | |
|---|---|
| <p>THE FOLLOWING <u>MUST BE SERVED</u> 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>Division of Water Rights Prosecution Team Andrew Tauriainen, Attorney III SWRCB Office of Enforcement 1001 I Street, 16th Floor Sacramento, CA 95814 andrew.tauriainen@waterboards.ca.gov</p> | <p>Byron Bethany Irrigation District Daniel Kelly Somach Simmons & Dunn 500 Capitol Mall, Suite 1000, Sacramento, CA 95814 dkelly@somachlaw.com</p> |
| <p>Patterson Irrigation District Banta-Carbona Irrigation District The West Side Irrigation District Jeanne M. Zolezzi Herum\Crabtree\Suntag 5757 Pacific Ave., Suite 222 Stockton, CA 95207 jzolezzi@herumcrabtree.com</p> | <p>City and County of San Francisco Johnathan Knapp Office of the City Attorney 1390 Market Street, Suite 418 San Francisco, CA 94102 jonathan.knapp@sfgov.org</p> |
| <p>Central Delta Water Agency Jennifer Spaletta Spaletta Law PC PO Box 2660 Lodi, CA 95241 jennifer@spalettalaw.com</p> <p>Dante Nomellini and Dante Nomellini, Jr. Nomellini, Grilli & McDaniel ngmplcs@pacbell.net dantejr@pacbell.net</p> | <p>California Department of Water Resources Robin McGinnis, Attorney PO Box 942836 Sacramento, CA 94236-0001 robin.mcginnis@water.ca.gov</p> |
| <p>Richard Morat 2821 Berkshire Way Sacramento, CA 95864 rjmorat@gmail.com</p> | <p>San Joaquin Tributaries Authority Valerie Kincaid O’Laughlin & Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95814 vkinaid@olaughlinparis.com</p> |
| <p>South Delta Water Agency John Herrick, Esq. 4255 Pacific Ave., Suite 2 Stockton, CA 95207 jherriaw@aol.com</p> | <p>State Water Contractors Stefani Morris, Attorney 1121 L Street, Suite 1050 Sacramento, CA 95814 smorris@swc.org</p> |