

State Water Resources Control Board

TO: Hearing Team and Designated Parties

FROM: Andrew Tauriainen
Attorney for Prosecution Team
OFFICE OF ENFORCEMENT

DATE: September 23, 2015

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

The Division of Water Rights (Division) Prosecution Team provides this statement as requested by the Hearing Officer's letter dated September 11, 2015.

Scope of Hearing

The Prosecution Team agrees with the scope of the hearing set forth in the Hearing Notice Key Issues, as clarified in the Hearing Officer's letters of September 11 and September 21. The Administrative Civil Liability Complaint (ACLC) alleges that Byron-Bethany Irrigation District (BBID) engaged in the unauthorized diversion of water (see, e.g., ACLC at ¶ 1), and that BBID should be subject to administrative civil liability under Water Code section 1052, subdivision (c) (see, e.g., ACLC at ¶ 2). Both of these issues are incorporated into Key Issue 1 of the Hearing Notice, and are properly framed for hearing. The ACLC and Key Issues 1 and 2 of the Hearing Notice also properly frame the application of Water Code section 1055.3 factors in determining the administrative civil liability.

Requests Regarding Postponement of Hearing and Discovery

On September 22, the Honorable Peter H. Kirwan of the Santa Clara County Superior Court heard motions brought by BBID and West Side Irrigation District (WSID) to stay proceedings on the State Water Board's administrative enforcement matters for the pendency of the coordinated California Water Curtailment Cases (Case No. 1-15-CV-285182). Judge Kirwan has not yet ruled on the motions, although he may do so before the pre-hearing conference. The Prosecution Team remains opposed to any request to stay proceedings in either the BBID or WSID administrative enforcement matters for the pendency of the litigation. Unless formally stayed by the court, the BBID and WSID administrative enforcement matters should proceed in order to address the important drought management issues raised in each.

The Prosecution Team also opposes the requests by BBID, Central Delta Water Agency (CDWA) and South Delta Water Agency (SDWA) and others to delay the hearing in order to conduct extensive discovery. The requesting parties overstate the complexity of the issues and the need for discovery. The availability of water to serve BBID's claimed pre-1914 appropriative right from June 13 through June 25, 2015, is relevant to the question of whether BBID engaged

in the unauthorized diversion of water during that period. In the same way, the availability of water to serve WSID's water right license is relevant to the question of whether WSID is diverting or is threatening to divert water in violation of the prohibition set forth in Water Code section 1052, as framed in the draft Cease and Desist Order (CDO) scheduled for hearing beginning November 12, 2015. But, as described in the ACLC, the Division's water availability determination is a straightforward process comparing water supply and demand data taken from publicly available sources. The Division has applied the same process since 2014, and water availability determinations and supporting technical data are available to the public via the State Water Board's website. Extensive discovery would not provide any benefit or clarity.

The Hearing Notice provides that the parties must submit written witness statements and supporting evidence well in advance of hearing so the other parties may prepare cross-examination and rebuttal. The Prosecution Team intends to submit witness statements and evidence, including regarding the availability of water to serve BBID's claimed pre-1914 appropriative right from June 13 through June 25. Given this process, discovery is unnecessary.

The requested time delays (e.g., "at least one year" by CDWA and "May 2016" by BBID, WSID and the City and County of San Francisco), would delay resolution of the issues until the middle of 2016 or later. Should the drought extend into 2016, such a delay could harm the State Water Board's ability to protect senior water right holders, which could harm all water users' abilities to respond to drought conditions. This matter can, and should, be resolved sooner.

If the Hearing Officer is inclined to delay the BBID hearing and allow discovery, the Prosecution Team requests that any such discovery period be no longer than four weeks in duration, and that all parties be allowed to conduct discovery on all issues. Given the common issues between the BBID ACLC and the WSID CDO proceedings (including the Division's water availability determinations), the Prosecution Team also requests that any discovery conducted by BBID, WSID or aligned parties named in the BBID proceeding regarding the common issues should not be repeated during the WSID proceeding. To that end, the Prosecution Team requests that the Hearing Officer put WSID and aligned parties on notice that WSID and any party to the WSID proceeding should conduct discovery in the BBID proceeding on matters common to both proceedings, and that the Hearing Officer may decline to allow discovery in the WSID proceeding that could have been conducted in the BBID proceeding.

Objections Regarding Incomplete Witness Lists

BBID and CDWA submitted incomplete witness lists with their Notices of Intent to Appear. Specifically, BBID lists five witnesses as "TBD," addressing issues including water availability, SWRCB water availability analysis, SWRCB water demand analysis, SWRCB water supply analysis, and criteria in Water Code section 1055.3. BBID also lists three entities as witnesses: Mountain House Community Services District, Mariposa Energy Project, and Contra Costa Airport. BBID also states that its Notice of Intent to Appear is a "draft" and that BBID reserves the right to revise the witness list at any time before hearing. CDWA's Notice of Intent to Appear does not list any witnesses, instead stating that its witnesses are likely to be rebuttal witnesses.

In accordance with 23 Cal. Code Regs. section 648.4, subdivision (b), the Hearing Notice's "Information Concerning Appearance at Water Right Hearings" makes clear on page 2 that "[e]xcept for interested persons who will not be participating as parties, the Notice of Intent to Appear must also include: (1) the name of each witness who will testify on the party's behalf...." The failure by BBID and WSID to name their witnesses prejudices the Prosecution Team and other parties who might request discovery or raise objections to such witnesses. Thus, BBID

and CDWA should be prohibited from entering any testimony or exhibits from such witnesses in accordance with 23 Cal. Code Regs. section 648.4, subdivision (e). Moreover, any witness statements or evidence from previously unnamed witnesses should be excluded as surprise testimony, prejudicial to the other parties and expressly discouraged by 23 Cal. Code Regs. section 648.4, subdivision (a).

The Prosecution Team requests that the Hearing Officer prohibit BBID and CDWA from calling witnesses not expressly named on their Notices of Intent to Appear during their cases-in-chief, and prohibit BBID and CDWA from submitting evidence regarding the subject of proposed testimony for any unnamed witnesses during their cases-in-chief.

The Prosecution Team also requests that the Hearing Officer remind the parties that “[r]ebuttal 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.” (Hearing Notice, “Information Concerning Appearance at Water Right Hearings,” at p. 6.)

Time Limits

Aligned Parties

There are a number of parties whose interests appear to be aligned in these proceedings. Specifically, CDWA, SDWA, WSID, Banta-Carbona Irrigation District, Patterson Irrigation District, San Joaquin Tributaries Authority (SJTA), and the City and County of San Francisco are likely aligned with each other in opposition to the Division’s water availability determinations and possibly other issues. The interests of the Department of Water Resources and the State Water Contractors may be aligned in support of the Division’s water availability determinations, but that is not clear from their Notices of Intent to Appear.

Aligned parties other than the Prosecution Team or BBID should be limited to the coordinated cumulative time limits set forth in the Hearing Notice and September 11 letter. That is, up to twenty (20) minutes per witness, and a total of one (1) hour to present all direct testimony for aligned parties. Aligned parties should also be limited to one cross-examiner and a total of one (1) hour of cross-examination per witness or panel of witnesses. Any requests for redirect or recross examination should be addressed at hearing, although the Hearing Officer should remind the parties to limit redirect and recross to the scope of any underlying cross or redirect examination, and impose reasonable time limits. The Prosecution Team requests that the Hearing Officer expressly prohibit the parties from presenting rebuttal evidence that they should have presented during their case(s)-in-chief.

Witness Testimony Time

The Hearing Notice provides that the parties may make an opening statement of up to twenty (20) minutes, case-in-chief witnesses shall have up to twenty (20) minutes each and a total of one (1) hour per party, and each party shall have an initial limit of one (1) hour for cross examination. These time limits are reasonable given the scope and complexity of the issues framed in the ACLC and Hearing Notice.

The Prosecution Team objects to any general requests by the parties for additional hearing time. No party has provided an adequate explanation for why the Hearing Notice time limits are inadequate. The Prosecution Team also objects to the specific estimated length of direct

testimony provided by a number of parties in their Notices of Intent to Appear. For example, BBID estimates that it will require nearly **twenty (20) hours** for direct testimony (including for the unnamed witnesses discussed above). SJTA estimates that it will require 3.5 hours of direct testimony, and SDWA estimates that it will require ninety (90) minutes for direct testimony. The issues in this case are important, but not so technical as to require this much hearing time.

Should the Hearing Officer be inclined to grant additional time to any of the parties for any element of the hearing, the Prosecution Team requests that it be granted a like amount of time.

State Water Board Witnesses Called by Other Parties

BBID and SJTA have listed State Water Board staff as direct witnesses. The Prosecution Team reserves the right to object and/or move to quash any subpoenas when served. Meanwhile, the Prosecution Team notes that the BBID and SJTA witness lists indicate that the State Water Board staff will be asked to address identical issues, which may result in prohibited repetitive testimony. The Prosecution Team requests that the Hearing Officer direct BBID and SJTA to coordinate with each other to prevent repetitive discovery and/or witness testimony, and that those parties be subject to the cumulative testimony time limits applicable to aligned parties.

Status of Public Records Act Request Response

BBID and WSID have each submitted similar, extensive Public Records Act (PRA) requests. The Division of Water Rights provided timely initial responses as required under the PRA. The Prosecution Team anticipates beginning to provide substantive responses to those requests this week or early next week, with complete substantive disclosures on matters relevant to this proceeding or before the evidence submittal deadline in this matter. However, the PRA requests touch upon issues on either side of the separation of functions in the BBID and WSID matters, and the State Water Board's Office of Chief Counsel is preparing its own response. The Prosecution Team is not aware of the status of that response.

Stipulation as to Matters not in Dispute

The Prosecution Team sent a proposed draft stipulation to BBID's counsel on September 17, and a follow up request on September 18. BBID's counsel did not provide a substantive response in time for inclusion in this statement. The Prosecution Team and BBID will update the Hearing Officer as to the status of any stipulation at the pre-hearing conference.

The Prosecution Team thanks you for the opportunity to submit this statement.

Sincerely,



Andrew Tauriainen
Office of Enforcement
Attorney for Prosecution Team

cc: Prosecution Team
Service list

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

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