

## SOUTH DELTA WATER AGENCY

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August 28, 2015

Sent Via E-mail [wrhearing@waterboards.ca.gov](mailto:wrhearing@waterboards.ca.gov)

Division of Water Rights  
State Water Resources Control Board  
P.O. Box 2000  
Sacramento, CA 95812-2000  
Attn: Jane Farwell-Jensen

Re: Byron-Bethany Irrigation District ACL Hearing

Dear Ms. Farwell-Jensen:

Included herewith is the South Delta Water Agency's Notice of Intent to Appear in the above referenced hearing. As you can see, SDWA will be presenting testimony, including expert witness testimony as a party to the proceedings. Please note the following issues/requests:

1. The Notice for the hearing sets the commencement of the hearing on Wednesday, October 28, 2015. In our opinion that date should be continued for at least two reasons. First, Byron-Bethany Irrigation District ("BBID") recently filed a Petition in the Superior Court of Contra Costa County challenging the SWRCB's jurisdiction to issue any curtailment notice dealing with BBID's water rights (and other claims). That case is now being coordinated in Santa Clara County with other similar cases. During the coordination, BBID will be asking the court to stay the above referenced hearing pending the outcome of the court cases. Not only are the underlying issues similar, but the SWRCB was arguably required to bring this action as a mandatory cross-complaint in court once BBID filed its action. Since BBID (and others) allege the SWRCB has acted improperly and without authority regarding the curtailment of Delta and other senior water rights, it would be inappropriate for the SWRCB to rule on its own actions, especially now that the matter is before the court.

Secondly, the ACL Hearing will include significant testimony regarding water availability, water quality, priority of rights and Delta hydrodynamics. This will necessary include not only the presentation of technical evidence, but also depositions of the relevant SWRCB personnel. It is unrealistic to assume that a party can find the necessary technical/expert

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witnesses, prepare the necessary testimony and participate in such a hearing within such a short time frame. We believe it would be a denial of due process to conduct the hearing so soon after the Notice. Given this, SDWA requests that the SWRCB continue this hearing until the court has ruled on BBID's soon-to-be-hear motion. Even if the court does not grant any sort of stay of this proceeding, the ACL Hearing and all deadlines associated therewith should be continued for at least 3-4 months.

2. The Key Issues listed in the Notice appear to exclude the purported underlying factual and legal bases upon which the ACL is sought. Those issues include the calculation of the available supply for in-Delta users and the many related issues. It would be unfair for the SWRCB to consider much less assess a monetary penalty against a party for diverting without allowing the party to challenge the bases on which the purported wrongful diversion was determined. The Key Issues in the Notice suggest that the SWRCB has already determined liability and the only things left to consider are mitigating circumstances. Such limitations on the hearing would also be a violation of the party's due process rights.

3. SDWA believes it is necessary to depose certain SWRCB staff members well before the hearing. We hereby request the Board issue us four (4) deposition subpoenas so that we can begin the discovery process.

Please feel free to contact me if you have any questions.

Very truly yours,

  
JOHN HERRICK, Esq

NOTICE OF INTENT TO APPEAR

South Delta Water Agency plans to participate in the water right hearing regarding

Administrative Civil Liability
against
Byron-Bethany Irrigation District

scheduled to commence
Wednesday, October 28, 2015 and continue, if necessary
on October 29 and 20, 2015
at 9:00 a.m.

Check all that apply:

- I/we intend to present a policy statement only.
I/we intend to participate by cross-examination or rebuttal only.
X I/we plan to call the following witnesses to testify at the hearing.

Table with 4 columns: NAME, SUBJECT OF PROPOSED TESTIMONY, ESTIMATED LENGTH OF DIRECT TESTIMONY, EXPERT WITNESS (YES/NO). Rows include Tom Burke, P.E., Terry Prichard, and Chris Neudeck, P.E.

(If more space is required, please add additional pages or use reverse side.)

Name (Print): John Herrick, Esq.

Mailing

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Optional:

I/we decline electronic service of hearing-related materials.

Signature: John Herrick

Dated: August 26, 2015