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BETHANY IRRIGATION DISTRICT

8  
9 BEFORE THE  
10 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

11 ENFORCEMENT ACTION ENF01949  
DRAFT CEASE AND DESIST ORDER  
12 REGARDING UNAUTHORIZED  
DIVERSIONS OR THREATENED  
13 UNAUTHORIZED DIVERSIONS OF WATER  
FROM OLD RIVER IN SAN JOAQUIN  
14 COUNTY

15 In the Matter of ENFORCEMENT ACTION  
ENF01951 – ADMINISTRATIVE CIVIL  
16 LIABILITY COMPLAINT REGARDING  
UNAUTHORIZED DIVERSION OF WATER  
17 FROM THE INTAKE CHANNEL TO THE  
BANKS PUMPING PLANT (FORMERLY  
18 ITALIAN SLOUGH) IN CONTRA COSTA  
COUNTY

SWRCB Enforcement Action  
ENF01951 and ENF01949

BYRON-BETHANY IRRIGATION  
DISTRICT'S OPPOSITION TO  
STATE WATER CONTRACTORS'  
MOTION TO STRIKE TESTIMONY  
OF RICK GILMORE AND MOTION  
TO EXCLUDE IRRELEVANT  
EVIDENCE

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I. INTRODUCTION

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2 Byron-Bethany Irrigation District (BBID) submitted the testimony of its General  
3 Manager Rick Gilmore (Gilmore) to address, among other things, BBID's perspective on  
4 water availability in the Delta in June 2015. State Water Contractors (SWC) object and  
5 seek to strike this testimony, claiming Gilmore is not qualified to testify on that issue  
6 because he is not an expert. SWC also argues that the testimony is based on a "secret"  
7 report in violation of hearsay rules and the secondary evidence rule. In so arguing, SWC  
8 mischaracterizes the facts and misapplies the law in a transparent attempt to dispose of  
9 evidence it deems unfavorable to its legal position.

10 BBID neither offers Gilmore as an expert on water availability nor provides any  
11 expert opinions. To the contrary, Gilmore offers appropriate layperson testimony  
12 regarding his observations and impressions on the status of water availability in June  
13 2015. Regarding hearsay, while SWC acknowledges the rule of law in administrative  
14 hearings making hearsay admissible, it fails to explain why the rule of hearsay  
15 admissibility does not apply in this instance. Further, the report that SWC deems  
16 "secret" and "undisclosed" was actually attached to the ACL Complaint filed by the State  
17 Water Resources Control Board (SWRCB) at the inception of this proceeding. Either  
18 way, Gilmore's comments about the report do not constitute hearsay because he does  
19 not refer to the report to prove the truth of the contents. Rather, he only refers to the  
20 report to show BBID's impression of water availability in June 2015. Gilmore's testimony  
21 thereon is proper.

22 SWC also brings a motion in limine seeking to exclude testimony on water  
23 availability evidence preceding June 13, 2015 as irrelevant. SWC fails to set forth a  
24 tenable argument as to why this information is irrelevant, highlighting that SWC is once  
25 again merely seeking to dispose of evidence it deems unfavorable to its legal position.  
26 SWC declares that the relevant time period mid-2015, ignoring the ACL Complaint itself  
27 places historical water availability analyses squarely at issue. All of the experts discuss  
28 the history of water availability issues in order to render opinions as to what happened in

1 the summer of 2015. The evidence is clearly relevant and SWC's motion must be  
2 denied.

3 II. STATEMENT OF FACTS

4 In July 2015, the SWRCB issued a Draft Cease and Desist Order to the West  
5 Side Irrigation District (WSID), Enforcement Action ENF01949 (CDO), and an  
6 Administrative Civil Liability Complaint to BBID, Enforcement Action ENF01951 (ACL).  
7 (Declaration of Michael Vergara in Support of BBID's Opposition SWC's Motion to Strike  
8 Testimony of Rick Gilmore and Motion to Exclude Irrelevant Evidence (Vergara Decl. at  
9 ¶ 2.) Attachment 5 to the ACL is a report entitled "2012-2015 Delta Salinity Conditions  
10 under a Without Project Scenario" dated June 5, 2015, prepared by Tyler Hatch/CH2M  
11 HILL and Chandra Chilmakuri/CH2M HILL." (Vergara Decl. at Exh. A.)

12 BBID submitted its Notice of Intent to Appear on September 2, 2015, naming  
13 Gilmore as a witness on the topics of "Water diversions and related issues." (Vergara  
14 Decl. at Exh. B.) On October 2 to dispose of evidence it deems unfavorable to its legal  
15 position.

16 On October 22, 2015, BBID submitted its revised Notice of Intent to Appear  
17 continuing to name Gilmore as a witness on the topic of "Key Issues 1 and 2 Water  
18 Availability, BBID Operations, diversion and use." (Vergara Decl. at Exh. C.)

19 On June 19, 2015, BBID submitted the written testimony of Gilmore. (Vergara  
20 Decl. at Exh. D.) On February 29, 2016, SWC filed its Motion to Strike Testimony of  
21 Rick Gilmore and Motion to Exclude Irrelevant Evidence (Motion). (Vergara Decl. at ¶ 7.)

22 III. ARGUMENT

23 A. Legal Standard

24 Administrative hearings and discovery procedures are governed by the Water  
25 Code (Wat. Code, § 1075 et seq.) and SWRCB regulations (Cal. Code Regs., tit. 23, §§  
26 648 et seq.), which incorporate portions of the Administrative Procedure Act (Gov. Code,  
27 § 11400 et seq., 11513), Evidence Code sections 801-805 and the Civil Discovery Act  
28 (Code Civ. Proc., § 2016.010 et seq.).

1 Pursuant to Government Code section 11513, an administrative hearing is not  
2 conducted according to technical rules relating to evidence and witnesses. Instead, any  
3 relevant evidence is admissible if “it is the sort of evidence on which responsible persons  
4 are accustomed to rely in the conduct of serious affairs” regardless of any common law  
5 or statutory rule that might make the admission improper in civil actions. (Gov. Code, §  
6 11513(c).) “Hearsay evidence may be used for the purpose of supplementing or  
7 explaining other evidence but over timely objection shall not be sufficient in itself to  
8 support a finding unless it would be admissible over objection in civil actions.” (Gov.  
9 Code, § 11513(d).)

10 Lay witness testimony is based on the personal knowledge of a witness on the  
11 matters to which he testifies. (Evid. Code, § 702.) Lay witnesses can generally testify to  
12 things they have personally seen or heard or otherwise experienced through their own  
13 senses. (Cal. Law. Rev. Com. com, Deering’s Ann., Evid. Code, § 702; *People v. St.  
14 Andrew* (1980) 101 Cal.App.3d 450, 458 (*St. Andrew*).) Evidence Code section 800  
15 permits a non-expert witness, or layperson, to provide opinion testimony if the opinion is  
16 “(a) rationally based upon the perception of the witness and (b) helpful to a clear  
17 understanding of his testimony.” Opinion testimony that is otherwise admissible “is not  
18 objectionable because it embraces the ultimate issue to be decided by the trier of fact.”  
19 (Evid. Code, § 805.)

20 B. Gilmore Proffers Proper Layperson Testimony Regarding His Observations and  
21 Impressions of Water Availability

22 SWC objects to Gilmore’s testimony regarding “Water Availability in June 2015”  
23 found at 8:6 through 9:16 of his testimony, labeling it as “expert”. (Vergara Decl. at Exh.  
24 D.) BBID neither offers Gilmore as an expert on water availability nor provides any  
25 expert opinions. (*Id.* at Exh. B, C.) To the contrary, Gilmore offers appropriate  
26 layperson testimony regarding his observations and impressions on the status of water  
27 availability in June 2015. (Evid. Code, § 702; *St. Andrew, supra*, 101 Cal.App.3rd at  
28 458.)

1 Generally, Gilmore discusses his “his understanding of water availability” and  
2 describes his observations and involvement regarding historical water diversion,  
3 including an explanation as to when and why BBID diverted water. (Vergara Decl., Exh.  
4 D at p. 8:7-15.) He explained that BBID hired CH2M to review water quality, his  
5 understanding of the investigation CH2M performed and his impression and  
6 understanding of the results. (*Id.*, p. 8:13-28.) Gilmore described directions that he  
7 gave to CH2M to perform a fingerprinting analysis and his understanding and perception  
8 of the results. (*Id.* at p. 9:2-12.) All of the Gilmore testimony is in his capacity as  
9 General Manager of BBID for the past 24 years. (*Id.* at p. 1:27-2:2).

10 Gilmore’s observations of water availability, as well as understanding and  
11 impressions of CH2M’s work is appropriate and admissible layperson testimony.  
12 Moreover, even if some aspects of Gilmore’s testimony are interpreted as “opinion”,  
13 Evidence Code section 800 allows him to proffer opinion testimony based upon his  
14 impressions. (Evid. Code, § 800(a).) Also, the fact that his testimony involves water  
15 unavailability, which is a central issue in the litigation is likewise irrelevant. SWC may  
16 not object to the testimony because it “embraces the ultimate issue to be decided by the  
17 trier of fact.” (Evid. Code, § 805.)

18  
19 C. SWC’s Hearsay Objection is Without Merit

20 “Hearsay evidence may be used for the purpose of supplementing or explaining  
21 other evidence.” (Gov. Code, § 11513(d).) While SWC acknowledges the existence of  
22 this rule in administrative hearings, it fails to explain why the rule of hearsay admissibility  
23 does not apply in this instance. As explained *supra*, Gilmore properly offers his  
24 observations and impressions of water availability in the Delta and utilizes the CH2M  
25 report to explain how he gained his understanding on certain aspects of water availability  
26 issues. As such, to the extent that the report is considered “hearsay”, it is admissible to  
27 supplement and explain Gilmore’s observations and impressions.

28 Further, the CH2M report that SWC deems “secret” and “undisclosed” was

1 actually attached to the ACL Complaint filed by the SWRCB at the inception of this  
2 proceeding. (Vergara Decl. at Exh. A.) Thus, SWC's purported concerns about testing  
3 the reliability of the testimony because the document is "secret" are moot. SWC's  
4 concern regarding secondary evidence is likewise moot because the report exists and  
5 available to all parties. (*Ibid.*)

6 Finally, Gilmore's comments about the report do not constitute hearsay because  
7 he does not refer to the report to prove the truth of the contents. Rather, he only refers  
8 to the report to show BBID's impression of water availability in June 2015. Irrespective  
9 of whether the report was right or wrong (that is for the experts to determine), BBID  
10 formed an understanding upon which it based water diversion decisions. Gilmore's  
11 testimony thereon is proper.

12 D. SWC's Motion to Exclude Historical Water Availability Testimony Must Fail

13  
14 SWC moves to exclude evidence of water availability outside the time periods at  
15 issue in the enforcement proceedings based on relevance.<sup>1</sup> "Relevant evidence means  
16 evidence...having any tendency in reason to prove or disprove any disputed fact that is  
17 of consequence to the determination of the action." (Evid. Code, § 210.) Evidence is  
18 relevant if it has some tendency in reason, however slight, to prove or disprove an issue  
19 in the case. (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1048.) The weight of the  
20 evidence is not a factor in determining relevance (admissibility). (*People v. Clark* (2011)  
21 52 Cal.4th 856, 923.) Rather, the weight of the evidence is determined by the jury in  
22 arriving at a verdict. (*People v. Cordova* (1979) 97 Cal.App.3d 665, 669.)

23 SWC argues that water availability evidence should essentially be considered in a  
24 vacuum by only looking at the circumstances during the summer of 2015 during the  
25 timeframe BBID and WSID were ordered to cease water diversions. However, SWC  
26 fails to set forth a tenable argument as to why the historical water availability analyses

27 \_\_\_\_\_  
28 <sup>1</sup> SWC defines the time periods at issue as June 13-June 25, 2015 as to BBIC and post-May 1, 2015 as to  
WSID.

1 are not relevant. Instead, SWC complains about the volume of evidence at issue in  
2 discussing historical water availability and concludes that because the “unauthorized  
3 diversions” were in 2015 nothing else matters. Indeed, even the ACL Complaint itself  
4 places historical water availability analyses squarely at issue by attaching the CH2M  
5 report entitled “2012-2015 Delta Salinity Conditions under a Without Project Scenario.”  
6 (Vergara Decl. at Exh. A.) Not only does the title of the report place historical water  
7 availability data in issue, the substantive text of the report is replete with discussions of  
8 historical water availability data. (*ibid.*)

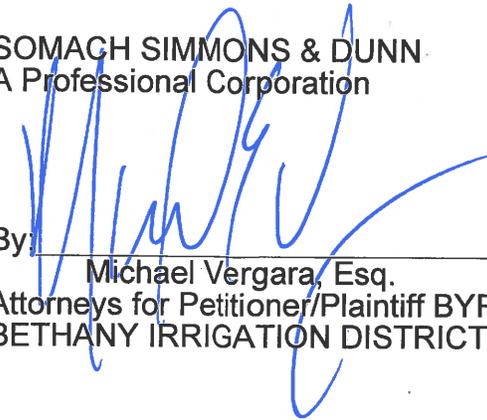
9 In fact, all of the experts discuss historical water availability issues in order to  
10 render opinions regarding the appropriateness of diversions in 2015. Thus, evaluation of  
11 the historical water data has “some tendency in reason” to prove that BBID had water  
12 available in June 2015. Moreover, as the historical data that SWC seeks to exclude is  
13 significantly probative of “the central dispute in these enforcement proceedings” there is  
14 little risk — and no reason — that its value could be substantially outweighed by the  
15 probability that its admission will necessitate an undue consumption of time. As the  
16 Motion fails to demonstrate either irrelevance or risk of undue consumption of time, BBID  
17 respectfully requests that the court deny SWC’s motion to exclude the historical water  
18 availability testimony.

19 IV. CONCLUSION

20 For the foregoing reasons, BBID respectfully requests the SWRCB deny SWC’s  
21 Motion to Strike and Motion to Exclude Irrelevant Testimony.

22 Dated: March 4, 2016

SOMACH SIMMONS & DUNN  
A Professional Corporation

23  
24  
25 By:   
26 Michael Vergara, Esq.  
27 Attorneys for Petitioner/Plaintiff BYRON-  
28 BETHANY IRRIGATION DISTRICT

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**PROOF OF SERVICE**

I am employed in the County of Sacramento; my business address is 500 Capitol Mall, Suite 1000, Sacramento, California; I am over the age of 18 years and not a party to the foregoing action.

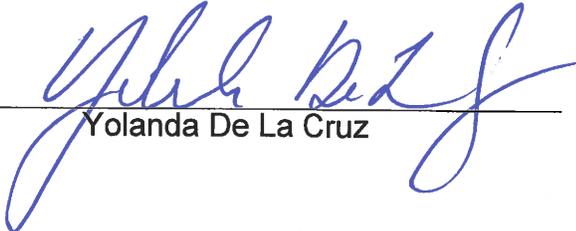
On March 4, 2016, I served the following document(s):

**BYRON-BETHANY IRRIGATION DISTRICT'S OPPOSITION TO STATE WATER CONTRACTORS' MOTION TO STRIKE TESTIMONY OF RICK GILMORE AND MOTION TO EXCLUDE IRRELEVANT EVIDENCE**

X (via electronic mail) by causing to be delivered a true copy thereof to the person(s) and at the email addresses set forth below:

**SEE ATTACHED SERVICE LIST**

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 4, 2016 at Sacramento, California.

  
\_\_\_\_\_  
Yolanda De La Cruz

**SERVICE LIST OF PARTICIPANTS  
BYRON-BETHANY IRRIGATION DISTRICT  
ADMINISTRATIVE CIVIL LIABILITY HEARING  
(Revised 9/2/15; Revised: 9/11/15)**

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CEASE AND DESIST ORDER HEARING**

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