

1 ANDREW TAURIAINEN (SBN 214837)
JOHN PRAGER (SBN 289610)
2 Office of Enforcement
State Water Resources Control Board
3 1001 I Street, 16th Floor
Sacramento, California 95814
4 Telephone: (916) 341-5445
Fax: (916) 341-5896
5 E-mail: andrew.tauriainen@waterboards.ca.gov

6 Attorneys for the Prosecution Team

7 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

| | | | |
|----|---|---|--------------------------------------|
| 8 | In the Matter of the Administrative Civil | } | PROSECUTION TEAM'S OPPOSITION |
| 9 | Liability Complaint Against Byron | | |
| | Bethany Irrigation District |) | TO MOTIONS IN LIMINE |
| 10 | In the Matter of the Draft Cease and | } | |
| 11 | Desist Order Against the West Side | | |
| | Irrigation District |) | |

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1 **I. INTRODUCTION**

2 The Prosecution Team agrees with the general sentiment expressed by Central Delta
3 Water Agency (CDWA) and Banta-Carbona Irrigation District (BCID) – “let’s do it right.”
4 These enforcement matters address important issues regarding State Water Board staff’s
5 response to the worst drought in decades, and diversions by Byron-Bethany Irrigation
6 District (BBID) and actual or threatened diversions by the West Side Irrigation District
7 (WSID) during times when there was no water available for their rights. The Hearing Officers
8 should hear the evidence and the Board should decide these matters on a robust record.

9 But CDWA, BCID, BBID, WSID, South Delta Water Agency (SDWA), Patterson
10 Irrigation District (PID) and San Joaquin Tributaries Authority (SJTA) move to exclude much
11 of the record, asking the Hearing Officers to apply the wrong standards in determining
12 admissibility of evidence in State Water Board adjudicative proceedings, and often
13 improperly arguing about the weight of the evidence under the guise of admissibility. This is
14 not a trial court proceeding, no matter how aggressively these parties try to make it like one.
15 The technical rules relating to evidence and witnesses in trial court do not apply, and the
16 governing regulations and procedures establish a liberal standard for admissibility of
17 evidence.

18 The Prosecution Team respectfully suggests that the way to “do it right” is for the
19 Hearing Officers to admit the evidence and then weigh the evidence accordingly. It is
20 premature to consider arguments about the weight of the evidence before the hearing, and
21 such arguments now should be disregarded. The parties will have ample opportunity to
22 argue the weight of the evidence in closing briefs. The motions in limine against the
23 Prosecution Team’s witnesses and evidence should be denied.

24 This brief addresses the motions in limine filed on February 29 by CDWA and BCID
25 (CDWA/BCID Motion), WSID and PID (WSID/PID Motion), SJTA (SJTA Motion), BBID and
26 SDWA (BBID/SDWA Motion), and BBID’s February 29 Motion to Strike (BBID Motion to
27 Strike). Given the length and scope of these motions, the Prosecution Team requests leave,
28 if necessary, to submit this brief in its entirety.

1 **II. LEGAL STANDARDS**

2 This is an administrative hearing, conducted according to the provisions of California
3 Code of Regulations, title 23, sections 648-648.8, the underlying statutes of the Government
4 Code, and sections 801-805 of the Evidence Code. (23 Cal. Code Regs. § 648, subd. (b).)
5 This is not a civil or criminal trial, nor even a formal adjudicative hearing under Chapter 5 of
6 the Administrative Procedures Act. The Board is not required to conduct adjudicative
7 hearings according to the technical rules relating to evidence and witnesses in trial court.
8 (Cal. Gov. Code, § 11513, subd. (c).) “Any relevant evidence shall be admitted if it is the
9 sort of evidence on which responsible persons are accustomed to rely in the conduct of
10 serious affairs, regardless of the existence of any common law or statutory rule which might
11 make improper the admission of the evidence over objection in civil actions.” (*Id.*) Hearsay
12 evidence is admissible and may be used to supplement or explain other evidence. (*Id.*, §
13 11513, subd. (d).) Over a timely objection, however, hearsay is not sufficient in itself to
14 support a finding unless it would be admissible over objection in a civil action. (*Id.*) The goal
15 of any adjudicative hearing is to gain information without undue expense to the parties, and
16 thus the Hearing Officers may “exclude evidence if its probative value is substantially
17 outweighed by the probability that its admission will necessitate undue consumption of
18 time.” (*Id.*, § 11513 subd. (f).)

19 **III. ARGUMENT**

20 **A. The Board may rely on testimony and expertise of Division of Water Rights**
21 **staff relating to the subject matter of these proceedings**

22 CDWA, BCID, BBID and SDWA move to exclude or limit the testimony of Katherine
23 Mrowka and Brian Coats based on an alleged lack of expertise in water supply and demand
24 issues. (CDWA/BCID Motion, at pp. 5-8; BBID/SDWA Motion, at pp. 10-13.) WSID and PID
25 join that motion. (WSID/PID Motion, at p. 11.) WSID and PID move to exclude or limit the
26 testimony of Kathryn Bare based on an alleged lack of expertise in the subject matter of her
27 testimony. (*Id.* at pp. 4-5.) CDWA and BCID join that motion. (CDWA Motion, at p. 12.)
28 These motions should be denied.

1 **1. The moving parties improperly and prematurely argue regarding the**
2 **weight of staff testimony, not the admissibility of that testimony**

3 The parties' expert witness arguments are barely-concealed attacks on the weight of
4 the testimony offered by Ms. Mrowka, Mr. Coats and Ms. Bare, rather than on the
5 admissibility of the testimony. In arguing that the witnesses do not have requisite expertise,
6 the moving parties primarily rely on small portions of transcripts of early witness depositions.
7 (CDWA/BCID Motion, at pp. 5-7 [Coats and Mrowka]; WSID/PID Motion, at pp. 6, 7, 9, 10
8 [Bare]; BBID/SDWA Motion, p. 12 [Coats]; SJTA Motion, pp. 5-6 [Coats].) Although any
9 arguments about the weight of the evidence are premature at this stage, it is important to
10 note that these depositions were taken in November, 2015, many months after the relevant
11 events, and several weeks before staff had any opportunity prepare their witness
12 statements. Neither BBID nor WSID had provided their Subpoena responses at the time of
13 the depositions, so staff had not even reviewed that significant evidence. As a result, to the
14 extent that the deposition transcripts appear to conflict with the witness testimony, the
15 witness testimony is more reliable. But the question here is whether the testimony should be
16 admitted at all, and under the standards governing admissibility in these proceedings, the
17 answer is emphatically yes. The parties will have ample opportunity to argue the weight of
18 the evidence in the closing briefs.

19 **2. Division staff are experts in the subject matter of these proceedings**

20 To the extent that the moving parties do address admissibility, they apply the wrong
21 standards. The moving parties rely on Evidence Code section 720, which governs the
22 qualifications of expert witnesses in trial court, and on cases interpreting section 720.
23 (CDWA/BCID Motion, at pp. 2, 6-8; WSID/PID Motion, at pp. 2-11; BBID/SDWA Motion, at
24 pp. 10-13.) Evidence Code section 720 does not apply in Board adjudicative proceedings.
25 (23 Cal. Code Regs. § 648, subd. (b).) Staff witness testimony easily meets the governing
26 relevance and admissibility standards. (Gov. Code § 11513, subd. (c).)

27 The moving parties dramatically misconstrue the role of staff expertise in the Board's
28 day-to-day functions and in supporting the Board's decisions in adjudicatory proceedings.
Staff witnesses qualify as experts where the type of analysis at issue is their business.

1 (*Greenebaum v. City of Los Angeles* (1984) 153 Cal.App.3d 391, 413.) Staff witnesses may
2 provide both percipient and expert testimony, any of which the Board may properly rely on
3 as substantial evidence supporting decisions in these enforcement proceedings. (*Center for*
4 *Biological Diversity v. California Department of Forestry and Fire Protection* (2014) 232
5 Cal.App.4th 931, 948; *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th
6 884, 900; *City of Rancho Cucamonga v Regional Water Quality Control Board* (2006) 135
7 Cal.App.4th 1377, 1387; *Anthony v. Snyder* (2004) 116 Cal.App.4th 643, 660-661;
8 *Browning-Ferris Industries v. City Council* (1986) 181 Cal.App.3d 852, 866; *Coastal*
9 *Southwest Dev. Corp. v. California Coastal Zone Conservation Com.* (1976) 55 Cal.App.3d
10 525, 535-536.) Although the Division staff witness here are experts, it is important to note
11 that even under the technical rules of evidence, non-expert opinion testimony is allowed
12 where the testimony is rationally based on the witness' perception and is helpful to a clear
13 understanding of the witness' testimony. (Cal. Evid. Code § 800.)

14 Even if section 720 applies, Ms. Mrowka, Ms. Bare and Mr. Coats all easily qualify as
15 expert witnesses. The fundamental business of the Division of Water Rights is to implement
16 the water rights priority system, and to understand the available water supplies and the
17 demands placed on those supplies throughout California. Ms. Mrowka and Mr. Coats have
18 been with the Division of Water Rights as Water Resources Control Engineers (WRCEs),
19 senior WRCEs, and now as a program manager and a supervising senior WRCE,
20 respectively, for many years. (WR-8, WR-10.) Ms. Bare also has long experience as a
21 WRCE with the Division. (WR-14.) In response to the drought emergency, each has taken
22 on important roles in examining and quantifying drought water supplies and demands in
23 impacted watersheds and sub-watersheds, and in investigating complaints of unauthorized
24 diversion. They are experts in the subject matter of their testimony.

25 To the extent that the parties argue that Ms. Mrowka, Mr. Coats and Ms. Bare offer
26 testimony beyond the scope of their expertise, Evidence Code sections 801 through 805 do
27 apply to these proceedings. Section 801 limits the scope of opinion testimony to opinion:

28 (a) Related to a subject that is sufficiently beyond common experience that

1 the opinion of an expert would assist the trier of fact; and (b) Based on matter
2 (including his special knowledge, skill, experience, training, and education)
3 perceived by or personally known to the witness or made known to him at or
4 before the hearing, whether or not admissible, that is of a type that
5 reasonably may be relied upon by an expert in forming an opinion upon the
6 subject to which his testimony relates, unless an expert is precluded by law
7 from using such matter as a basis for his opinion. (Cal. Evid. Code § 801.)

8 The expert testimony offered by Ms. Mrowka, Mr. Coats and Ms. Bare easily meets
9 these subject matter standards. There can be little question that technical matters regarding
10 drought water availability and enforcement issues are sufficiently beyond common
11 experience that staff testimony would clearly assist the Hearing Officers. Moreover, the
12 testimony of Ms. Mrowka, Ms. Bare and Mr. Coats regarding these matters is based on their
13 special knowledge, skills, experience and training developed at least in part in the course of
14 performing their duties, and by reviewing information developed and submitted in
15 anticipation of their appearance as witnesses in these proceedings.

16 **B. Testimony regarding staff's understanding and application of the legal
17 framework for the drought water supply and demand analysis is proper and
18 relevant to understanding the Division's drought actions and the issues
19 framed in these enforcement proceedings, not legal argument**

20 Several parties move to strike or limit the testimony of Katherine Mrowka and Brian
21 Coats, arguing that their testimony includes improper legal argument. (BBID/SDWA Motion,
22 pp. 16-18; CDWA/BCID Motion, p. 11; WSID/PID Motion, p. 11; SJTA Motion, pp. 3-5.)
23 WSID and PID move to strike portions of Kathryn Bare's testimony on the same basis.
24 (WSID/PID Motion, pp. 5-11.) The moving parties misconstrue the testimony. The testimony
25 at issue here is not legal argument, but rather each staff person's description of his or her
26 understanding of the legal framework governing the Division's functions, and how that
27 understanding guided staff decisions regarding water availability and these enforcement
28 actions. Such understanding is necessary, proper, and relevant to these enforcement
proceedings, as it will be up to the Board to determine whether staff acted within the law.
The testimony also provides staff recommendations for Board findings and orders, which
are fundamental to administrative proceedings. These motions should be denied.

1 To the extent that staff witnesses testify as to ultimate issues in these proceedings,
2 such testimony is proper. An expert's opinion is admissible when it is "[r]elated to a subject
3 that is sufficiently beyond common experience that the opinion of an expert would assist the
4 trier of fact." (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178.) Evidence
5 Code section 805 permits testimony regarding an ultimate issue in a case. (*People v.*
6 *Spence* (2012) 212 Cal.App.4th 478, 507; Evid. Code § 805.) There is no hard and fast rule
7 that an expert cannot be asked a question that coincides with the ultimate issue in the case.
8 (*People v. Wilson* (1944) 25 Cal.2d 341, 349.) Rather, "admissibility depends on the nature
9 of the issue and the circumstances of the case," with "a large element of judicial discretion
10 involved." (*Id.*) Expert opinions on factual issues and ultimate issues are nonetheless
11 admissible even when they closely relate to questions of law. (*Summers, supra*, 69
12 Cal.App.4th at 1180.) Experts testifying with regard to questions involving matters of within
13 the scope of their expertise often must "translate" legal documents, standards, and
14 regulations, not to vary or contradict legal language, but to assist a court in understanding
15 specialized factual issues in the context of the law. (*Richfield Oil Corp. v. Crawford* (1952)
16 39 Cal.2d 729, 741; *Bloxham v. Saldinger* (2014) 228 Cal.App.4th 729, 737-738, as
17 *modified on denial of reh'g* (Aug. 27, 2014), *review denied* (Oct. 15, 2014).) For example,
18 courts have long accepted testimony from surveyors and engineers, who assist courts in
19 "translating" the legal language of deeds and boundary descriptions in accordance with
20 accepted surveying practices, to assist in resolving property disputes. (*Richfield Oil Corp.*,
21 *supra*, 39 Cal.2d at 741.)

22 Much like surveyors and outside engineers, Division engineers and other technical
23 staff must understand and often apply legal and regulatory requirements in the course of
24 performing their duties, such as in permitting or analyzing drought water availability supply
25 and demand and/or recommending enforcement actions and findings. This is essential to
26 how the State Water Board conducts its business. With this background, Ms. Mrowka (WR-
27 7, WR-209), Mr. Coats (WR-9, WR-210) and Ms. Bare (WR-13, WR-216) do not offer legal
28 argument. Rather, each witness explains his or her understanding of the legal, regulatory

1 and policy frameworks, and how they applied that understanding in the course of their
2 duties to develop assumptions used in assessing drought water supply and demand, in
3 investigating BBID and WSID, and in recommending enforcement action. They also explain
4 how their opinions on factual issues relate to allegations in the ACL Complaint and Draft
5 CDO.

6 The purpose of this testimony is to help the Board determine whether staff properly
7 understood and applied the law to the facts in these cases. For example, in Ms. Mrowka's
8 testimony for the Prosecution Team's case in chief (WR-7), she states "there was no water
9 was available under the priority of License 1381 as of May 1, 2015" for the purposes of
10 explaining the Division's water supply and demand analysis, why the Division notified right
11 holders when it did, and why it believes it had sufficient evidence to pursue enforcement
12 action against BBID. (WR-7, p. 3.) She similarly references "applicable periods of non-
13 availability" to describe drought water supply and demand analysis as it relates to BBID and
14 the basis for allegations in the ACL Complaint. (*Id.*) For WSID and BBID, she also offers an
15 overview of the Division's investigation and the basis for pursuing enforcement action, and
16 recommends findings. (WR-7, pp. 4-20.)

17 Mr. Coats, in his testimony, references statutes and law as he understood them to
18 apply to the water supply and demand analyses. (WR-9, pp. 1-3.) Mr. Coats also discusses
19 relevant considerations under Water Code section 1055.3, in the context of applying the
20 facts to these considerations to develop a recommendation to the Board for the ACL
21 amount. (WR-9, pp. 20-22.) Ms. Bare describes her understanding of the legal framework
22 for wastewater change petitions, drainage, and her understanding of the legal ramifications
23 of WSID's admissions that it diverted water after the May 1 and June 12 Unavailability
24 Notices without valid claim of right, which guided her investigation and recommendations for
25 enforcement, and Ms. Bare recommends findings. (WR-13, pp. 1-6.)

1 **C. The *Kelly* test for a new scientific test procedure is irrelevant to this**
2 **proceeding because the staff conclusions as to water availability in the**
3 **relevant time period are based on expert opinion, not a new scientific test or**
4 **procedure**

5 Several parties argue that the Board should exclude the opinions of Prosecution
6 Team witnesses as to the amount of water available in the relevant time periods because
7 there is no foundation to establish that the staff's water availability supply and demand
8 analysis meets the requirements of *People v. Kelly* (1976) 17 Cal.3d 24. (BBID/SDWA
9 Motion, pp. 13-14, CDWA/BCID Motion, p. 9.) These motions should be denied.

10 The arguments regarding the *Kelly* test lack merit and are inapposite because the
11 evidence presented by the Prosecution Team's witnesses Mrowka, Coats, and Yeazell is
12 not based on the application of a new scientific technique, device, procedure or method to
13 which the *Kelly* test applies. Rather, the Division of Water Rights staff employed standard or
14 elementary mathematics to develop an accounting of the quantity of water forecasted to be
15 available and the demand for water in the relevant geographic areas, in order to compare
16 supply and demand. The parties may question the inputs Division staff made to the various
17 categories of water supply theoretically available to the diverters, as well staff judgments as
18 to the categories of right to consider when analyzing the quantity of demand involved in the
19 analysis, but these are criticisms that go to the weight of the evidence, not its admissibility,
20 and should be disregarded now.

21 “In applying the *Kelly* test, it is important to distinguish between expert testimony and
22 scientific evidence; the former is not subject to the special admissibility rule of *Kelly*, which
23 applies to novel devices or processes.” (1 Jefferson, Cal. Evidence Bench Book (Cont. Ed.
24 Bar 4th Ed.) §21.70, p. 21-52.) “This distinction is based on the fact that [w]hen the witness
25 gives his personal opinion on the stand—even if he qualifies as an expert—the jurors may
26 temper their acceptance of his testimony with a healthy skepticism born of their knowledge
27 that all human beings are fallible. (*People v. Bui* (2001) 86 Cal.App.4th 1187, 1195 (citing
28 *People v. McDonald* (1984) 37 Cal.3d 351, 272, overruled on another ground in *People v.*

1 *Mendoza* (2000) 23 Cal.4th 896, 914.)” (1 Jefferson, Cal. Evidence Bench Book, *supra*, §
2 21.70, p. 21-52; § 21.49, p. 21-33.)

3 In this case, the Prosecution Team witnesses provide expert opinion as to the
4 amount of water available for diversion during the relevant time period based on available
5 information. Rather than a new scientific test or procedure, the Board’s staff applied their
6 substantial experience and expertise in making determinations as to which categories of
7 water are relevant to its water availability analysis, and how the categories of relevant
8 diverters should be treated within it. These are determinations Division staff engineers make
9 on a daily basis with respect to water availability, but on a much smaller scale than was at
10 issue in connection with the current drought. (WR-7, p. 3.) Under these circumstances, the
11 *Kelly* test simply doesn’t apply. (1 Jefferson, Cal.Evidence Bench Book, *supra*, § 21.70, p.
12 21-52; § 21.49, p. 21-33.) Again, any criticisms of the witness’ conclusions go to the weight
13 the Board should give their testimony, not to its admissibility, and should be disregarded.

14 **D. The testimony of Mrowka, Coats, and Yeazell are not improperly cumulative,**
15 **and Mrowka may properly rely on the testimony of Coats**

16 BBID and SDWA complain that the testimony of Kathy Mrowka, Brian Coats, and Jeff
17 Yeazell, are improperly cumulative, and characterize their testimony as “[p]arading multiple
18 experts . . . to all testify about the same facts.” (BBID/SDWA Motion, pp. 14-15, 18-19.)

19 The moving parties mischaracterize these witnesses’ testimony. Kathy Mrowka, Brian
20 Coats, and Jeff Yeazell, are Division engineers who worked as a team in this matter to
21 develop the factual information needed to draw conclusions about the relevant facts
22 including how much water was available during the specific time periods at issue in each
23 case. Each of them played a particular role with particular responsibilities, and each testifies
24 to that extent. These motions should be denied.

25 For example, Jeff Yeazell gathered the relevant data and analyzed it performing
26 basic calculations under the supervision of Brian Coats, Kathy Mrowka and John O’Hagan
27 who determined which inputs were relevant to the comparison of water supply forecast to
28 demand. Brian Coats was a liaison between Mr. Yeazell and Ms. Mrowka, and he gave

1 direction to Mr. Yeazell as to the judgments Mr. Coats made in consultation with Ms.
2 Mrowka and Mr. O'Hagan concerning the inputs to the analysis. Mr. Coats' written testimony
3 describes the methods by which he took the information from Mr. Yeazell to draw
4 conclusions about the supply of water available to the Defendants during the time periods at
5 issue in each case, and he testifies as to the recommendations he made to his supervisors
6 concerning the outcome of Mr. Yeazell's analysis. (WR-9, pp. 1, 18-20.) Ms. Mrowka, in a
7 senior management position, made determinations as to the scope and priority of each
8 defendants' right to divert, and used the conclusions from the work of Messrs. Coats and
9 Yeazell to decide whether the Defendants diverted water in excess of their rights. (WR-7,
10 pp. 4, 16.) In simple terms, Yeazell testifies to the mathematical analysis, Coats testifies to
11 the inputs, and Mrowka testifies to the decisions made based upon the results. None of the
12 witnesses overlap in this regard. Each provides a part of the testimony needed to establish
13 the ultimate factual issues in this case, and their testimony is not made inadmissible
14 because it may touch upon the ultimate factual issues. (Evid. Code, § 805.)

15 To the extent that any of these witnesses rely on the statements or conclusions of
16 other witnesses, reference to those other witnesses' statements is not an effort to seek
17 admission of the same evidence twice. Rather, referring to other witnesses' statements and
18 opinions is an effort to provide the foundation for the expert opinions that are presented by
19 each witness, which is proper in these proceedings. (Evid. Code, §§ 801, 802, 804, 805.) In
20 short, it is not cumulative, but foundational for the each witness' conclusions.

21 As with parties' other criticisms of the testimony offered by the Prosecution Team,
22 those criticisms are only relevant to the weight to be given the witnesses' statements, and
23 are not relevant to their admissibility. If a foundational witness' testimony is excluded or
24 deemed unreliable by the Board, the issue becomes what, if any, effect that might have on a
25 derivative opinion of another witness that may have relied on that foundational witness'
26 testimony. The parties' complaints of cumulative testimony are not a legitimate basis for
27 excluding any testimony.

1 **E. The witnesses lay proper foundation for admissibility in these proceedings**

2 CDWA and BCID move to exclude or limit the testimony of Katherine Mrowka and
3 Brian Coats as lacking foundation. (CDWA/BCID Motion, at pp. 3, 10-11.) WSID and PID
4 join that motion. (WSID/PID Motion, at p. 11.) WSID and PID move to exclude the testimony
5 of Kathryn Bare as lacking foundation. (*Id.*, at pp. 5, 6, 10.) CDWA and BCID join that
6 motion. (CDWA/BCID Motion, at p. 12.) Again, these arguments are primarily aimed at the
7 weight of the evidence, and thus are premature. The parties also apply the wrong legal
8 standards, and broadly misconstrue the testimony. These motions should be denied.

9 The moving parties rely on Evidence Code sections 400 and 401, regarding the
10 admissibility of evidence and preliminary facts. (See, e.g., CDWA/BCID Motion, at p. 3.) But
11 these sections do not apply in Board adjudicative proceedings, which are governed by the
12 relaxed admissibility standards under Government Code section 11513. (23 Cal. Code
13 Regs. § 648, subd. (a).) Moreover, the moving parties entirely rely on conclusory statements
14 about broad swaths of witness testimony, without specific example or discussion. To the
15 extent that the parties object to testimony relating to foundation for staff’s understanding of
16 applicable laws, regulations and policies, such knowledge and expertise is developed in the
17 course of performing their duties, which are described in the witness statements. The same
18 for staff’s understanding of technical issues. None of the moving parties can make specific
19 objection to testimony that allegedly lacks foundation under the proper governing standards,
20 because the testimony all establishes the proper foundation and “is the sort of evidence on
21 which responsible persons are accustomed to rely in the conduct of serious affairs.” (Gov.
22 Code § 11513, subd. (c).)

23 **F. The Michael George declaration properly describes the Delta Watermaster’s**
24 **authorization for the Assistant Deputy Director to proceed with the BBID**
25 **and WSID enforcement actions**

26 BBID moves to strike the Declaration of Michael George and any reference to that
27 declaration in the Prosecution Team’s February 22 Opposition to BBID’s Motions to
28 Dismiss, alleging that the George Declaration includes impermissible legal conclusions, and
the Declaration constitutes hearsay, speculation, argument and improper opinion. (BBID

1 Motion to Strike, pp. 1, 4-6.) Mr. George's Declaration explains how he authorized the
2 Assistant Deputy Director for Water Rights to proceed with the BBID and WSID enforcement
3 actions. BBID's motions should be denied.

4 Mr. George's Declaration explains his role in the investigation and enforcement
5 action against WSID, and describes his authorization to the Assistant Deputy Director for
6 Water Rights to issue the WSID and BBID enforcement actions. (Decl. of Michael George in
7 Support of PT's Opp. to BBID Mot. to Dismiss/Delegation, pp. 1-2.) Insofar as Mr. George
8 references the Water Code and State Board resolutions, he is not offering legal argument,
9 but rather factual testimony of his understanding of his authority as Delta Watermaster, how
10 his understanding of his role influenced his decision making in the investigation and
11 enforcement action against BBID, and his authorization to the Assistant Deputy Director for
12 Water Rights to proceed with the enforcement actions in the Delta. (*Id.*) This testimony of
13 fact is offered to assist the Board in determining whether Mr. George and the Assistant
14 Deputy Director acted in accordance with the law.

15 It is notable that BBID does not object to Mr. George's written testimony, even though
16 that testimony also describes Mr. George's understanding of his authority as Delta
17 Watermaster, including the authority to authorize Division of Water Rights staff to undertake
18 enforcement actions in the Delta, and his role in the WSID enforcement matter. (WR-21, pp.
19 1-2.) Although Mr. George was not initially offered as an expert witness, he is an active
20 member of the State Bar of California (SBN 225704), he has served as Delta Watermaster
21 for over a year, and as such has legal expertise necessary to interpret the Water Code and
22 Board resolutions relating to the Delta Watermaster's authority.

23 Insofar as Mr. George describes his verbal authorization to the Assistant Deputy
24 Director for Water Rights to issue the enforcement actions, that description is not hearsay
25 because it relates to an operative fact at issue in BBID's Motion to Dismiss, that is, whether
26 Mr. George authorized the Assistant Deputy Director to proceed with the enforcement
27 actions. (*People v. Fields* (1998) 61 Cal.App.4th 1063, 1068-1069.) The State Water Board
28 resolutions delegating authority to the Delta Watermaster do not require that the Delta

1 Watermaster provide written authorization to the Deputy Director for Water Rights to
2 proceed with enforcement actions in the Delta. (See, Resolution 2012-0048, p. 3;
3 Resolution 2015-0058, p. 3.) The statement also shows the effect on the Assistant Deputy
4 Director, who issued the enforcement actions as a result. Mr. George will appear at hearing
5 and be available for cross-examination. Even if, for the sake of argument, Mr. George's
6 declaration contains hearsay, it is admissible in these proceedings pursuant to Government
7 Code section 11513, subdivision (d), as it is offered to supplement and explain other
8 evidence, including the ACL Complaint and the Draft CDO. The Hearing Officers may
9 properly admit Mr. George's declaration and weigh it accordingly in considering BBID's
10 Motion to Dismiss.

11 The real problem BBID has with Mr. George's Declaration is it helps explain and
12 correct harmless errors contained in the ACL Complaint and Draft CDO. As described in the
13 Prosecution Team's Opposition to BBID's Motion to Dismiss, and the Declaration of Andrew
14 Tauriainen submitted in support, the ACL Complaint and the Draft CDO did not properly
15 describe the Assistant Deputy Director's authority to issue the enforcement actions,
16 although he most certainly had such authority. The errors in the enforcement documents are
17 not harmful or prejudicial to any party – except that so much briefing has now been
18 generated due to BBID's unyielding refusal to accept the explanation. But this issue is not
19 significant in the way BBID hopes it to be. The Board may correct the errors in the Draft
20 CDO should it choose to issue a final CDO, and the Division will issue a corrected ACL
21 Complaint if so directed, although by now the record reflects the Assistant Deputy Director's
22 properly delegated authority.

23 **G. The Board may consider all relevant evidence, including evidence**
24 **developed after June 12, 2015, in deciding whether to issue BBID an**
25 **Administrative Civil Liability for unauthorized diversions from June 13**
26 **through June 24, 2015**

26 BBID and SDWA move to exclude “all testimony and/or documents purporting to
27 support the June 12, 2015 water unavailability determination that were generated,
28 discovered, prepared or otherwise created by the SWRCB after June 12, 2015.”

1 (BBID/SDWA Motion, at p. 19.) This argument misconstrues the issues framed in the ACL
2 Complaint, ignores the Phase 1 Key Issues set by the Hearing Officers in Phase 1 and,
3 frankly, is also completely absurd. By its terms, the Prosecution Team would not be able to
4 submit witness statements or other documents describing the water unavailability
5 determination unless those statements were prepared before June 12, 2015. If applied
6 broadly, the other parties would face the same restriction. That is simply not how Board
7 adjudicative proceedings work. The Board will render a decision on the ACL Complaint after
8 hearing, and it may consider all relevant evidence from hearing in making that decision.

9 With this motion, BBID attempts to resuscitate the argument that the June 12, 2015,
10 unavailability notice was an enforceable order of curtailment. That argument is a straw man
11 the Prosecution Team put to rest in the Pre-Hearing Briefs of Legal Issues in the BBID ACL
12 matter. Moreover, BBID has already conceded that Board staff on July 15, 2015, issued a
13 clarification that the June 12 Notice and similar notices were not enforceable orders. (See
14 BBID's Notice of Position Regarding the State Water Resources Control Board's Authority to
15 Issue Curtailments, dated January 25, 2016.) The ACL Complaint does not seek to enforce
16 the June 12 Notice. The January 8, 2016, Notice of Rescheduled Hearing provides that the
17 relevant Key Issue for Phase 1 is "*Was the water diverted by BBID from June through June*
18 *25, 2015, if any, unavailable under its claimed pre-1914 appropriative right and all other*
19 *claims of right by BBID?"* Under the standards governing these adjudicative proceedings,
20 the Board may accept and consider all relevant evidence in considering this question.
21 BBID's motion should be denied.

22 **H. SJTA's motion to exclude several Prosecution Team exhibits should be**
23 **denied**

24 SJTA moves to exclude 69 Prosecution Team Exhibits based on purported "fatal
25 evidentiary defects relating to relevance, reliability, and hearsay." (SJTA Motion, at p. 7:20-
26 21.) BBID and SDWA join in SJTA's motion (BBID Motion, at p. 1, n.1) despite offering into
27 evidence the same or similar documents, or having their experts rely on the same or similar
28 documents, that SJTA seeks to exclude. Because SJTA's motion constitutes a premature

1 attack on the weight of the evidence, and the exhibits SJTA seeks to exclude are relevant
2 and admissible, SJTA's motion should be denied.

3 **1. SJTA's arguments regarding reliability of evidence are premature attacks**
4 **on weight of evidence, not admissibility**

5 SJTA argues in broad strokes that most of the challenged exhibits should be rejected
6 as unreliable. (SJTA Motion, at pp. 7-9.) Again, arguments about reliability of evidence go to
7 the *weight* of the evidence, not its admissibility, and are premature. The Board should
8 accept the evidence, the consider the weight of the evidence accordingly in making any
9 findings. SJTA's arguments regarding reliability should be ignored.

10 **2. The exhibits are relevant**

11 SJTA's motion should also be denied because the exhibits SJTA seeks to exclude
12 are relevant to these enforcement proceedings. In its motion, SJTA contends that 69
13 Prosecution Team exhibits falling into four categories – “news articles and website
14 screenshots,” “State Water Board notices, orders and correspondence”, “studies, reports
15 and related materials”, and “permits, statements, or other planning materials” – “do not
16 address whether BBID or WSID unlawfully diverted water in 2015, and thus are inadmissible
17 on the grounds that they are irrelevant.” (SJTA Motion, p. 8:24-26; see also SJTA Motion,
18 8:3-4 and 10:7-9.) This contention is baseless and SJTA's motion should be denied.

19 In trial court proceedings, “relevance” means the evidence has a tendency in reason
20 to prove or disprove any disputed fact of consequence to the determination of the action,
21 including the credibility of a witness or hearsay declarant. (Evid. Code, § 210; *People v.*
22 *Nelson* (2008) 43 Cal.4th 1242, 1266.) To be relevant, the evidence must relate to some
23 matter raised by the pleadings, pretrial orders or applicable substantive law and have
24 probative worth (i.e., some logical tendency to prove the matter at issue). (*Winfred D. v.*
25 *Michelin North America, Inc.* (2008) 165 CA4th 1011, 1029.) All of the exhibits SJTA seeks
26 to exclude meet this standard.

27 The “news articles and website screenshots” that SJTA moves to exclude are
28 actually three drought-related orders issued by the Governor (WR-23, 25 and 31), seven

1 newspaper articles (WR-101, 102, 103, 104, 105, 108, and 207) and one official press
2 release (WR-206). The three drought related orders relate to, and are probative of, the
3 authority and rationale for issuing water unavailability notices and pursuing enforcement
4 actions in times of drought, and are therefore relevant to these proceedings. These and
5 other official records are also subject to official notice, which the Prosecution Team requests
6 to the extent necessary. (23 Cal. Code Regs., § 648.2.) The newspaper articles and press
7 release to which SJTA objects provide evidence of BBID and WSID's actions in response to
8 the periods of announced water unavailability (WR-101, 102, 103, 104, 105, and 108),
9 document a BBID's witness's prior statement regarding the cost of replacement water (WR-
10 100), and relate to the question of whether BBID had alternative supplies in June 2015
11 (WR-206 and 207), all of which informed the Division's decision to issue the ACLC against
12 BBID and the draft CDO against WSID, helped the Division calculate the ACLC penalty
13 amount and are disputed issues in this proceeding.

14 The "State Water Board notices, orders and correspondence" about which SJTA
15 complains demonstrate the process by which the Division developed its supply availability
16 methodology and the notice provided to BBID and WSID regarding the Division's findings of
17 water unavailability (WR-24, 27, 28, 29, 30, 31, 43, 44, 45, 80, 111, 194), as well as the
18 scope and extent of the claimed water rights of BBID and WSID (WR-174, 175, 176, 177).
19 These are also subject to official notice, which the Prosecution Team requests to the extent
20 necessary. The Division's supply availability analysis is being challenged during Phase I of
21 these proceedings, BBID and WSID's awareness of the Division's findings of water
22 unavailability was a factor in bringing these proceedings as well as the calculation of the
23 penalty against BBID. The Division would not have been able to determine whether BBID
24 and WSID had diverted in excess of right without first examining the scope of those claimed
25 rights. Accordingly, all of these exhibits are directly relevant to these enforcement
26 proceedings.

27 The "studies, graphs, charts, maps, photographs and other data" to which SJTA
28 objects are also directly relevant to these proceedings. WR-60, 61, 62, 64, 65, 72, 76, 79,

1 149, 152, 153, 154, 155, and 158 are the sources from which the Division gathered data
2 and developed its methodology for the water supply availability analysis that resulted in the
3 issuance of water unavailability notices, the ACLC against BBID and the draft CDO against
4 BBID. The Division created WR-58, 59 and 81 using observed water flows after issuance of
5 the water unavailability notices to confirm the accuracy of the Division's projections in the
6 unavailability notices that are being challenged in these proceedings. WR-132, 133 and 150
7 are part of the investigation files on BBID and WSID that led to the issuance of the ACLC
8 and draft CDO, and help explain the nature of BBID and WSID's operations. Thus, these
9 exhibits are relevant and SJTA's motion should be denied.

10 Similarly, the "permits, statements, or other planning materials" SJTA seeks to
11 exclude are relevant. WR-84, 85, 86, 87, 88, 115, 116, 117, 118, 119, 120, 121, and 122
12 address the scope of BBID and WSID's claimed water rights, are probative of whether BBID
13 and WSID are subject to the unavailability notices and also provide historical usage and
14 estimated 2015 usage by which the Division was able to assess the accuracy of the
15 observed BBID and WSID diversions during the periods of unavailability. WR-159, 192 and
16 193 provide information regarding the source and quantity of WSID drainage water and City
17 of Tracy wastewater, and WR-191 addresses alternative sources of supply for BBID during
18 the period of unavailability, all of which are issues in dispute in these proceedings. Most or
19 all of these documents are subject to official notice, which the Prosecution Team requests to
20 the extent necessary. (23 Cal. Code Regs. § 648.2.)

21 Because all Prosecution Team exhibits SJTA seeks to exclude are relevant to the
22 matters in dispute in these proceedings, the Hearing Officers should deny SJTA's motion.

23 **3. SJTA's motion should be denied because the exhibits challenged on**
24 **hearsay grounds are not hearsay, or are admissible**

25 SJTA moves to exclude 49 of the Prosecution Team's exhibits on hearsay grounds.
26 However, these exhibits are admissible on the grounds that they are not hearsay, fall under
27 hearsay exceptions, or are hearsay used to supplement or explain other Prosecution Team
28 testimony and exhibits. Accordingly, all of the Prosecution Team's exhibits are admissible

1 and SJTA's motion should be denied.

2 SJTA's motion fails because several of the exhibits SJTA seeks to exclude are not
3 hearsay. Hearsay evidence is evidence of a statement that was made other than by a
4 witness while testifying at the hearing, and that is offered to prove the truth of the matter
5 stated. (Evid. Code, § 1200, subd. (a).) WR-24, 27, 28, 29, 30, 31, 43, 44, 45, 80, 101, 102,
6 104, 105, 108, and 207 are not being offered to prove the truth of the matter stated; these
7 news articles and notices are being offered to show that WSID and BBID were aware of
8 ongoing drought conditions and were put on notice of the Division's findings of water
9 unavailability, and are therefore not hearsay. WR-132, 133, and 150 are not hearsay
10 because they are photographs. While California's Evidence Code requires photographs to
11 be authenticated, photographs are not included in the Evidence Code's definition of
12 "statement." (Evid. Code, § 225.)

13 SJTA's motion also fails because the exhibits that are being offered for the truth of
14 the matters stated are admissible under hearsay exceptions. WR-23, 25, 58, 59, 60, 61, 62,
15 64, 65, 72, 76, 79, 80, 81, 111, 149, 152, 153, 154, 155, 158, 174, 175, 176, 194 and 206
16 are admissible under the official records and business records exceptions to the hearsay
17 rule because they are records prepared and maintained as a part of the regular business of
18 administrative agencies, prepared by governmental employees in the normal course of their
19 duties, Prosecution Team witnesses will testify as to the mode of their preparation, and the
20 sources of information and method of preparation (e.g., use of real-time readings from
21 gages, diversion amounts reported by WSID and BBID, and historical reports that have not
22 been challenged) are such to indicate these exhibits' trustworthiness. (Evid. Code, §§ 1271,
23 1280.) As a result, photographs are not hearsay. As these documents would be admissible
24 over any objection, they can support Board findings by themselves. (Gov. Code § 11513,
25 subd. (d).)

26 Alternatively, the DWR 120 Bulletins (WR-61, 62, 64 and 65) are excepted from the
27 hearsay rule under Evidence Code section 1340 because they are compilations of data that
28 are generally used by the business community and relied upon as accurate in the course of

1 business. These are also subject to official notice, which the Prosecution Team requests to
2 the extent necessary. (23 Cal. Code Regs. § 648.2.) WR-103 is admissible under the
3 inconsistent statement exception because it contains a statement regarding the cost of
4 replacement water made by Edwin Pattison, a BBID witness, that potentially conflicts with
5 his written testimony on this subject (BBID 242, ¶ 29), and Mr. Pattison will be able to
6 explain this apparent discrepancy at the hearing. (Evid. Code, §§ 770, 1235.)

7 Even if all of these exhibits were hearsay, which they are not, SJTA's motion should
8 still be denied. Hearsay evidence is admissible in these proceedings. (Gov. Code, § 11513,
9 subd. (d).) Here, there will be direct testimony from eight Prosecution Team witnesses and
10 more than 125 other Prosecution Team exhibits that are not hearsay supporting all
11 substantive matters addressed in the exhibits that SJTA alleges constitute hearsay.

12 Accordingly, all of the Prosecution Team's exhibits are admissible and SJTA's motion
13 should be denied in its entirety.

14 **IV. CONCLUSION**

15 For these reasons, the Prosecution Team respectfully requests that the Hearing
16 Officers deny each of the motions in limine filed against Prosecution Team witnesses and
17 exhibits.

18 Date: March 4, 2016

Respectfully Submitted,

19 

20 Andrew Tauriainen
21 **OFFICE OF ENFORCEMENT**
22 Attorney for the Prosecution Team
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