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BETHANY IRRIGATION DISTRICT
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9 BEFORE THE
10 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD
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12 ENFORCEMENT ACTION ENF01949
DRAFT CEASE AND DESIST ORDER
13 REGARDING UNAUTHORIZED
DIVERSIONS OR THREATENED
14 UNAUTHORIZED DIVERSIONS OF WATER
FROM OLD RIVER IN SAN JOAQUIN
15 COUNTY

16 In the Matter of ENFORCEMENT ACTION
ENF01951 – ADMINISTRATIVE CIVIL
17 LIABILITY COMPLAINT REGARDING
UNAUTHORIZED DIVERSION OF WATER
18 FROM THE INTAKE CHANNEL TO THE
BANKS PUMPING PLANT (FORMERLY
19 ITALIAN SLOUGH) IN CONTRA COSTA
COUNTY
20

SWRCB Enforcement Action
ENF01951 and ENF01949

BYRON-BETHANY IRRIGATION
DISTRICT'S MOTION TO STRIKE
THE DECLARATION OF MICHAEL
GEORGE IN SUPPORT OF
PROSECUTION TEAM'S
OPPOSITION TO BYRON-
BETHANY IRRIGATION
DISTRICT'S MOTION TO
DISMISS/DELEGATION

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I. INTRODUCTION

Byron-Bethany Irrigation District (BBID) objects to and moves to strike the Declaration of Michael George in Support of Prosecution Team’s Opposition to BBID’s Motion to Dismiss/Delegation (George Declaration) in the above-captioned enforcement proceeding. In conjunction therewith, BBID seeks to strike any and all references to the George Declaration included within the Prosecution Team’s Opposition Brief to BBID’s Motion to Dismiss/Delegation. BBID moves to strike the George Declaration and any references thereto in the Prosecution Team’s briefing on the grounds that Michael George (George) cannot proffer testimony as to an ultimate legal conclusion and the Declaration constitutes hearsay, speculation, argument and improper opinion and should be stricken.

II. STATEMENT OF FACTS

On July 20, 2015, the State Water Resources Control Board’s (SWRCB) Assistant Deputy Director for Water Rights John O’Hagan (O’Hagan), signed and issued the subject ACL Complaint against BBID. (Declaration of Michael E. Vergara In Support of Byron-Bethany Irrigation District’s Motion to Strike Declaration of Michael George In Support of Prosecution Team’s Opposition to Byron-Bethany Irrigation District’s Motion to Dismiss/Delegation (Vergara Decl.) at Exh. F.) It is BBID’s position that O’Hagan did not have the authority to issue the ACL Complaint. During his deposition on November 20, 2015, Mr. O’Hagan testified that his authority to sign the ACL Complaint was pursuant to a written redelegation of authority by the SWRCB’s Deputy Director. (Vergara Decl., Exh. A, p. 251:12-18.) According to his testimony, the SWRCB maintained these redelegation documents, and he agreed to supply a copy of the documents to BBID’s counsel. (*Id.*, Exh. A, p. 252:2-4.)

On the afternoon of November 20, 2015, the Prosecution Team sent an e-mail to BBID’s counsel attaching the “delegations of authority inquired about by BBID’s counsel this morning.” (Vergara Decl., Exh. B.) The e-mail attached a 2012 Redlegation Memorandum, purporting to confirm the authority of the SWRCB’s Executive Director to

1 delegate authority to issue an ACL Complaint to Mr. O'Hagan. (*Ibid.*) On January 25,
2 2016, the Prosecution Team provided new and different authority by way of two staff
3 memoranda purporting to delegate authority to issue ACL complaints to the Assistant
4 Deputy Director for Water Rights. (*Id.*, Exh. C.) Through a continued e-mail exchange
5 with the Prosecution Team, BBID continued to assert its position that the authority to
6 issue an ACL Complaint was non-delegable, absent statutory authority. (*Id.*, Exh. D.)

7 Now, and in opposition to BBID's Motion to Dismiss the ACL Complaint, the
8 Prosecution Team proffers the Declaration of the Delta Watermaster, Michael George
9 (George Decl.). (Vergara Decl., Exh. E.) In his Declaration, George sets forth the
10 legislative authority for the Delta Watermaster to issue an ACL Complaint, and declares
11 that he "verbally authorized the Assistant Deputy Director for Water Rights to issue the
12 WSID and BBID notices." (Vergara Decl., Exh. E at p. 2:14-15.)

13 III. LEGAL STANDARD

14 All SWRCB adjudicative proceedings are governed by SWRCB regulations, select
15 portions of the Administrative Procedure Act (commencing with Gov. Code, § 11400),
16 Evidence Code sections 801-805, and Government Code section 11513. (Cal. Code
17 Regs., tit. 23, § 648.) In an administrative hearing, relevant evidence "is the sort of
18 evidence on which responsible persons are accustomed to rely in the conduct of serious
19 affairs." (Gov. Code, § 11513(c).) Though administrative hearings "need not be
20 conducted according to technical rules relating to evidence and witnesses," the evidence
21 still "must be relevant and reliable" to be admissible. (*Ibid.*; *Aengst v. Bd. of Medical*
22 *Quality Assurance* (1980) 110 Cal.App.3d 275, 283.) The "presiding officer has
23 discretion to exclude evidence if its probative value is substantially outweighed by the
24 probability that its admission will necessitate undue consumption of time." (Gov. Code,
25 § 11513(f).)

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1 A. The George Declaration Contains Hearsay and Impermissible Legal Conclusion
2 and Must Be Stricken

3 To be admissible, declarations submitted to the adjudicative body “must meet all
4 statutory requirements for admissibility of evidence at trial” including that “the
5 declarations or affidavits must be from competent witnesses having personal knowledge
6 of the facts stated therein, rather than hearsay or conclusions.” (Weil & Brown, Cal.
7 Practice Guide: Civil Procedure Before Trial (The Rutter Group 2015) ¶ 9:57, p. 9(I)-33.)
8 Further, it is improper “to include legal argument in a Declaration.” (*Id.*, ¶ 9:49.5,
9 p. 9(I)-29; *In re Marriage of Heggie* (2002) 99 Cal.App.4th 28, 30, fn. 3 [holding that
10 including arguments in declarations “forces ... opposing counsel, to sort out the facts
11 that are actually supported by oath from material that is nothing more than the statement
12 of an opinion ostensibly under oath ... it makes a mockery of the requirement that
13 Declarations be supported by statements made under penalty of perjury.”].)

14 The Declarant must be competent to testify and must have personal knowledge of
15 the facts set forth in the declaration. It is not enough for the declaration simply to state
16 the Declarant has personal knowledge of the facts stated. Rather, the declaration itself
17 must contain facts showing the Declarant’s connection with the matters stated therein,
18 establishing the source of his or her information. Otherwise, the Declarant’s statement
19 he or she has such knowledge is purely a conclusion. (Evid. Code, § 702; *Osmond v.*
20 *EWAP, Inc.* (1984) 153 Cal.App.3d 842, 851.)

21 Here, a critical disputed legal issue is O’Hagan’s authority to issue an ACL
22 Complaint. It is BBID’s position that despite the issuance of staff memoranda speaking
23 to delegation, the power to issue the ACL Complaint simply cannot be delegated to
24 O’Hagan absent statutory authority. “As a general rule, powers conferred upon public
25 agencies and officers which involve the exercise of judgment or discretion are in the
26 nature of public trusts and cannot be surrendered or delegated to subordinates in the
27 absence of statutory authorization. [Citations.]” (*California School Employees Assn. v.*
28 *Personnel Com. of the Pajaro Valley Unified School Dist. of Santa Cruz County* (1970)

1 3 Cal.3d 139, 144 (*California School Employees Assn.*); see also *Bagley v. City of*
2 *Manhattan Beach* (1976) 18 Cal.3d 22, 24-25.) In contrast to discretionary action,
3 “public agencies may delegate the performance of ministerial tasks, including the
4 investigation and determination of facts preliminary to agency action. [Citations.]”
5 (*California School Employees Assn.*, *supra*, 3 Cal.3d at p. 144.) When the Legislature
6 provides an official with powers and duties personal to the individual, however, the
7 powers and duties cannot be delegated. (See *Central Delta Water Agency v. State*
8 *Water Resources Control Bd.* (2004) 124 Cal.App.4th 245, 261.)

9 Under Water Code section 1055, the power and authority to issue an ACL
10 complaint for alleged violations of Water Code section 1052 is personally vested in the
11 Executive Director. (Wat. Code, § 1055(a).) Deciding whether to issue an ACL
12 complaint requires the exercise of judgment or discretion, and is not merely ministerial.
13 Thus, the Executive Director *cannot delegate* his authority under Water Code
14 section 1055. (*California School Employees Assn.*, *supra*, 3 Cal.3d at p. 144.)

15 After O’Hagan testified under oath that his authority to issue the ACL for the basis
16 for this Enforcement Proceeding¹ was delegated pursuant to certain documents, and
17 after production of several different documents purporting to delegate authority to him,
18 the Delta Watermaster now declares under oath that he has the legal authority to
19 “verbally” delegate his authority to issue an ACL Complaint against a Delta water
20 diverter.² Setting aside the fact that this conclusion directly contradicts prior testimony of
21 O’Hagan, all facts set forth in the George Declaration and the ultimate legal conclusion
22 reached by George are improper, inadmissible and should be excluded as a matter of
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24 ¹ In the Declaration of Andrew Tauriainen In Support of Prosecution Team’s Opposition Motions to
25 Dismiss/Summary Judgment (Tauriainen Decl.), the Prosecution Team concedes that “[b]ecause BBID is
located within the Delta, the Delta Watermaster is authorized to issue this enforcement action....”
(Vergara Decl., Exh. G at p. 2:2-3.)

26 ² Oddly, while stating in his declaration that due to his understanding “that Resolution 2012-0048 was no
27 longer in force, and thus [his] position lacked delegated authority to address internal procedures related to
enforcement action in the Delta until the State Water Board adopted a new delegation resolution,”
28 (Vergara Decl., Exh. E at p. 2:7-15, emphasis in original) he apparently holds his statutory authority in
lesser esteem, and subject to delegation by mere word and a sweeping gesture.

1 law. The authority to issue the ACL Complaint against a Delta diverter, and authority to
2 delegate (the power to do so, or lack thereof) are legal issues before the Hearing Team
3 and George may not proffer testimony as to the ultimate legal conclusion. Moreover,
4 George's statement that he "verbally" authorized Mr. O'Hagan to issue the subject ACL
5 Complaint is inadmissible hearsay evidence for which there is no exception. (Evid.
6 Code, § 1200.)

7 BBID objects that this testimony is not based on personal knowledge, and thus
8 constitutes speculation, argument and improper opinion and, as such, should be
9 stricken. (Evid. Code, §§ 702, 800, 803; *People v. McAlpin* (1991) 53 Cal.3d 1289,
10 1308.)

11 V. CONCLUSION

12 For the foregoing reasons, the BBID respectfully requests that the SWRCB strike
13 the George Declaration in its entirety. In conjunction therewith, BBID requests that the
14 SWRCB strike any and all references to the George Declaration included within its
15 Opposition Brief to BBID's Motion to Dismiss/Delegation

16 Dated: February 29, 2016

SOMACH/SIMMONS & DUNN
A Professional Corporation

17 By: 
18 Michael E. Vergara
19 Attorneys for Petitioner/Plaintiff BYRON-
20 BETHANY IRRIGATION DISTRICT

1 **PROOF OF SERVICE**

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

5 On February 29, 2016, I served the following document(s):

6 **BYRON-BETHANY IRRIGATION DISTRICT'S MOTION TO STRIKE THE**
7 **DECLARATION OF MICHAEL GEORGE IN SUPPORT OF PROSECUTION**
8 **TEAM'S OPPOSITION TO BYRON-BETHANY IRRIGATION DISTRICT'S MOTION**
9 **TO DISMISS/DELEGATION**

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

12 **SEE ATTACHED SERVICE LIST**

13 I declare under penalty of perjury that the foregoing is true and correct. Executed
14 on February 29, 2016 at Sacramento, California.

15 
16 _____
17 Michelle Bracha

SOMACH SIMMONS & DUNN
A Professional Corporation

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

SOMACH SIMMONS & DUNN
A Professional Corporation

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