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7 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

8 In the Matter of the Administrative Civil)
Liability Complaint Against Byron)
9 Bethany Irrigation District)

10 In the Matter of the Draft Cease and)
Desist Order Against the West Side)
11 Irrigation District)

**PROSECUTION TEAM'S OPPOSITION
TO BYRON-BETHANY IRRIGATION
DISTRICT'S MOTIONS TO DISMISS
AND DISQUALIFY HEARING OFFICER**

Submitted herewith:
Declaration of Andrew Tauriainen
Declaration of Michael George

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1 **I. INTRODUCTION**

2 Through its February 3, 2016, Motion to Dismiss Administrative Liability Complaint In
3 ENF01951 And Disqualify Hearing Officer On Constitutional And Statutory Grounds
4 (Motion), Byron-Bethany Irrigation District (BBID) argues that the Hearing Officer cannot
5 reach the merits of the July 20, 2015 Administrative Civil Liability Complaint's (ACL
6 Complaint) (Exhibit WR-4) allegation that BBID unlawfully diverted water from June 13 to
7 25, 2015. None of the four issues that BBID raises support dismissing the ACL Complaint or
8 disqualifying the Hearing Officer.

9 BBID first alleges that the process by which State Water Resources Control Board
10 (Board) staff reach its conclusion as to whether water was unavailable for BBID to divert
11 was a regulation, unlawfully adopted without compliance with the Administrative Procedures
12 Act (APA). That argument is unavailing because staff's factual water unavailability
13 determination does not meet any of the elements necessary to establish that it is a
14 regulation subject to the APA.

15 BBID next argues that it was entitled to due process that it did not receive *before* the
16 ACL Complaint was issued in the first place. That conception turns due process on its head.
17 BBID is receiving due process through this very proceeding which it now seeks to halt. The
18 issuance of the ACL Complaint in July 2015 initiated a rigorous procedure that guarantees
19 BBID's due process right to challenge the allegations made in the ACL Complaint before a
20 decisionmaker (the Hearing Officer) determines whether or not BBID unlawfully diverted
21 water.

22 Third, BBID argues that Board staff lacked delegated authority to issue the ACL
23 Complaint. That is incorrect, as the Delta Watermaster has clear statutory authority to
24 initiate this enforcement proceeding, and he had clear statutory authority to delegate that
25 authority.

26 Finally, BBID argues that Hearing Officer Doduc should be disqualified. BBID fails to
27 meet its burden to show either actual bias on Ms. Doduc's part, or the risk of bias.
28

1 BBID's motions to dismiss should be denied, and this matter should proceed to a
2 hearing on the merits.

3 **II. LEGAL STANDARD**

4 A "motion to dismiss" is a nonstatutory motion, i.e., not specifically authorized by the
5 Code of Civil Procedure except in certain limited circumstances not relevant here. (Cal.
6 Prac. Guide, Civil Procedure Before Trial, § 7:370.) When courts exercise their inherent
7 judicial power to hear such pleadings denominated as a motion to dismiss, they typically
8 apply procedural rules and standards applicable to demurrers. (*Id.* § 7:376.) Thus, motions
9 to dismiss should be confined to the matters appearing on the face of the ACL Complaint or
10 to which the hearing officer can take judicial notice. (*Id.*)

11 **III. ARGUMENT**

12 **A. The drought water availability analysis is evidence of a fact, and is not an** 13 **underground regulation**

14 BBID argues that the State Water Board must dismiss this action because it cannot
15 enforce an underground regulation.¹ (BBID Motion, at p. 6:19-24.) BBID argues that two
16 items related to this prosecution are underground regulations requiring dismissal: (1) the
17 method of determining water availability developed by staff and utilized by the Prosecution
18 Team, and (2) the Notice of Unavailability of Water (Motion, at p. 3:7-14.) BBID is wrong as
19 to both in that it is not being prosecuted for violation of the drought availability analysis or
20 the Notice of Unavailability of Water, and these two items do not amount to regulations,
21 underground or otherwise.

22 First, the premise of BBID's argument is incorrect, because BBID is not being subject
23 to an ACL for violation of the items they claim are regulations. BBID is being prosecuted for
24 a violation of Water Code section 1052, for unauthorized diversion of water, a trespass.
25 (WR-4; Wat. Code, § 1052.) Similarly, the West Side Irrigation District (WSID) is being
26 subject to a Cease and Desist Order for an actual or threatened unauthorized diversion of

27 ¹ The West Side Irrigation District (WSID) makes essentially the same motion and incorporates BBID's legal
28 arguments and assertions on this issue. (WSID Motion, at p. 18:27-19:16.) This portion of the opposition
applies equally to WSID's motion, and any references to BBID in this section should be read to include WSID
and WSID's Motion.

1 water. (WR-1; Wat. Code, §§ 1831(d)(1).) Both BBID and WSID are being prosecuted for
2 violation of a statute, and the statute is being enforced.

3 Second, contrary to BBID's arguments, the drought availability analysis and Notice of
4 Unavailability do not meet the definition of a regulation under the Administrative Procedures
5 Act.

6 A regulation subject to the APA ... has two principal identifying characteristics.
7 [Citation omitted.] First, the agency must intend its rule to apply generally,
8 rather than in a specific case. The rule need not, however, apply universally; a
9 rule applies generally so long as it declares how a certain class of cases will be
10 decided. [Citation omitted.] Second, the rule must 'implement, interpret, or
11 make specific the law enforced or administered by [the agency], or ... govern
12 [the agency's] procedure.' [Citation.]" (*Tidewater Marine Western, Inc. v.*
13 *Bradshaw* (1996) 14 Cal.4th 557, 571.)

14 (*Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 333-334; see also
15 *Patterson Flying Service v. California Department of Pesticide Regulation* (2008) 161
16 Cal.App.4th 411, 429.)

17 The drought availability analysis at issue in this case does not satisfy either part of
18 the definition of an underground regulation. Water availability is one fact which supports the
19 Board's determination of whether BBID violated (or WSID violated or threatened to violate)
20 Water Code section 1052. In this case, whether BBID or WSID engaged in the actual or
21 threatened unauthorized use of water is based on the existence of two basic facts: (1) how
22 much water is available in a particular watershed at a particular time, and (2) the demand for
23 water in that watershed at a specific time considering all diverters priorities of right.

24 The drought availability analysis does not "declare how a certain class of cases will
25 be decided." (*Morning Star Co., supra*, 38 Cal.4th at p. 333.) Whether any individual diverter
26 engaged in an unauthorized use of water will vary depending on the water available under
27 particular circumstance, the demand under particular circumstances, and the priority of right
28 of the diverter alleged to have engaged in the unauthorized diversion of water. Moreover,
BBID and WSID have an opportunity to, and is attempting to, convince the Board that water
was available because the staff's water availability analysis is not reliable. While the
Prosecution Team disagrees with the Defendants' arguments, it shows that the drought

1 availability analysis utilized by staff and the Prosecution Team does not declare how a class
2 of cases, or even this case, will be decided. (*Ibid.*)

3 The drought availability analysis does not “implement, interpret, or make specific any
4 law administered by the Board, nor does it govern any procedures.” (*Morning Star Co.,
5 supra*, 38 Cal.4th at p. 334.) It is simply a method of determining the existence of a fact
6 relevant to the Board's inquiry in this case, which BBID is attempting to dispute. The only
7 rules at issue are the Rules of Evidence, and the Board will be applying those rules to the
8 evidence offered to draw a conclusion about the existence of a fact.

9 Alternatively, the Notice of Unavailability does not meet the definition of an
10 underground regulation. Defendants are wrong when they describe the Notice as an order
11 of curtailment. It is not. The ACL Complaint in this case does not allege that the June 12,
12 2015 notice (Notice of Unavailability) is an enforceable order, or that BBID violated the June
13 Notice in any way. (WR-4, ¶ 31.) Similarly, the WSID CDO does not allege that the May 1,
14 2015, Notice of Unavailability is an enforceable order, or that WSID violated that Notice.
15 The Notices of Unavailability are simply notice to the public of the staff's conclusion
16 regarding the existence of facts which indicate that diverters with certain priority dates do
17 not have water available to them at that time each Notice was released. The Notices do not
18 decide a class of cases, or implement, interpret, or make specific any law. (*Morning Star
19 Co., supra*, 38 Cal.4th at p. 334.)

20 *Patterson Flying Service v. California Department of Pesticide Regulation, supra*, is
21 instructive. In that case, a county agricultural commissioner prosecuted a crop dusting
22 service, Paterson Flying Service, for violation of a statute that made it illegal to use a
23 pesticide in conflict with the registered label. At Patterson's request a hearing was held, and
24 the hearing officer made findings of fact as to what the registered label stated, and that
25 Patterson had used the particular pesticide in conflict with the label. Ultimately, Patterson
26 challenged the agricultural commissioner's decision and imposition of a fine by way of
27 petition for writ of mandate. The petition was denied, and the Court of Appeal upheld the
28

1 denial. (*Patterson Flying Service v. California Department of Pesticide Regulation, supra*,
2 161 Cal.App.4th at pp. 417-418.)

3 In an argument similar to that presented by BBID, Patterson argued that the
4 registered label, the content of which was the subject of a finding of fact, was an
5 underground regulation, and that no penalty could be imposed because it did not go through
6 the process set forth in the Administrative Procedures Act. (*Patterson Flying Service, supra*,
7 38 Cal.4th at p. 429.) The Court of Appeal rejected the argument. After properly identifying
8 the characteristics of a regulation, the Court concluded that:

9 [Patterson was] penalized for violation of a state statute. That statute makes it a
10 violation of state law to use a pesticide in conflict with its registered labeling.
11 The labeling is not intended to apply generally rather than to a specific
12 pesticide; it is not approved or registered to implement, interpret, or make
13 specific the law enforced by the agency. Rather, the labeling is intended to
14 accurately inform the user of the purposes for which the pesticide may [be]
15 used, the manner in which it may be used, and the hazards involved in its use.
16 Consequently, [Patterson] was not subject to a penalty pursuant to an
17 underground regulation.

18 (*Ibid.*)

19 The same can be said for this case. If the Board makes sufficient findings of fact to
20 support the conclusion that BBID illegally diverted water, or that WSID diverted or
21 threatened to illegally divert water, then BBID will not be subjected to the ACL and WSID will
22 not be subject to a CDO pursuant to an underground regulation simply because the staff
23 used a particular methodology to determine how much water was available to the various
24 classes or right, and provided notice of its factual conclusions. BBID's motion should be
25 denied.

26 **B. The Prosecution Team's issuance of the ACL Complaint did not violate
27 BBID's due process rights**

28 **1. Introduction**

BBID moves to dismiss the ACL Complaint against it, arguing that the United States
Constitution required the Board to conduct a hearing *prior to* the Prosecution Team's
issuance of the ACL Complaint. (Motion, at pp. 6-11.) BBID erroneously characterizes staff's
allegations as to water unavailability which support the factual assertions made in the

1 Complaint as constituting a deprivation of a property right for which a hearing is required.
2 BBID ignores the fact that the ACL Complaint is not a finding of wrongdoing by the Board;
3 they are only *allegations* of wrongdoing. BBID is receiving due process – in this proceeding
4 – to contest those allegations. BBID’s motion is premised on an attempt to confuse and
5 conflate actions by Board *staff* (such as their June 12, 2015 determination of the amount of
6 water available, and their decision to issue the proposed ACL Complaint) with actions by the
7 State Water Board *as a Board* (such as will be made following the March and April 2016
8 hearings). BBID’s motion should be denied.

9 **2. Background**

10 There is no dispute that in the summer of 2015 the State was in the fourth year of an
11 historic drought. In that year and preceding years, the Governor issued various emergency
12 orders to recognize and combat the continuing drought. (WR-23; WR-25; WR-31.)

13 In 2014, Board staff began anticipating the possibility that there would be insufficient
14 flow in various watersheds statewide to meet the demands of all water right holders, and
15 that California’s water rights priority system would require junior water rights holders to stop
16 diverting water so that senior water rights holders could exercise their full rights. (WR-24.) In
17 January 2014, SWRCB issued a notice to the entire water rights community to alert them to
18 the potential consequences of continued drought conditions on water rights holders
19 generally. (*Id.*) In May 2014, SWRCB staff informed post-1914 rights holders in the
20 Sacramento and San Joaquin watersheds that there was insufficient flow to meet their
21 demands as well as the demands of senior water rights holders. (WR-26.) That notice was
22 intended to protect the water rights of those with more senior water rights, such as pre-1914
23 water right holders as claimed by BBID. That notice was lifted in November 2015. (WR-27;
24 WR-28.)

25 The drought conditions did not improve in 2015. In January and again in April 2015,
26 SWRCB staff again notified the water rights community generally of the continued drought
27 and possibility that there would again be insufficient flow to meet all water rights demands in
28 the state in the coming year. (WR-29; WR-32.) Informational orders regarding the

1 unavailability of water were issued on April 23, 2015 to post-1914 water right holders on the
2 San Joaquin River. (WR-33.) On May 1, 2015, an informational order was issued to all post-
3 1914 water rights holders on the Sacramento River. (WR-34.) The full natural flow on the
4 Sacramento and San Joaquin Rivers continued to deteriorate in May and June 2015 as
5 seasonal demand increased. On June 12, 2015, a notice of unavailability was issued to all
6 water rights holders on the Sacramento and San Joaquin River watersheds extending the
7 notice of unavailability back to water rights holders with a priority date of 1903 or later. (WR-
8 36.) The Board staff did not intend for the June Notice to be considered “an enforceable
9 decision or order of the State Water Board” or “a State Water Board determination that any
10 individual diverter is taking water without authorization under the Water Code.” (BBID-299,
11 at pp. 3-4, ¶ 6 [Decl. of John O’Hagen].)

12 West Side Irrigation District (WSID) sought and obtained a temporary restraining
13 order² (TRO) from the Sacramento County Superior Court (the WSID Court) as to the June
14 Notice on due process grounds. (BBID-301.)³ The WSID Court found that the wording of the
15 June Notice was more than informational and instead was impermissibly coercive, in that a
16 reasonable person would likely interpret the June Notice as requiring them to actually stop
17 diverting. (BBID-301 at p. 5.) The WSID Court’s TRO prohibited the Board “from taking any
18 action against [WSID] ... on the basis of the 2015 Curtailment Letters ...” (BBID-379, at p. 7,
19 ¶ 2.)⁴ However, the WSID Court also held that that the SWRCB is

20 free to provide truly informational notices to water diverters of the nature of the
21 drought and the Board’s right to initiate Water Code section 1831 or 1052
22 proceedings. ... To be clear, **Respondents are free to exercise their
statutory authority to enforce the Water Code as to any water user,**

23 ² A temporary restraining order is a limited order; it is “issued to prohibit the acts complained of, pending a
24 hearing on whether the plaintiff is entitled to a preliminary injunction.” (6 Witkin, Cal. Proc. 5th (2008) Prov.
25 Rem, § 284, p. 224.) The court’s issuance of a temporary restraining order based on an interim finding of a
26 due process violation does not constitute an adjudication of the ultimate rights in controversy. (See *Cohen v.*
27 *Board of Supervisors* (1985) 40 Cal.3d 277, 286 [preliminary injunction].) It is rather a interim determination
28 designated to preserve the status quo pending either a hearing on a preliminary injunction (in the case of a
TRO), or pending a trial (in the case of a preliminary injunction). (6 Witkin, Cal. Proc. 5th (2008) Prov. Rem, §
285, p. 225.)

³ BBID also filed an action in the Contra Costa County Superior Court seeking a temporary restraining order
as to it, but that application was never heard by any court. (*Byron-Bethany Irrigation District v. California State
Water Resources Control Board, et al.*, Contra Costa County Superior Court, Case No. N15-0967.)

⁴ The WSID Court’s TRO does not apply to BBID, as it was not party to that case.

1 including these Petitioners, **if it deems them to be in violation of any**
2 **provisions of the Water Code, so long as the bases for said action are not**
3 **the Curtailment Letters.**

(BBID-301, at pp. 4-5, bold added.)

4 In response to the WSID Court's TRO, in July 2015, Board staff partially rescinded
5 and revised the June Notice (Revised Notice). (WR-40; WR-41.) The Revised Notice
6 clarified that it was not an order to anyone to stop diversions and that it does "not establish
7 or impose any compliance responsibilities." (*Id.*) BBID's motion neglects to inform the
8 Hearing Officer that following the hearing on WSID's motion for preliminary injunction, on
9 August 3, 2015, the WSID Court found that the Revised Notice does not violate anyone's
10 due process rights and declined to issue a preliminary injunction.⁵ (Declaration of Andrew
11 Tauriainen [Tauriainen Decl.] submitted herewith, at Ex. E [Aug. 3, 2015 Order, Sacramento
12 County Superior Court Case No. 34-2015-80002121]⁶.) The WSID Court found that the
13 Revised Notice was purely informational, and "no longer requires recipients to cease
14 diverting water." (*Id.* at p. 3.) Having denied the application for preliminary injunction, the
15 WSID Court's TRO automatically dissolved by operation of law. (*Landmark Holding Group,*
16 *Inc. v. Superior Court* (1987) 193 Cal.App.3d 525, 529 ["A TRO is purely transitory in nature
17 and terminates automatically when a preliminary injunction is issued or denied"].)

18 The Assistant Deputy Director for Water Rights issued the ACL Complaint against
19 BBID on July 20, 2015, alleging that BBID diverted water in violation of Water Code section
20 1052. (WR-4.)

21 **3. Discussion**

22 There is no debate between the parties that BBID is entitled to due process before
23 the Hearing Officer or full Board issues a penalty for an unlawful diversion of water. (E.g.,
24 *Cal. Teachers Assn. v. Butte Community College Dist.* (1996) 48 Cal.App.4th 1293, 1306.)
25 "An essential component of due process is a fair opportunity to be heard before deprivation

26 ⁵ If BBID is correct that the WSID's Court's finding that the June Notice violated WSID's due process rights "is
27 equally applicable" to BBID (Motion, at p. 8:9-12), by the same logic the WSID Court's finding that the Revised
28 Notice did *not* violate WSID's due process rights "is equally applicable" to BBID.

⁶ The Prosecution Team requests that the Hearing Officers take official notice of Exhibits A through F of the
Tauriainen Declaration pursuant to 23 CCR § 648.2.

1 of a significant property interest.” (*Id.*) That is exactly what is occurring here. (See, e.g., Cal.
2 Code Regs., tit. 23, §§ 648-648.8, 649.6 and 760.) The issuance of a proposed ACL
3 Complaint against BBID initiated a procedure which is providing BBID with due process
4 before the Hearing Officer or the Board makes a determination as to whether or not BBID
5 unlawfully diverted water from June 13-25, 2015. BBID elected to avail itself of the due
6 process rights available to it and requested a hearing. The Hearing Officer provided BBID
7 with notice of the procedures available to it, including the right to “make an opening
8 statement, call and examine witnesses, introduce exhibits, cross-examine opposing
9 witnesses on any matter relevant to the issues even if that matter was not covered in the
10 direct examination, impeach any witness, rebut adverse evidence, and subpoena, call and
11 examine an adverse party or witness as if under cross-examination.” (Tauriainen Decl., at
12 Ex. F [Notice of Hearing, Aug. 19, 2015, at p. 6 ¶ 1].) Because no adverse action against
13 BBID has yet been taken, and will only be taken, if at all, after the hearing, BBID’s due
14 process rights are being fully protected.

15 **a) This administrative enforcement proceeding poses no possible**
16 **violation of BBID’s due process rights because it is not “based on”**
17 **the June Notice or Revised Notice**

18 BBID’s entire motion is predicated on the false premise that the ACL Complaint is
19 “based on” the June Notice and/or the Revised Notice. (E.g., Motion, at p. 9:12-13.) That
20 assertion is simply wrong. The ACL Complaint is based on the factual allegation that from
21 June 13-25, 2015 there was insufficient water available for BBID to divert under its water
22 right, and BBID diverted water anyway. (See e.g., WR-4, ¶ 31.) The ACL Complaint does
23 not allege that the June Notice or Revised Notice are orders at all, or that BBID violated
24 either of them. Indeed, the Revised Notice made clear, to the extent it was not clear
25 already, that the June Notice was intended to be an informational order only. The notices do
26 not add or detract from the facts as to whether or not there was water available for BBID to
27 divert during the dates in question. Whether or not the Hearing Officer will agree with the
28 allegations made in the ACL Complaint remains to be seen, and the Hearing Officer will
make that determination only after the March and April 2016 hearings, during which time we

1 expect BBID will vigorously argue that there was water available for it to legally divert from
2 June 13-25, 2015.

3 Any due process violation associated with the issuance of the June Notice (which the
4 WSID Court found was cured in the Revised Notice) is not a license for entities to divert
5 water in violation of the Water Code free from enforcement. The WSID Court's TRO ruling
6 on which BBID heavily relies also expressly found that the Board was free to (1) provide
7 information notices to the water rights community (as the Board staff did in the July notice,
8 which the Court found was appropriate), and (2) take enforcement action against entities
9 that diverted water in violation of the Water Code (as the Board is currently doing in this
10 enforcement action). (BBID-301, at pp. 4-5.) That is exactly what is occurring now.

11 **b) The ACL Complaint's assertions of unavailability of water is not a**
12 **final determination by this Hearing Officer or the full Board**

13 BBID compounds its mistaken understanding of what the ACL Complaint is based
14 on by also erroneously asserting that the Hearing Officer or the full Board has already made
15 a conclusion as to the unavailability of water to support BBID's diversions. (Motion, at pp.
16 9:11 through 10:2.) Neither the Hearing Officer or the full Board has made any
17 determination as to whether water was available for BBID to divert from June 12-25, 2015,
18 or whether BBID's diversions during that time period constituted an unlawful trespass.
19 Indeed, that is the exact matter for the Board's Hearing Officer to decide at the upcoming
20 hearing in March and April 2016, following a full and robust adversarial proceeding. At the
21 conclusion of the upcoming hearing, the Hearing Officer (and potentially, the full Board) may
22 agree with the Prosecution Team that there was insufficient flow to support BBID's
23 diversions, or may agree with BBID that there was sufficient flow.

24 BBID also asserts claims that an alleged due process violation associated with the
25 issuance of the June Notice precludes the Protection Team from pursuing this enforcement
26 action entirely. (Motion, at p. 10:3-15.) Again, untrue. As the WSID Court held, the TRO and
27 the reasoning behind it do not prohibit the Prosecution Team from "exercise[ing] their
28 statutory authority to enforce the Water Code as to any water user, including these

1 Petitioners, if it deems them to be in violation of any provisions of the Water Code, so long
2 as the bases for said action are not the [June Notice].” (BBID-301, at pp. 4-5.) As discussed
3 above, the ACL Complaint is not based on the June Notice, and thus even the WSID Court
4 recognizes that this enforcement action can proceed notwithstanding the WSID Court’s
5 provisional conclusion as to a due process violation associated with the June Notice.

6 BBID also claims that the reasoning in *Duarte Nursery, Inc. v. United States Army*
7 *Corps of Engineers* (E.D. Cal. 2014) 17 F.Supp.3d 1013 prohibits this enforcement case
8 from proceeding to trial. (Motion at p. 10:16-17.) *Duarte* involved a cease and desist order
9 issued by the United States Army Corps of Engineers to a landowner, as well as a separate
10 notice of violation (NOV) issued by the Central Valley Regional Board. (*Duarte, supra*, 17
11 F.Supp.3d at p. 1015.) The court found that the landowner had properly stated a claim for
12 violation of due process against the Army Corps as to its cease and desist order because it
13 was coercive, but found that the Regional Board’s NOV was not. (*Id.* at pp. 1024-1025.) The
14 court held that the NOV merely “notifies plaintiff of the Board’s view that they are in violation
15 of law.” (*Id.* at p. 1025.) The WSID Court found that the Revised Notice, like the NOV in
16 *Duarte*, did not violate WSID’s due process rights because it rescinded the language in the
17 June Notice that the WSID Court found problematic. (Tauriainen Decl., Ex E. at p. 3.)

18 **c) BBID is receiving due process through this hearing**

19 It is ironic that BBID claims that this administrative proceeding should not occur
20 because BBID did not receive due process prior to it being initiated. As the Board staff
21 intended in the June Notice, and as clarified in the Revised Notice, the 2015 notices were
22 not intended to order to any water right holder to cease diversions; they were merely
23 informational. No conclusion as to whether any particular water rights holder could continue
24 diverting water was made in the 2015 notices. As the Revised Notice made clear, the Board
25 has issued no order compelling BBID to cease diversions. BBID has always been free to
26 continue diverting water, at its own risk that, after later hearing, those diversions will be
27 found to have been unlawfully made.

1 Neither the Hearing Officer nor full Board have made any determination regarding
2 whether BBID engaged in unlawful diversions. BBID is receiving due process before such a
3 decision will be made, if at all. The motion should be denied.

4 **C. The Assistant Deputy Director for Water Rights issued the ACL Complaint**
5 **pursuant to properly delegated authority**

6 Contrary to BBID's claims, the Delta Watermaster had statutory and delegated
7 authority to issue the ACL Complaint, and also had the authority to delegate his authority to
8 the Assistant Deputy Director who issued the ACL Complaint. (Motion, at p. 13:8-18, and fn.
9 8.) Because the ACL Complaint was issued by one with authority to do so, the motion to
10 dismiss should be denied.

11 The Delta Watermaster may issue enforcement actions in the Delta, and may
12 authorize appropriate staff in the Division of Water Rights to initiate such actions. (Wat.
13 Code, § 85230; Tauriainen Decl., at Ex. C [State Water Board Resolution 2012-0048, at ¶
14 3], and Ex. D [Resolution 2015-0058, at ¶ 3].) The Delta Watermaster was personally
15 involved in the investigations and in the discussions leading to the BBID ACL Complaint and
16 the WSID CDO, and has remained involved in these proceedings. (Declaration of Michael
17 George, submitted concurrently herewith, at ¶¶ 4-5.) The Delta Watermaster authorized the
18 Assistant Deputy Director for Water Rights to issue both enforcement actions. (*Id.* at ¶ 6.)

19 BBID also wrongly asserts that the Delta Watermaster may not delegate this
20 authority. (Motion, at p. 13:14-16, and fn. 8; see also Motion, at pp. 12:5 through 13:2.)
21 Water Code section 7 provides:

22 Whenever a power is granted to, or a duty is imposed upon, a public officer, the
23 power may be exercised or the duty may be performed by a deputy of the
24 officer or by a person authorized, pursuant to law, by the officer, unless this
25 code expressly provides otherwise.

26 Nothing in the Water Code prohibits the Delta Watermaster from re delegating
27 authority. *California School Employees Assn. v. Personnel Com. of the Pajaro Valley Unified*
28 *School Dist. of Santa Cruz County* (1970) 3 Cal.3d 139, 144, and *Bagley v. City of*
Manhattan Beach (1976) 18 Cal.3d 22, 24-25, both recognize that statutes may authorize
the delegation of even discretionary authority, and thus do not support BBID.

1 *Central Delta Water Agency v. State Water Resources Control Bd.* (2004) 124
2 Cal.App.4th 245 (*Central Delta*) is similarly inapposite. That court held that the Board, after
3 conducting a water rights permit hearing, could not defer findings that were prerequisite to
4 issuing permits by delegating the findings for subsequent staff determination. The *Central*
5 *Delta* court recognized the validity of other delegations made by the State Board pursuant to
6 section 7. (*Central Delta, supra*, at p. 261, fn. 16.)

7 The remainder of BBID's argument rests on an error in Paragraph 3 of the ACL
8 Complaint, which describes the delegation of authority from the Executive Director to the
9 Assistant Deputy Director. (Tauriainen Decl., at ¶¶ 2-7.) Both the ACL Complaint and the
10 WSID CDO are within the Delta Watermaster's jurisdiction, and thus the Delta
11 Watermaster's authorization described above is sufficient for the Assistant Deputy Director
12 to issue the actions. Although unfortunate, the error in the ACL Complaint and similar errors
13 in the WSID CDO are not material or prejudicial. (Tauriainen Decl., ¶ 8.) The Board may
14 correct the errors in the Draft CDO should it choose to issue a final CDO, and the Division
15 will issue a corrected ACL Complaint if the Hearing Officer so directs. (*Id.*)

16 The Assistant Deputy Director for Water Rights issued the BBID ACL Complaint (and
17 the WSID CDO) under properly delegated authority. The motion should be denied.

18 **D. BBID provides no evidence of violations of the separation of functions or ex**
19 **parte rules to warrant disqualifying the Hearing Officer for actual bias or**
20 **risk of bias**

21 BBID also moves to disqualify Hearing Officer Tam Doduc on the theory that there is
22 an unacceptable risk that she is impermissibly biased in favor of the Prosecution Team
23 because the Board has failed to "ensure adequate separation of functions between the
24 individuals acting in a prosecuting capacity from those acting in an adjudicatory capacity"
25 (Motion, at p. 13:23-25) as required by the Supreme Court's decision in *Morongo Band of*
26 *Morongo* holds that the due process guarantee of a fair hearing can be violated upon proof
27 of actual bias on the part of the decision-maker or a showing that the "probability of actual
28 bias...is too high to be constitutionally tolerable." (*Morongo, supra*, 45 Cal.4th at p. 737.) In

1 the context of administrative agency adjudications, impartiality of the adjudicator is
2 presumed and this presumption “can be overcome only by specific evidence demonstrating
3 actual bias or a particular combination of circumstances creating an unacceptable risk of
4 bias.” (*Id.* at pp. 741-42.) BBID has made no such showing here.

5 **1. BBID fails to establish any actual bias by Hearing Officer Doduc that**
6 **precludes her from adjudicating this matter**

7 In its Motion, BBID does not and cannot provide evidence of any actual bias on the
8 part of Hearing Officer Doduc that would disqualify her from hearing this matter. Instead,
9 BBID appears to argue that a declaration by John O’Hagan, a member of the Prosecution
10 Team, establishes Hearing Officer Doduc’s bias and predetermination of the issue of water
11 availability against BBID. (Motion, at p. 19:13-21.) This argument is meritless. Mr.
12 O’Hagan’s declaration reflects the view of Board staff regarding the unavailability of water,
13 not the view of Ms. Doduc. BBID does not present any evidence that Ms. Doduc has
14 adopted the Prosecution Team’s conclusion that there was no water available to BBID to
15 divert from June 12-25, 2015, or that BBID’s diversions during that time period constituted a
16 trespass. Demonstrating *staff* bias is not sufficient to warrant disqualification of a *hearing*
17 *officer*, a claim of bias “must establish an unacceptable probability of actual bias on the part
18 of those who have actual decision-making power over their claims.” (*BreakZone Billiards v.*
19 *City of Torrance* (2000) 81 Cal.App.4th 1205, 1236, italics added.) To make this showing,
20 the evidence demonstrating bias must clearly be attributable to the administrative hearing
21 officer. (See, e.g., *Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 473 [article
22 authored by Planning Commission member attacked project pending before commission].)
23 Where, as here, a petitioner fails to establish how a claim of staff bias may be attributed to
24 the actual decision-maker, the claim must fail. (*Kenneally v. Lungren* (9th Cir. 1992) 967
25 F.2d 329, 333-334.)
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27
28

1 **2. BBID fails to demonstrate the existence of particular circumstances**
2 **creating an unacceptable risk of bias on the part of Hearing Officer**
3 **Doduc**

4 Unable to establish actual bias, BBID asserts that Prosecution Team members'
5 discussions with Board members regarding potential water rights curtailments and drought-
6 related water availability violate the Board's internal separation of functions and prohibition
7 on ex parte communications and constitute particular circumstances that create an
8 unacceptable risk of bias on the part of any member of the Board, including Hearing Officer
9 Doduc. (Motion, at p. 16:17-18:16; *Morongo, supra*, 45 Cal.4th at pp. 741-42; Gov. Code,
10 § 11425.10, subd. (a)(4).) However, BBID fails to demonstrate how the circumstances of
11 this case result in the risk of bias required to succeed on its claim. As demonstrated below,
12 and consistent with the Administrative Procedures Act and the strictures of *Morongo*, the
13 procedural mandates to separate the prosecutorial and advisory functions and to avoid
14 impermissible ex parte communications have been strictly followed in this case to date.
15 Accordingly, the particular circumstances held to create an impermissible risk of bias in
16 *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81 and *Quintero v.*
17 *City of Santa Ana* (2003) 114 Cal.App.4th 810 are absent here.

18 **a) The Board has maintained the proper separation of functions during**
19 **this proceeding**

20 BBID argues that Prosecution Team members have impermissibly advised the Board
21 on the issues being litigated in this proceeding in violation of separation of functions rules,
22 citing *Nightlife* and *Quintero* as authority. In *Nightlife*, the Court found that the separation of
23 functions had not been maintained because the attorney advising the hearing officer on
24 appeal had previously advocated for denial of petitioner's permit. (*Nightlife, supra*, 108
25 Cal.App.4th at p. 95.) The key circumstances relied upon in *Quintero* to find a due process
26 violation were that the agency's attorney had acted in both prosecutorial and advisory roles
27 in the same matters, and that the attorney had become the agency's "sole or primary legal
28 adviser". (*Morongo, supra*, 45 Cal.4th at p. 739.) As in *Morongo*, neither of these
 circumstances is present in this case.

1 First, the Prosecution Team members have not “advised” the Board in the same
2 proceeding in which they are now serving as advocates, or in any other related proceeding
3 before the Hearing Officer. Contrary to BBID’s contentions, general informational briefings
4 on staff’s water availability analyses, water right curtailment notices and potential
5 enforcement actions are not the same proceeding as the ACL Complaint against BBID.
6 Under BBID’s proposed construction of administrative law, the Board presumably must
7 refuse to hear general informational briefings from its staff regarding any issue that might
8 subsequently invoke an enforcement proceeding for fear that they might commingle agency
9 functions. But such chilling of informed governance is not required by due process, nor
10 would it provide any discernible additional safeguards to petitioners regarding later-initiated
11 administrative proceedings. As evidenced by the Prosecution Team members’ careful
12 practice of not discussing how the water availability analysis would apply to a specific
13 diverter or the particulars of any ongoing enforcement actions when updating the Board
14 (see, e.g., BBID-306 at p. 4), the requisite safeguards are already in place and being
15 followed. Accordingly, BBID’s right to due process has been preserved.

16 Second, the Prosecution Team members have not “advised” the Board at all, let
17 alone served as the Board’s primary advisors. As illustrated by *Nightlife* and *Quintero*, a
18 staff member “advises” a Board by analyzing a set of specific facts and recommending a
19 particular course of action in the context of a pending adjudicatory proceeding. (*Nightlife*,
20 *supra*, 108 Cal.App.4th at p. 95; *Quintero*, *supra*, 114 Cal.App.4th at pp. 815-817.) Here, the
21 Prosecution Team members merely provided updates in the context of non-adjudicatory,
22 informational briefings and did not recommend any course of action as to adoption of the
23 water supply analysis or its application to any particular diverter, let alone BBID. To the
24 contrary, these updates merely provided the basic methodology behind the water availability
25 analysis and cited to the concerns of stakeholders regarding its accuracy. (See, e.g., BBID-
26 316 at pp. 4-5.) BBID fails to cite to a single case in which an administrative officer or board
27 was precluded from acting on a matter simply because it had previously received general
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1 information regarding matters of a general nature and wide applicability in a non-
2 adjudicatory setting, nor is there any such case.

3 Moreover, BBID's claim that the Hearing Officer must be disqualified because Ernie
4 Mona is serving as one of her advisors is unsupportable. BBID provides no evidence that
5 Mr. Mona has previously advocated in front of the Board in the same proceeding or a similar
6 proceeding, has had any impermissible interactions with the Prosecution Team regarding
7 this matter or is in any way biased against BBID. Instead, BBID's claim rests on the
8 incorrect assertion that Diane Riddle, Mr. Mona's direct supervisor, has had impermissible
9 interactions with the Prosecution Team regarding this matter and that the mere presence of
10 Mr. Mona's indirect supervisor, Leslie Grober, on the Prosecution Team creates an
11 intolerable risk of bias on the part of the Hearing Officer. But as with Mr. Mona, BBID
12 presents no evidence that Ms. Riddle has had any impermissible contact with the
13 Prosecution Team, including Mr. Grober, regarding the facts of this case or is in anyway
14 biased toward BBID. And the Supreme Court held in *Morongo* that the indirect supervisor of
15 an employee serving in an advisory role can serve in a prosecutorial role as long as the
16 proper separation and screening procedures are in place to preserve the right to due
17 process. (*Morongo, supra*, 45 Cal.4th at p. 736.) As evidenced by the Hearing Notice (BBID-
18 302 at p. 3), such separation and screening procedures are in place here and BBID
19 presents no evidence that they have been violated or that there is an impermissible risk that
20 they will be violated. Accordingly, BBID has not met its evidentiary burden and its motion
21 should be denied.

22 **b) There have been no impermissible ex parte communications**

23 BBID contends that the Prosecution Team members' updates in front of the Board
24 and emails with Board members regarding water availability and water curtailments
25 constitute impermissible ex parte communications that create an intolerable risk of biased
26 decisionmaking. (Motion, at pp. 16:18 through 17:18.) This contention is baseless.

27 Government Code section 11430.10 provides that, when an agency adjudicatory
28 proceeding is pending, no employee or representative of the agency who is acting as a

1 party to the proceeding shall communicate directly or indirectly to the presiding officer of the
2 proceeding without notice and opportunity for all other parties to participate in the
3 communication. (Gov. Code, § 11430.10, subd. (a).) A proceeding is “pending” within the
4 meaning of this statute once the agency issues a pleading or there is an application for an
5 agency decision, whichever is earlier. (*Id.* § 11430.10, subd. (c).)

6 Here, BBID claims that Board members were advised during 2014 and 2015 by
7 members of the Prosecution Team on matters related to this proceeding. However, there
8 was no “pending proceeding” within the meaning of the Government Code, and the Board’s
9 ex parte procedures that prohibit such communications did not apply until the enforcement
10 proceedings at issue here commenced when Board staff issued the ACL Complaint to BBID
11 on July 20, 2015. (WR-4.) Also, the regular updates provided by staff at public Board
12 meetings and comments at public workshops are not prohibited ex parte communications
13 because they occurred at open, public Board meetings where all interested parties have an
14 opportunity to participate in the communication, as required by the Government Code.

15 Further, none of the emails cited by BBID establishes that there were any prohibited
16 ex parte communications from members of the Prosecution Team to members of the Board,
17 or that there was otherwise a failure to adequately separate the Board staff’s prosecutorial
18 and advisory functions – either after or before the current ACL Complaint became pending.
19 As the Supreme Court held in *Morongo*:

20 [t]he agency head is free to speak with anyone in the agency...except the
21 personnel who serves as adversaries *in a specific case*...Virtually the only
22 contact that is forbidden is communication in the other direction: a prosecutor
cannot communicate off the record with the agency decision maker or the
decision makers’ advisors *about the substance of the case*.

23 (*Morongo, supra*, 45 Cal.4th at p. 738, original italics.) As discussed above, the
24 communications in question between Prosecution Team members and the Board did not
25 address the substance of this proceeding. These communications did not involve
26 application of the water availability analysis to BBID or any other specific facts concerning
27 BBID’s alleged trespass, and therefore do not constitute impermissible ex parte
28 communications.

1 For all of these reasons, BBID has failed to establish any violation of the separation
2 of functions or ex parte rules that evidences circumstances creating an intolerable risk of
3 bias on the part of the Hearing Officer. Accordingly, BBID's motion to disqualify the Hearing
4 Officer should be denied.

5 **IV. CONCLUSION**

6 The Prosecution Team respectfully requests that BBID's motions be denied.

7 Date: February 22, 2016

Respectfully Submitted,

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9 Andrew Tauriainen
10 **OFFICE OF ENFORCEMENT**
11 Attorney for the Prosecution Team
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