



Terry Tamminen  
Secretary for  
Environmental  
Protection

# State Water Resources Control Board

## Executive Office

Arthur G. Baggett Jr., Chair  
1001 I Street • Sacramento, California 95814 • (916) 341-5615  
Mailing Address: P.O. Box 100 • Sacramento, California • 95812-0100  
Fax (916) 341-5621 • <http://www.swrcb.ca.gov>



Arnold Schwarzenegger  
Governor

March 25, 2004

Stuart L. Somach, Esq.  
Somach, Simmons & Dunn  
816 Sixth Street  
Sacramento, CA 95814

Dear Mr. Somach:

### PROPOSED REVOCATION OF LICENSE 659 (APPLICATION 553) OF THE MORONGO BAND OF MISSION INDIANS

This letter responds to two petitions recently filed by your firm on behalf of the Morongo Band of Mission Indians (Morongo Band). The first petition is to (1) disqualify the enforcement team, (2) conduct discovery regarding activities and communications of the enforcement team, (3) establish a briefing schedule and hearing on the petition for disqualification, and (4) stay the hearing pending resolution of the petition for disqualification. The second petition is to (1) continue the hearing, (2) extend the deadline to submit a Notice of Intent to Appear, (3) extend the deadline to submit exhibits, and (4) establish a discovery schedule. I have reviewed the enforcement team's answer to the petition and the Morongo Band's response. Finally, I have received and considered the request from Coachella Valley Water District (CVWD) to extend the hearing deadlines and delay the hearing for at least 120 days.

The Morongo Band's petition for disqualification and related matters is denied. Under the circumstances of this case, the Morongo Band will not be deprived of a fair and impartial hearing if the enforcement team is allowed to participate in the hearing.

The Morongo Band cites to *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810 [7 Cal.Rptr.3d 896] in support of its position that the Morongo Band will be deprived of a fair hearing because members of the enforcement team also advise the State Water Resources Control Board (SWRCB) in unrelated matters. For example, the Morongo Band points to the fact that Samantha Olson, the attorney representing the enforcement team, is assigned to the hearing team in an unrelated water right hearing before the SWRCB.

In *Quintero*, the Court of Appeal held that a hearing before the Santa Ana Personnel Board regarding the termination of a Santa Ana Police Department employee violated the employee's right to procedural due process because the deputy city attorney who represented the Police Department at the hearing also advised the Personnel Board in unrelated matters. Although the deputy city attorney had not been assigned to advise the Personnel Board in that case, the Court was troubled that the line between the attorney's role as an advocate and his role as an advisor

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had been blurred. (*Quintero, supra*, at p. 817.) Judging from the Court's opinion, it appears that an independent attorney had not been assigned to the Personnel Board. The Court concluded that the Personnel Board naturally would look to "its legal adviser," the deputy city attorney, for advice. (*Ibid.*)

The *Quintero* Court recognized that the city attorney's office could represent both the Police Department and the Personnel Board, "if there are assurances that the adviser for the decision maker is screened from any inappropriate contact with the advocate." (*Quintero, supra*, at p. 813, quoting *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575, 1586 [5 Cal.Rptr.2d 196].) In this case, the SWRCB has provided for a clear separation between its adjudicative function and its investigatory and prosecutorial functions, as required by the Administrative Procedure Act. (Gov. Code, § 11425.10, subd. (a)(4).) After the Morongo Band requested a hearing on the proposed revocation of License 659 (Application 553), the SWRCB assigned separate staff to the enforcement and hearing teams. The enforcement team will prosecute the case and the hearing team will advise the hearing officer and other SWRCB Members. No one on the hearing team has had any previous involvement in the investigation and proposed revocation of the Morongo Band's license, nor have any of the SWRCB Members. The SWRCB has screened the enforcement team from inappropriate communication with the decision makers through application of the rule against ex parte communications regarding substantive or controversial procedural issues in the hearing.

The Court's holding in *Quintero* was based on the totality of the circumstances. (*Id.* at p. 817.) Under the circumstances of this case, I am satisfied that the SWRCB's procedures will ensure that the Morongo Band will be afforded a fair hearing.<sup>1</sup> Moreover, there is no indication that the integrity of the SWRCB's procedures have been compromised. Accordingly, the discovery that the Morongo Band seeks to conduct in support of its petition for disqualification is unwarranted.

The Morongo Band's petition for a continuance and for an extension of the hearing deadlines is granted, but its petition to establish a discovery schedule is denied. For the reasons discussed below, I am not persuaded that the discovery that the Morongo Band seeks to conduct is warranted, or that the hearing should be continued to allow for discovery to be conducted. The Morongo Band's request for a continuance is granted, however, in view of counsel's vacation schedule and the relatively short time-frame provided to prepare for the hearing. In light of the fact that the hearing has already been delayed by more than six months, however, I am unwilling at this point to delay the hearing for 120 days as requested by CVWD. If serious settlement discussions among the parties ensue, I would be willing to consider another continuance.

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<sup>1</sup> Another one of the factors considered by the *Quintero* Court was the deputy city attorney's extensive experience advising the Personnel Board. (*Quintero, supra*, at pp. 815-816.) Although the experience of the prosecuting attorney is not dispositive, it merits note that in this case Ms. Olson is the SWRCB's most junior water right attorney.

**The hearing is rescheduled for Tuesday, June 15, 2004, beginning at 10:00 a.m., to be continued if necessary on Wednesday, June 16, beginning at 10:00 a.m.** The hearing will be held in the Coastal Hearing Room at the Cal-EPA Headquarters Building in Sacramento. **The deadline to submit a Notice of Intent to Appear is extended to noon on Tuesday, May 18, 2004.** The SWRCB will issue a list of parties to exchange information on or about May 20, 2004. **The deadline for each participant to serve a copy of its Notice of Intent to Appear on the other participants is extended to Tuesday, June 1, 2004. The requisite number of copies of written testimony and other exhibits, a completed Exhibit Identification Index, and a statement of service must be received by the SWRCB by noon on Tuesday, June 1, 2004, and served on the other participants on or before that date.** All other procedural requirements set forth in the March 11, 2004 Revised Hearing Notice remain the same.

The Morongo Band seeks to conduct discovery "to uncover all of the factual allegations upon which the Enforcement Team will rely." The Morongo Band maintains that this discovery is necessary in order to prepare its case, including its Notice of Intent to Appear and its case-in-chief. It appears that the Morongo Band intends to rebut the enforcement team's case-in-chief as part of the Morongo Band's case-in-chief. Such an approach is unnecessary. The Morongo Band will have ample opportunity to present evidence that rebuts the enforcement team's case-in-chief.

Conducting discovery to determine the nature of the enforcement team's case-in-chief would also duplicate the hearing procedures. The Morongo Band will learn who the enforcement team's witnesses will be and the subject of their testimony when the enforcement team submits its Notice of Intent to Appear. Similarly, the Morongo Band will receive the enforcement team's exhibits and written testimony in advance of the hearing. The discovery that the Morongo Band seeks to conduct would be unduly burdensome to the extent that the Morongo Band seeks to discover the nature of the enforcement team's case-in-chief before the submittal deadlines in order to include rebuttal evidence in the Morongo Band's case-in-chief. Accordingly, it does not appear that a discovery schedule is warranted.

Under certain circumstances, however, discovery may be appropriate. For example, it may be appropriate to conduct discovery after the parties' exhibits have been submitted in order to prepare for cross-examination of another party's witnesses, or to prepare rebuttal evidence. Any such discovery should be conducted pursuant to Water Code sections 1075 through 1106; Government Code sections 11450.05 through 11450.50; and California Code of Regulations, title 23, section 649.6. It is not necessary to petition the hearing officer to conduct discovery in the first instance.

Finally, the enforcement team has requested that I order the Morongo Band to allow the enforcement team to conduct an inspection of the place of use under License 659. If necessary, the dispute between the enforcement team and the Morongo Band over access to the Morongo Band's property should be resolved by a court, not the SWRCB.

Questions regarding this letter may be addressed to Jean McCue, Water Resources Engineer, in the Division of Water Rights at (916) 341-5351, or Dana Differding, Staff Counsel, in the Office of Chief Counsel, at (916) 341-5188.

Sincerely,

**ORIGINAL SIGNED BY:**

Gary Carlton, P.E.  
Hearing Officer

cc: Ms. Samantha Olson [via email]  
Division of Water Rights  
Enforcement Team  
1001 I Street  
Sacramento, CA 95814

Ms. Jean McCue [via email]  
Division of Water Rights  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814

Mr. Robert B. Maddow  
Bold, Polisner, Maddow, Nelson & Judson  
500 Ygnacio Valley Road, Suite 325  
Walnut Creek, CA 94596-3840

Ms. Dana Differding [via email]  
Office of Chief Counsel  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814