

## State Water Resources Control Board

February 1, 2016

### VIA ELECTRONIC MAIL

TO: ENCLOSED SERVICE LIST OF PARTICIPANTS

### **PROCEDURAL RULING: THE WEST SIDE IRRIGATION DISTRICT DRAFT CEASE AND DESIST ORDER HEARING (ENFORCEMENT ACTION (ENF01949)) AND THE BYRON-BETHANY IRRIGATION DISTRICT ADMINISTRATIVE CIVIL LIABILITY COMPLAINT HEARING (ENFORCEMENT ACTION (ENF01951))**

This letter addresses matters raised by the Division of Water Rights Prosecution Team (Prosecution Team) regarding electronic service by way of online storage; The West Side Irrigation District's (WSID) amended Notice of Intent to Appear; and the motions filed by Byron-Bethany Irrigation District (BBID) and WSID on January 25, 2016. This letter also confirms the opportunity for parties to supplement their exhibits based on the public documents produced by the Board on January 20, 2016, pursuant to the Public Records Act.

#### **ELECTRONIC SERVICE BY ONLINE STORAGE**

On January 19 and January 25, 2016, respectively, BBID served exhibits and motions by e-mailing a link to the parties and the hearing team for an online document storage service. This method of delivery is acceptable and may be used by all parties for future service. Upon request by any party, the serving party must provide an electronic copy of the served documents by another acceptable means, such as e-mail or a disc sent by overnight delivery.

#### **THE WEST SIDE IRRIGATION DISTRICT'S AMENDED NOTICE OF INTENT TO APPEAR**

On January 19, 2016, WSID submitted an amended Notice of Intent to Appear (NOI) that adds Ms. Karna Harrigfeld and Mr. Greg Young as witnesses.

To the extent that the Prosecution Team objects to the addition of Mr. Young as a witness for WSID, that objection is overruled. Mr. Young was already identified by BBID to testify regarding water availability in the BBID proceeding. WSID could therefore elicit the same testimony from Mr. Young on cross-examination as on direct examination, because the subject matter of cross-examination is not limited in these proceedings to the scope of direct testimony. Because the water availability portion of the two proceedings is now consolidated, there is no basis to distinguish between testimony offered in the BBID proceeding from that in the WSID proceeding on the issue of water availability. The exhibits and testimony in the consolidated portions of the proceedings are to be included in the records for both. Therefore, we cannot perceive how the addition of Mr. Young to WSID's witness list would prejudice any other party.

The time limits for direct testimony and cross-examination will be addressed in more detail at the pre-hearing conference on February 8, 2016, so we will not address it here.

The addition of Ms. Karna Harrigfeld to WSID's list of witnesses is a different matter. Ms. Harrigfeld was not previously listed by any party as a witness. Her late addition to WSID's

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

witness list means that the Prosecution Team and other parties had no opportunity to conduct discovery concerning Ms. Harrigfeld prior to the deadline to submit a case-in-chief. The Prosecution Team stated in their objection that they would have sought discovery of Ms. Harrigfeld's records and possibly her deposition had she previously been identified as a witness. WSID explains in justification of the late addition that WSID's general manager, who was initially included on their witness list, has been in his position for less than three years and does not have the "requisite factual knowledge regarding the district's day-to-day operations or history." (Letter, January 26, 2016, Ms. Jeanne Zolezzi to Hearing Officer Spivy-Weber.)

We find this explanation to be insufficient. WSID does not state when it learned that its general manager did not have the "requisite factual knowledge" and why it did not immediately request to amend its NOI. We conclude that the risk that the Prosecution Team and other parties would be prejudiced by the late addition of Ms. Harrigfeld, after the deadline for submission of cases-in-chief, is not justified by WSID's rationale for the late amendment. The Prosecution Team's objection to the addition of Ms. Harrigfeld to WSID's witness list and request to strike her written testimony, is sustained. Ms. Harrigfeld's written testimony will not be included in the record at this time. WSID may, however, identify an alternate witness as necessary to authenticate the exhibits referenced in Ms. Harrigfeld's testimony.

#### **BYRON-BETHANY IRRIGATION DISTRICT'S AND THE WEST SIDE IRRIGATION DISTRICT'S JANUARY 25, 2016 SUBMITTALS**

In our ruling of December 16, 2015, we established a deadline of January 25, 2016, for service and receipt of motions to dismiss or motions for summary judgment from BBID, WSID, and the Prosecution Team. The hearing team confirmed in an e-mail to the parties of January 14, 2016, that the submitted briefings were not to exceed ten pages in length. On January 25, 2016, BBID filed five motions to dismiss and WSID filed two motions to dismiss and one motion for summary judgment, each of which is up to ten pages in length. The Prosecution Team objected to the filing by BBID and WSID of more than ten pages of briefs.

It was our intent in our rulings of October 30, 2015, December 16, 2015, and clarifying e-mail of January 14, 2016, to allow BBID and WSID to file a single document, including a motion (or motions) and supporting memorandum of points and authorities, not to exceed ten pages in length *in total*. The reading of our instruction by BBID and WSID to allow an unlimited number of motions and briefs each up to ten pages in length would undermine the purpose of imposing page limits. But to the extent that our direction may not have been clear, it is now clarified.

The Board has the authority and discretion to conduct an adjudicatory proceeding "in a manner as the Board deems most suitable to the particular case with a view toward securing relevant information expeditiously without unnecessary delay and expense to the parties and the Board." (23 Cal. Code Regs. § 648.5.) Limitation on pages of briefing promotes efficiency in the Board's adjudicatory process and fairness to opposing parties.

We construe BBID's and WSID's over-length filings as a request to submit additional pages of briefing. Accordingly, we will allow BBID and WSID to each submit one document in their respective proceedings that includes a motion (or motions, if the parties choose to style their requests as separate motions) to dismiss or for summary judgment, and any supporting memorandum or brief, all of which must not exceed **twenty pages** in length *in total*. The amended motions must be received by the Board by **noon on February 3, 2016**. If the parties elect not to file amended motions, we will exercise our discretion to exclude pages in excess of the page limit. We note, and reject, BBID's assertion that our enforcement of page limitations would violate rights protected by the United States Constitution.

The Prosecution Team may submit one brief in each proceeding in response to the respective motions, of up to **twenty pages** in length *in total*, to be received by the Board by noon on February 22, 2016. The page limits applicable to all other parties remain the same. The page limits do not include exhibits, declarations, attachments, a table of contents, a table of authorities, or the proof of service.

BBID responded to Hearing Officer Doduc's request for legal briefing on the two specific legal issues identified in her request, with a motion to dismiss and supporting brief of ten pages in length. This motion and brief is acceptable in response to the request for legal briefing and does not need to be resubmitted. The additional two pages of briefing, titled "Notice of Position on Curtailments" are also accepted into the record.

The parties may raise arguments addressing the jurisdiction and authority of the Board to hold these proceedings. But we conclude that these arguments can be concisely briefed within the page limits allowed. The parties will also have the opportunity to make legal arguments in their opening and closing briefs. If the Board finds that additional briefing may be helpful, the Board may allow the parties to submit supplemental briefs at an appropriate time.

#### **PRODUCTION OF DOCUMENTS BY THE STATE WATER RESOURCES CONTROL BOARD**

We are aware that a final production of documents has been made by our legal office in response to the requests for public records by BBID and WSID. This production was made on January 20, 2016, the day after the deadline for submission of cases-in-chief. The parties may supplement their exhibits based on these most recently produced documents, if the amendments or additional exhibits are received by the Board by **noon on February 4, 2016**. Those parties seeking to supplement their submitted exhibits must demonstrate why the information or document could not have been submitted by the deadline of January 19, 2016.

#### **EX PARTE COMMUNICATIONS**

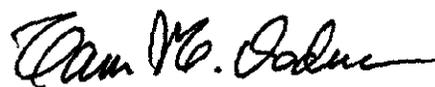
We would like to remind the parties that *ex parte* communications concerning substantive or controversial procedural issues relevant to this hearing are prohibited. Please be sure to copy the service list on any correspondence to us, the other Board Members, and the hearing team related to this matter.

Thank you for your continued cooperation. Questions regarding non-controversial procedural matters should be directed to Staff Counsel Nicole Kuenzi at (916) 322-4142 or by email to [Nicole.Kuenzi@waterboards.ca.gov](mailto:Nicole.Kuenzi@waterboards.ca.gov); or Ernie Mona at (916) 341-5359 or by email to [Ernie.Mona@waterboards.ca.gov](mailto:Ernie.Mona@waterboards.ca.gov) or to Jane Farwell-Jensen at (916) 341-5349 or by email to [Jane.Farwell-Jensen@waterboards.ca.gov](mailto:Jane.Farwell-Jensen@waterboards.ca.gov) (Gov. Code, § 11430.20, subd. (b).)

Sincerely,



Frances Spivy-Weber, Vice-Chair  
WSID Hearing Officer



Tam M. Doduc, Board Member  
BBID Hearing Officer

Enclosure: Service Lists

**SERVICE LIST OF PARTICIPANTS  
THE WEST SIDE IRRIGATION DISTRICT  
CEASE AND DESIST ORDER HEARING  
(October 8, 2015, Revised 12/18/15)**

Parties	
THE FOLLOWING <b><u>MUST BE SERVED</u></b> WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (All have AGREED TO ACCEPT electronic service, pursuant to the rules specified in the hearing notice.)	
<p><b>DIVISION OF WATER RIGHTS</b> Prosecution Team Andrew Tauriainen, Attorney III SWRCB Office of Enforcement 1001 I Street, 16th Floor Sacramento, CA 95814 <a href="mailto:Andrew.Tauriainen@waterboards.ca.gov">Andrew.Tauriainen@waterboards.ca.gov</a></p>	<p><b>THE WEST SIDE IRRIGATION DISTRICT</b> Jeanne M. Zolezzi Karna Harrigfeld Janelle Krattiger Herum\Crabtree\Suntag 5757 Pacific Ave., Suite 222 Stockton, CA 95207 <a href="mailto:jzolezzi@herumcrabtree.com">jzolezzi@herumcrabtree.com</a> <a href="mailto:kharrigfeld@herumcrabtree.com">kharrigfeld@herumcrabtree.com</a> <a href="mailto:jkrattiger@herumcrabtree.com">jkrattiger@herumcrabtree.com</a></p>
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<p><b>SOUTH DELTA WATER AGENCY</b> John Herrick, Esq. Dean Ruiz 4255 Pacific Ave., Suite 2 Stockton, CA 95207 <a href="mailto:jherrlaw@aol.com">jherrlaw@aol.com</a> <a href="mailto:dean@hprlaw.net">dean@hprlaw.net</a></p>	<p><b>CENTRAL DELTA WATER AGENCY</b> Jennifer Spaletta Spaletta Law PC PO Box 2660 Lodi, CA 95241 <a href="mailto:jennifer@spalettalaw.com">jennifer@spalettalaw.com</a></p> <p>Dante Nomellini and Dante Nomellini, Jr. Nomellini, Grilli &amp; McDaniel <a href="mailto:ngmplcs@pacbell.net">ngmplcs@pacbell.net</a> <a href="mailto:dantejr@pacbell.net">dantejr@pacbell.net</a></p>
<p><b>CITY AND COUNTY OF SAN FRANCISCO</b> Jonathan Knapp Office of the City Attorney 1390 Market Street, Suite 418 San Francisco, CA 94102 <a href="mailto:jonathan.knapp@sfgov.org">jonathan.knapp@sfgov.org</a></p>	<p><b>SAN JOAQUIN TRIBUTARIES AUTHORITY</b> Valerie Kincaid O'Laughlin &amp; Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95814 <a href="mailto:vkinaid@olaughlinparis.com">vkinaid@olaughlinparis.com</a> <a href="mailto:towater@olaughlinparis.com">towater@olaughlinparis.com</a></p> <p align="right"><b>(revised 12/18/15)</b></p>

<p><b>CALIFORNIA DEPARTMENT OF WATER RESOURCES</b> Robin McGinnis, Attorney PO Box 942836 Sacramento, CA 94236-0001 <a href="mailto:robin.mcginis@water.ca.gov">robin.mcginis@water.ca.gov</a></p>	<p><b>BYRON BETHANY IRRIGATION DISTRICT</b> Daniel Kelly Somach Simmons &amp; Dunn 500 Capitol Mall, Suite 1000, Sacramento, CA 95814 <a href="mailto:dkelly@somachlaw.com">dkelly@somachlaw.com</a></p>
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**SERVICE LIST OF PARTICIPANTS  
BYRON-BETHANY IRRIGATION DISTRICT  
ADMINISTRATIVE CIVIL LIABILITY HEARING**

**(09/02/15; Revised: 09/10/15; Revised 10/06/15; Revised 10/22/15, 12/18/15)**

<b>PARTIES</b>	
<p>THE FOLLOWING <b><u>MUST BE SERVED</u></b> WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (All have AGREED TO ACCEPT electronic service, pursuant to the rules specified in the hearing notice.)</p>	
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