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## State Water Resources Control Board

**TO:** BBID ACLC and WSID Draft CDO Hearing Teams

**FROM:** Andrew Tauriainen  
Attorney for Prosecution Team  
**OFFICE OF ENFORCEMENT**

**DATE:** December 4, 2015

**SUBJECT: PROSECUTION TEAM COMMENTS ON BIFURCATION AND PHASING OF THE BBID ACLC AND WSID DRAFT CDO HEARINGS**

The Prosecution Team appreciates the Hearing Officers' consent to bifurcate the BBID ACLC and WSID Draft CDO hearings in order to consolidate the water availability portions of the hearings. The Prosecution Team offers the following clarification to the comments submitted November 24, 2015, and makes the following additional comments.

### **Clarification Regarding Phase 1 and Phase 2 Issues**

Upon further reflection, the Prosecution Team agrees with the other parties that issues regarding water availability should be strictly limited to the joint Phase 1 hearing. Such limitation provides for a fair hearing and promotes efficiency by creating one record on water availability, minimizing the number of required hearing days for water availability witnesses, and by eliminating overlap of issues between phases. Broadly restated, Phase 1 should address whether water was available for WSID's license or BBID's claimed pre-1914 right during the relevant periods, and the Phase 2 hearings should focus on all remaining elements of the alleged violations and proposed remedies with the assumption that water was not available.

The Prosecution Team's November 24, 2015, comments therefore require clarification. Notably, those comments suggest that the BBID Phase 2 hearing should address whether there was water available for BBID to divert under its claimed pre-1914 appropriative right during the alleged violation period. This question should be adjudicated in Phase 1. The Prosecution Team proposes to further clarify and revise the Phase 1 purposes and issues as follows:

*Phase 1: The purpose of Phase 1 is to receive evidence, testimony and briefing regarding the availability of water to serve water rights claimed by WSID or BBID during the relevant periods. Key Issues: 1) Was water available for diversion under WSID's post-1914 license during the relevant period framed in the Draft CDO? 2) Was water available for diversion under BBID's claimed pre-1914 appropriative right during the relevant period framed in the ACLC?*

The Phase 2 purposes and key issues described in the Prosecution Team's November 24 email are adequate after removing those issues referencing water availability and adding the assumption that water was not available for WSID's license or BBID's claimed pre-1914 right during the relevant periods. Such an assumption is implied in the parties' proposed schedule

and in Mr. Buckman's November 30 email, but it should be made explicit in the revised hearing notices. Any potential inefficiency in holding the Phase 2 hearings prior to the Phase 1 ruling is outweighed by the need to fully and expeditiously resolve both enforcement matters.

### **Richard Morat Evidence and Testimony**

The Prosecution Team does not object to allowing Mr. Morat to present his policy statement, evidence, testimony and any cross-examination during the week of March 21 through 25, 2016, whether his issues are considered to be Phase 1, BBID Phase 2, or both.

### **Schedule and Motions In Limine**

The Prosecution Team agrees that the deadlines currently in place for the BBID ACLC hearing should serve for all phases of the bifurcated proceedings. However, the Prosecution Team notes that the current BBID schedule does not provide deadlines for motions in limine. Although the Prosecution Team will continue to seek stipulations regarding facts and evidence with BBID and WSID to streamline the presentation of evidence, motions in limine may be necessary for any unresolved issues. The Prosecution Team suggests that such motions should be subject to reasonable page limits, and filed along with written opening statements no later than February 29, 2016, with any opposition due on March 5, 2016.

### **Pre-Hearing Conferences**

The current BBID schedule provides a second pre-hearing conference on February 8, 2016. The Prosecution Team suggests that the WSID Hearing Officer also conduct allow for a second pre-hearing conference. The Prosecution Team further suggests that the second prehearing conference on Phase 1 issues be conducted jointly by the BBID and WSID Hearing Officers, with separate second pre-hearing conferences conducted for each Phase 2 the same day.

### **Exhibit Indexes and Submittals**

The Prosecution Team respectfully requests that the Hearing Officers state their preference regarding the parties' Exhibit Indexes and submittals. Specifically, do the Hearing Officers prefer that each party submit one Exhibit Index to cover all phases, or should each party submit a separate Exhibit Index for each phase? The Prosecution Team suggests that the record will be simpler and more easily managed if each party submits one Exhibit Index to cover all phases.

Sincerely,



Andrew Tauriainen  
Office of Enforcement  
Attorney for Prosecution Team

cc: Service Lists (attached)

**SERVICE LIST OF PARTICIPANTS  
BYRON-BETHANY IRRIGATION DISTRICT  
ADMINISTRATIVE CIVIL LIABILITY HEARING  
(09/02/15; Revised 09/10/15; Revised 10/06/16; Revised 10/22/15)**

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**SERVICE LIST OF PARTICIPANTS  
WEST SIDE IRRIGATION DISTRICT  
CEASE AND DESIST ORDER HEARING  
(October 8, 2015)**

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