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BETHANY IRRIGATION DISTRICT
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8
9 BEFORE THE
10 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

11 In the Matter of ENFORCEMENT ACTION
12 ENF01951 – ADMINISTRATIVE CIVIL
LIABILITY COMPLAINT REGARDING
13 UNAUTHORIZED DIVERSION OF WATER
FROM THE INTAKE CHANNEL TO THE
14 BANKS PUMPING PLANT (FORMERLY
ITALIAN SLOUGH) IN CONTRA COSTA
15 COUNTY

Enforcement Action ENF01951

**OPPOSITION TO PROSECUTION
TEAM'S MOTION FOR
PROTECTIVE ORDERS**

16
17 **INTRODUCTION**

18 Byron-Bethany Irrigation District (BBID) opposes the Division of Water Rights
19 Prosecution Team's Motion for Protective Orders (Motion) In the Matter of Enforcement Action
20 ENF01951 – Administrative Civil Liability Complaint Regarding Unauthorized Diversion of
21 Water From the Intake Channel to the Banks Pumping Plant (Formerly Italian Slough) in Contra
22 Costa County (ENF01951).

23 As a preliminary matter, the Prosecution Team conflates the hearings of two different
24 enforcement matters, which is improper. The proceeding in Enforcement Action ENF01949 –
25 Draft Cease and Desist Order Regarding Unauthorized Diversions or Threatened Unauthorized
26 Diversions of Water From Old River in San Joaquin County (ENF01949) is entirely independent
27 of and separate from the proceedings in ENF01951. The two enforcement proceedings arise out
28 of different water rights, different alleged violations, and individualized allegations. Moreover,

1 ENF01949 and ENF01951 will be heard by different Hearing Officers. There is no authority to
2 support the Prosecution Teams attempt to limit BBID's right to discovery by attempting to
3 improperly consolidate proceedings in ENF01949 and ENF01951.

4 Additionally, while BBID will not seek the written testimony of witnesses ahead of the
5 scheduled time for the submittal of written testimony¹, BBID opposes any prohibition or
6 limitation on depositions as sought by the Prosecution Team. The Prosecution Team has the
7 burden of showing a need for a protective order; it has not met that burden, and it certainly has
8 not provided any grounds for the *broad* protective order requested. In addition to the right to
9 discover facts supporting the Prosecution Team's complaint, BBID has the right to discover facts
10 relevant to BBID's defense of ENF01951, including, but not limited to, facts regarding the
11 separation of functions by the State Water Resources Control Board (SWRCB), the SWRCB's
12 predetermination on the availability of water, and facts that other parties to this proceeding might
13 possess that are relevant to the question of water availability from June 13-25, 2015. The
14 SWRCB argued to the Superior Court on September 22, 2015, that BBID will receive "an
15 evidentiary hearing [before the SWRCB] where each party will have an opportunity to present
16 evidence to an impartial tribunal." (Reporter's Transcript of Proceedings, Sept. 22, 2015 at p. 8;
17 pertinent pages attached hereto as Ex. 1.)² Through its Motion, however, the Prosecution Team
18 now seeks to limit BBID's ability to engage in statutorily authorized discovery, thereby depriving
19 BBID its right to prepare for a full evidentiary hearing on all controverted issues. BBID therefore
20 requests that the Hearing Officer deny the Motion.

21 BACKGROUND

22 The hearings in ENF01949 and ENF01951 will be considered separately, by different
23 SWRCB Hearing Officers, on different dates, with different interested parties participating.

24
25 ¹ While BBID will not seek actual written testimony as part of the prehearing discovery in ENF01951, BBID has the
26 right to conduct discovery of the basis for the allegations contained in the Prosecution Team's complaint and to
27 discover facts that might be relevant to BBID's defense, among other things. BBID does not waive this right.

28 ² The SWRCB also argued to the Superior Court: "Additionally, as previously discussed, petitioners have
adequate alternative remedies, such as moving the Board to disqualify members of the prosecution or hearing team,
or moving to recuse any allegedly biased Board member." (SWRCB's Amended Consolidated Opposition to Ex
Parte Applications, filed September 17, 2015, at p.7, attached to Declaration of Daniel Kelly (Kelly Decl.) at Ex. A.)

1 These separate hearings involve different parties holding different water rights (which are subject
2 to different sets of rules and involve different points of diversion), and different allegations of
3 actual or threatened diversions of water during different periods of time. While there may be
4 some similarities between the proceedings, the facts relevant to each of these proceedings will
5 necessarily be different.

6 The Prosecution Team's allegations in ENF01951 rely heavily on the validity of the
7 SWRCB's water availability analysis conducted prior to June 12, 2015, and the application of that
8 analysis to the alleged facts set forth in the Prosecution Team's complaint. The June 12, 2015
9 Curtailment Notice issued by the SWRCB was premised on that water availability analysis and
10 forms the backbone of the Prosecution Team's complaint.

11 In addition to testing the validity of the work undertaken by the SWRCB to support the
12 June 12, 2015 Curtailment Notice, BBID is entitled to raise various defenses in defending itself
13 against the Prosecution Team's complaint. Some of the facts relevant to those defenses are
14 known by various SWRCB staff and management, and BBID must have the opportunity to
15 discover those facts to adequately prepare for the evidentiary hearing in ENF01951. Moreover,
16 the June 12, 2015 Curtailment Notice violated due process and, in defense of its actions, the
17 SWRCB has argued that many of the actions taken in curtailing water rights was the work of staff
18 and not that of the SWRCB. The water availability analysis undertaken by the SWRCB and the
19 individuals responsible for participating in and making curtailment decisions are relevant to an
20 adjudication of the issues raised by the Prosecution Team's complaint and BBID's defenses.
21 The evidentiary hearing in ENF01951 is currently scheduled for the week of March 21, 2016.
22 Generally, discovery must be completed 30 days prior to the date the trial commences. (Code
23 Civ. Proc., § 2024.020.) Discovery in ENF01951 must therefore be completed before February
24 19, 2016. Written testimony in ENF01951 is currently due no later than January 18, 2016.
25 Written rebuttal testimony must be provided by February 22, 2016. Limiting discovery to the
26 period *after* written testimony is submitted will effectively result in a deprivation of discovery
27 because it is unlikely the parties can schedule and conduct depositions, and otherwise engage in
28 meaningful discovery, between January 18, 2016 and February 19, 2016. It certainly will not

1 allow for discovery to serve any useful purpose in the preparation of direct written testimony, and
2 it is unlikely to provide timely information to support the preparation of rebuttal testimony.

3 LEGAL STANDARD

4 As vested property rights, water rights “cannot be infringed by others or taken by
5 governmental action without due process ...” (*United States v. State Water Resources Control*
6 *Bd.* (1986) 182 Cal.App.3d 82, 101.) Due process requires an opportunity to be heard, and an
7 opportunity to confront and cross-examine adverse evidence. (*Goldberg v. Kelly* (1970) 397 U.S.
8 254, 268-269.) Where a statute requires a state agency (e.g., the SWRCB) to conduct an
9 evidentiary hearing for determination of facts, the mandatory provisions in the “Administrative
10 Adjudication” chapter of the Administrative Procedures Act at Government Code section 11400
11 et seq. govern the adjudicative proceeding. (Gov. Code, §§ 11410.10, 11410.20.) Government
12 Code section 11425.10 (Section 11425.10) is one of the mandatory provisions. (Cal. Law Rev.
13 Com. com. to Deering’s Ann. Gov. Code (1995) foll., § 11425.10; see Cont. Ed. Bar,
14 Administrative Hearing Practice 2d, § 1.26.)

15 Section 11425.10 provides that “[t]he agency shall give the person to which the agency
16 action is directed notice and an opportunity to be heard, including the opportunity to present and
17 rebut evidence.” (Gov. Code, § 11425.10, subd. (a)(1).) Section 11425.10 is “self-executing”
18 and “specifies the minimum due process requirements for an adjudicative hearing” before a state
19 agency. (*Patterson Flying Service v. Dept. of Pesticide Regulation* (2008) 161 Cal.App.4th 411,
20 424.) BBID qualifies as a “person” under Section 11425.10. (Gov. Code, § 11405.70.)
21 Accordingly, BBID is entitled to a full evidentiary hearing, including the discovery allowed under
22 Water Code section 1100, to create the record to support a subsequent Code of Civil Procedure
23 section 1094.5 appeal to the Court, if necessary. The Water Code further governs the SWRCB’s
24 hearing and discovery procedures, and incorporates elements of the Administrative Procedure Act
25 and the Civil Discovery Act (Title 4 [commencing with Section 2016.010] of Part 4 of the Code
26 of Civil Procedure). (See generally Wat. Code, § 1100; Gov. Code, § 11400 et seq.; Cal. Code
27 Regs., tit. 23, §§ 648, 648.4.)

28 The Water Code *expressly provides* that any party to proceedings before the SWRCB may

1 take depositions of witnesses in accordance with Part 4 of the Code of Civil Procedure. (Wat.
2 Code, § 1100; Code Civ. Proc., §§ 2016.010, et. seq.) A party’s attorney of record may also issue
3 a subpoena for attendance at a hearing or a subpoena *duces tecum* for the production of
4 documents. (Gov. Code, §§ 11450.10, 11450.20; see also Cal. Code Regs., tit. 23, § 649.6.)
5 These statutory rights to discovery are consistent with due process. As an appellate court
6 observed: “[T]he due process clause ensures that an administrative proceeding will be conducted
7 fairly, ‘discovery must be granted if in the particular situation a refusal to do so would so
8 prejudice a party as to deny him due process.’ [Citation].” (*Mohilef v. Janovici* (1996) 51
9 Cal.App.4th 267, 302.)

10 The burden is on the party who brings a motion for a protective order to establish why
11 such an order is necessary. (*Zellerino v. Brown* (1991) 235 Cal.App.3d 1097, 1111.) In deciding
12 whether to grant a protective order, and on what terms, the Hearing Officer must fashion
13 particularized relief for the specific case. (*Ibid.*)

14 ARGUMENT

15 A. The Enforcement Matters are Separate, Independent, and not Coordinated

16 The Prosecution Team’s attempt to “coordinate” ENF01949 and ENF01951 for purposes
17 of discovery is improper. The two proceedings are unrelated. They involve different parties
18 holding different water rights subject to different sets of rules, and they involve different points of
19 diversion and different allegations of actual or threatened diversions of water during different
20 periods of time. While there may be some similarities between the proceedings, the facts relevant
21 to each of these proceedings will necessarily be different. Moreover, nothing in the Water Code
22 or Code of Civil Procedure provides for blanket discovery limitations in separate administrative
23 proceedings through a single order.

24 In effect, the Prosecution Team is seeking to control the timing of BBID’s discovery by
25 requesting a general order with application in separate administrative proceedings, and
26 attempting to achieve formal rulemaking through these separate administrative proceedings. The
27 SWRCB does not have a formal rule mandating the coordination of discovery in separate
28 administrative proceedings, and has not adhered to the formal procedures for administrative

1 rulemaking sufficient to create such a rule in ENF01951. As such, a blanket order to coordinate
2 discovery in separate administrative matters is not appropriate and should be rejected.

3 **B. The Prosecution Team Provided No Basis for the Broad Protective Order Requested**

4 The Prosecution Team's Motion seeks a protective order prohibiting or limiting
5 depositions under Code of Civil Procedure sections 2025.420, subdivision (b), and 2019.030,
6 subdivisions (a) and (b), and Government Code section 11450.30. The Prosecution Team claims
7 a broad and unlimited protective order is necessary to prevent undue burden and expense. The
8 Prosecution Team fails, however, to identify a single unreasonable, oppressive, or unduly
9 expensive burden that will result from BBID taking depositions in accordance with the Water
10 Code and Code of Civil Procedure.

11 The Prosecution Team has the burden to establish why such an order is necessary.
12 (*Zellerino v. Brown, supra* 235 Cal.App.3d at p. 1111.) The Prosecution Team's attempt to rely
13 on orders in prior enforcement matters is not determinative, nor appropriate. In deciding whether
14 to grant a protective order, and on what terms, the Hearing Officer must fashion particularized
15 relief for the specific case at issue. (*Ibid.*) This necessarily means that the Hearing Officer must
16 consider the particularized facts of ENF01951. The Prosecution Team has made no argument,
17 and provided no evidence, that it is entitled to the requested protective order in ENF01951. If the
18 Prosecution Team believes a protective order is warranted in ENF01951, the appropriate course
19 of action is for the Prosecution Team to object to a noticed deposition and establish the need for a
20 protective order based upon the facts relevant to that deposition.

21 To date, BBID has noticed the depositions of Brian Coats, Jeff Yeazel, and Kathy
22 Mrowka. BBID understands that the water availability analysis was conducted by Jeff Yeazel
23 under the supervision of Brian Coats. Kathy Mrowka is also identified in the Prosecution Team's
24 Notice of Intent to Appear as testifying regarding "water availability determination." As water
25 availability will be one of the primary controverted issues at the evidentiary hearing in
26 ENF01951, discovery through deposition of these witnesses is appropriate and warranted.
27 Moreover, BBID has identified several SWRCB staff and management who possess information
28 relevant to certain defenses BBID intends to raise throughout the proceedings in ENF01951.

1 Those individuals were identified in BBID’s initial Notice of Intent to Appear and include John
2 O’Hagan, Kathy Mrowka, Tom Howard, and Michael George. The depositions of these
3 individuals are necessary to prepare for BBID’s case-in-chief.

4 For example, in *Banta-Carbona Irrigation Dist. v. State Water Resources Control Bd.*,
5 San Joaquin County Superior Court Case No. 39-2015-00326421-CU-WM-WTK, the SWRCB
6 filed a declaration of John O’Hagan in opposition to a request for a temporary restraining order.
7 (Kelly Decl. at Ex. B.) In his declaration, Mr. O’Hagan, who oversees the SWRCB’s Division of
8 Water Rights, declared that he led the SWRCB’s water availability analysis and curtailment effort
9 for at least the past two years. He further declared that the Curtailment Notice in that action
10 reflected the SWRCB’s *determination* that water was not available for BBID to divert. (Kelly
11 Decl. at Ex. B, ¶ 6.) According to Mr. O’Hagan, the Curtailment Notice represented the
12 SWRCB’s “findings of the unavailability of water,” and the need to cease diversions. (*Ibid.*)
13 BBID is entitled to take Mr. O’Hagan’s deposition to obtain information regarding his personal
14 knowledge in this regard. Messrs.’ Howard and George were also involved in water right
15 curtailment decisions, and in approving exceptions to curtailments. Accordingly, their testimony
16 is also relevant to BBID’s defenses in ENF01951.

17 BBID must also have the opportunity to conduct discovery regarding the separation of
18 functions at the SWRCB relating to curtailments and water availability determinations. If the
19 SWRCB did not maintain adequate separation with respect to water availability determinations or
20 curtailments, disqualification or recusal would be warranted. (See SWRCB’s Amended
21 Consolidated Opposition to Ex Parte Applications, filed September 17, 2015, at p. 7, attached to
22 Kelly Decl. as Exh. A [SWRCB stating “petitioners have adequate alternative remedies, such as
23 moving the Board to disqualify members of the prosecution or hearing team, or moving to recuse
24 any allegedly biased Board member”].)

25 Whether “it is difficult [for the Prosecution Team] to imagine the need for” the noticed
26 depositions is not relevant. (Motion at p. 4.) BBID is not obligated to obtain the Prosecution
27 Team’s approval of its discovery plan prior to implementation. The sole issue is whether the
28 Prosecution Team has met its burden in seeking a protective order. It has not met the burden

1 here.

2 **C. The Prosecution Team's Request is Unreasonable**

3 The Prosecution Team proposes to limit BBID's ability to commence depositions until
4 after January 18, 2016. Pursuant to the Code of Civil Procedure, discovery must be completed by
5 February 19, 2016. Thus, the Prosecution Team proposes to give BBID only twenty-four (24)
6 working days to evaluate the evidence and witness statement submittals (which are anticipated to
7 be voluminous), schedule and take pertinent depositions, and prepare rebuttal testimony and
8 exhibits in response to a threatened \$5.2 million penalty through ENF01951. The Prosecution
9 Team's proposal is an affront to due process, and is inconsistent with the SWRCB's repeated
10 assurances to the Superior Court that BBID would have a full and fair opportunity to defend itself
11 in ENF01951.

12 **CONCLUSION**

13 The Water Code and referenced Code of Civil Procedure sections expressly provide for
14 the opportunity to conduct depositions in this matter. Whether the SWRCB has issued protective
15 orders or limited discovery requests in other unrelated administrative proceedings is irrelevant.
16 The Hearing Officer must consider the individual facts of the particular discovery request in a
17 particular administrative proceeding before issuing a protective order. Only after the Prosecution
18 Team meets its burden of showing that it is entitled to a protective order, can the burden shift to
19 BBID to demonstrate why the discovery is warranted. The Prosecution Team has not met its
20 preliminary burden. For the above reasons, BBID requests that the Hearing Officer deny the
21 Prosecution Team's Motion.

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23 SOMACH SIMMONS & DUNN
24 A Professional Corporation

25 Dated: October 21, 2015

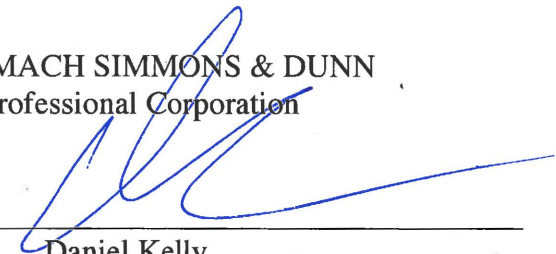
26 By: 
27 Daniel Kelly
28 Attorneys for Byron-Bethany Irrigation District

EXHIBIT 1

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA
BEFORE THE HONORABLE PETER H. KIRWAN, JUDGE
DEPARTMENT 1

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CALIFORNIA WATER CURTAILMENT CASES.)
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REPORTER'S TRANSCRIPT OF PROCEEDINGS
SEPTEMBER 22, 2015

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OFFICIAL COURT REPORTER: MELISSA CRAWFORD, CSR, RPR
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1 felt it was incumbent on them to inform the Court that these
2 factual issues we had disagreements with. And it was to that
3 end that there was a Mr. O'Hagan declaration submitted.

4 THE COURT: Okay. So, what I'm hearing you tell me is
5 that the proceedings will be an evidentiary hearing where each
6 party will have an opportunity to present evidence to an
7 impartial tribunal; is that correct?

8 MR. LEE: That is correct.

9 THE COURT: All right. And no decision will be made
10 until both sides have an opportunity to present their evidence,
11 correct?

12 MR. LEE: Correct, Your Honor.

13 THE COURT: All right. All right, let's talk -- let's
14 switch gears here and talk a little bit about concurrent
15 jurisdiction, all right? I read the *National Audubon* case. And
16 it's factually distinguishable from this case. But that isn't
17 the only reason why I'm not particularly persuaded by it. I
18 think there are sound reasons that go beyond just different
19 facts that cause me concern about the Court's reliance on that
20 case in making any type of determination that there's concurrent
21 jurisdiction here. In that case it was an environmental agency,
22 as you know, suing Los Angeles. And, ultimately, the Court,
23 towards the latter part of the conclusion, concluded that
24 because the Court could, under certain sections of the Water
25 Code, utilize its right to employ somebody from the State Water
26 Agency as a referee. That there was concurrent jurisdiction.
27 And there was enough body of law that said we're not going to
28 take it out of the hands of the Court.

SERVICE LIST
BYRON-BETHANY IRRIGATION DISTRICT
ADMINISTRATIVE CIVIL LIABILITY HEARING

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