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10 **STATE WATER RESOURCES CONTROL BOARD**

11 In the matter of Administrative Civil
12 Liability Complaint issued against Byron-
13 Bethany Irrigation District;

14 In the matter of Draft Cease and Desist
15 Order issued against West Side Irrigation
16 District

**OPPOSITION TO REQUEST FOR
PROTECTIVE ORDER OF THE WEST
SIDE IRRIGATION DISTRICT, CENTRAL
DELTA WATER AGENCY AND SOUTH
DELTA WATER AGENCY**

17 West Side Irrigation District (“WSID”) South Delta Water Agency (“SDWA”), and
18 Central Delta Water Agency (“CDWA”) oppose the Division of Water Rights Prosecution
19 Team’s (“Prosecution Team”) request for a protective order because (1) the Parties are entitled to
20 conduct discovery, including depositions, (2) due to the timing of the hearings, the number of
21 identified Prosecution Team witnesses (particularly experts) and the need to gather information
22 necessary to prepare both cases-in-chief and rebuttal evidence, it is crucial that discovery
23 commence immediately to avoid prejudice or due process violations; (3) the Prosecution Team
24 has not shown any prejudice or undue burden associated with the requested discovery or timing.

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I. RELEVANT BACKGROUND

On October 12th, 2015 counsel for WSID, Bryon Bethany Irrigation District (“BBID”), SDWA, and CDWA, collectively the “Delta Parties”) initiated a conference call with counsel for the Prosecution Team to meet and confer regarding discovery in the WSID and BBID matters and coordinate schedules. At the conclusion of the conference call, counsel for the Prosecution Team agreed to provide available dates for Prosecution Team witnesses by the close of business on October 13, 2015. No such dates were provided. Instead, on October 14th, the Prosecution Team sent an email to all Parties objecting to the taking of depositions until after submittal of witness testimony.

With the WSID matter scheduled to commence shortly, and due to the significant prejudice related to delaying discovery, the Delta Parties were forced to commence noticing depositions for Prosecution Team witnesses. On October 15th the Delta Parties served deposition notices for Brian Coats, Jeff Yeazel and Kathy Mrowka. The Prosecution Team’s request for Protective Order followed.

Counsel for the Prosecution Team still has not provided dates for its witnesses to be deposed, or provided any response at all regarding coordination for dates for the notices depositions or any other depositions. (See attached declaration of S. Dean Ruiz).

II. ARGUMENT

A. The Parties Are Entitled To Take Depositions As A Matter Of Law.

Any party to a proceeding before the State Water Resources Control Board may, in any investigation or hearing, cause the deposition of witnesses to be taken in the manner prescribed by law for depositions in civil actions in the superior courts of this state. *Water Code §1100*. Section 1100 of the Water Code thus operates on the understanding that discovery in the State Water Resources Control Board’s proceedings should, as in civil actions in the superior courts, be construed broadly in favor of disclosure. As courts have repeatedly explained, “[t]he scope of discovery [in civil actions] is very broad.” (*Tien v. Superior Court* (2006) 139 Cal.App.4th 528, 535.) This expansive scope of discovery “enable[s] a party to obtain evidence in the control of

1 his adversary in order to further the efficient, economical disposition of cases according to right
2 and justice on the merits.” (*Fairfield v. Superior Court* (1966) 246 Cal. App. 2d 113, 119-120.)
3 Consistent with this purpose, the California “Supreme Court has often stated that discovery
4 statutes are to be construed broadly in favor of disclosure, so as to uphold the right to discovery
5 whenever possible.” (*Puerto v. Superior Court* (2008) 158 Cal.App.4th 1242, 1249 [citing
6 *Emerson Electric Co. v. Superior Court* (1997) 16 Cal.4th 1101, 1107-08; *Greyhound Corp. v.*
7 *Superior Court* (1961) 56 Cal.2d 355, 377].)

8 Water Code section 1100 reflects the general rule that parties to an adjudicative
9 proceeding are entitled to due process – which includes a full and fair opportunity to participate.
10 (See, e.g., *Sallas v. Municipal Court* (1978) 86 Cal.App.3d 737, 742 [“due process of law requires
11 that an accused . . . have a reasonable opportunity to prepare and present his defense. . . .”] The
12 Delta Parties are seeking no more than the Water Code, and basic due process rights, afford them.

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14 **B. Conducting Depositions In Advance of the Submission Written Testimony is Not Unduly**
15 **Burdensome.**

16 The Prosecution Team requests an order requiring depositions not occur until after witness
17 testimony has been submitted. However, the Prosecution Team’s motion describes absolutely no
18 prejudice which could result from depositions commencing now. Rather, the Prosecution Team’s
19 motion cites to general board procedures which provide for the pre hearing exchange of witness
20 testimony and exhibits, and in some cases rebuttal testimony. The Prosecution Team suggests that
21 it’s somehow unduly burdensome for the Prosecution Team witnesses to be subjected to
22 depositions while also having to prepare witness testimony. The Prosecution Team’s position is
23 untenable. Board procedures which allow for and/or require the submission of pre-hearing
24 witness testimony cannot be used as a tool eviscerate the meaning of Water Code §1100.

25 Further, the information sought in the depositions will relate to the work the Prosecution
26 Team purportedly has already done to substantiate the two pending enforcement actions. The
27 Delta Parties are not asking the Prosecution Team to do any more work – just to make witnesses
28 available to explain what they did, why they did it, and what information they did and did not rely

1 on to do it. This same burden will apply to the Prosecution Team regardless of when the
2 depositions are taken – but as we explain below – the prejudice to the Delta Parties of delaying
3 when it occurs is substantial.

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5 **C. Delaying Depositions Would Unduly Burden and Prejudice the Delta Parties.**

6 The Prosecutions Team’s position that depositions not be allowed until after witness
7 testimony is submitted unfairly confines the Delta Parties’ ability to defend the allegations
8 rendered by the prosecution team to rebuttal testimony. The Prosecution Team seems to have lost
9 sight of the fact that the Delta Parties did not initiate the subject proceedings. Rather, the Delta
10 Parties are the target of the proceedings and must be given every opportunity to understand and
11 defend against the allegations levied by the Prosecution Team. The Delta Parties’ ability to
12 adequately prepare their cases-in-chief is central to the opportunity to defend the allegations
13 against them. The depositions will elicit evidence that will be used by the Delta Parties in their
14 respective cases in chief, particularly by their experts.

15 Both enforcement proceedings hinge on the correctness of the Prosecution Team’s water
16 availability analysis – a voluminous, multi-step spreadsheet model encompassing literally dozens
17 of separate analytical decisions based on numerous sources of data. “Hiding” the rationale for
18 this model from the effected Parties so that they are limited in their ability to understand and
19 possible challenge the method and conclusions of the model is not only unfair – but highly
20 prejudicial and not the level of participation required by due process.

21
22 **D. Taking Depositions Prior To The Submission Of Written Testimony Will Cause The**
23 **Hearings To Be Significantly More Efficient.**

24 The Prosecution Team asserts taking depositions prior to the submission of witness
25 testimony is not needed because the water availability analysis is available on the State Board’s
26 website. However, the analysis involves significantly complicated modeling for which expert
27 review and testimony is required. Recently the Board provided some documents pursuant a
28 Public Records Act Request submitted by BBID in July of this year. The data and analysis

1 contained in the documents raise a plethora of questions related but not limited to, gaged data,
2 unimpaired flow, water use and consumptive demand, and assumptions and subjective judgments
3 made with regard to each of these components. The parties have a right to explore these issues
4 with the Prosecution Team's witnesses through depositions prior to submitting their cases-in-
5 chief.

6 It is clearly more appropriate and efficient to question witnesses as to these detailed
7 technical issues at deposition rather than during the hearing. This detailed discussion should
8 occur early on in the depositions to facilitate stipulations and ensure that only the issues in dispute
9 can be highlighted succinctly at the hearing. This is particularly important given the numerous
10 parties in the hearings and the number of identified witnesses.

11 Given the relatively short timelines between submission of written testimony and the
12 hearing, it would be impossible to conduct all of these depositions, digest and understand the
13 submitted written testimony, negotiate stipulations, prepare coherent rebuttal, and prepare concise
14 and coherent coordinated questioning and presentations of evidence for the hearing. Early
15 depositions significantly improve the process by allowing the parties to obtain and understand
16 information first, then reach agreements to narrow scope, then prepare properly to put on their
17 best and most succinct cases for hearing.

18 Absent timely depositions, the proceedings will be necessarily extended and significantly
19 more confusing and repetitive.

20
21 **E. The Delta Parties Have No Intent to Take Depositions Again after the Witness**
22 **Statements are Submitted Unless They Contain Substantively Different Testimony.**

23 The goal and focus of the noticed depositions is to streamline the testimony as it will be
24 presented at the hearing, as well as to verify the analysis used to determine the asserted
25 unavailability of water at WSID and BBID's points of diversion during the relevant time frame.
26 While the Prosecution Team's written witness testimony will provide ultimate conclusions on
27 these issues, it will not fully detail the analysis as to how these conclusions or volunteer facts that
28 might cause one to question the validity of the conclusions. This is the purpose of the

1 depositions. The Delta Parties have no intention of re-noticing any witness deposition after the
2 written witness testimony is produced, provided the Prosecution witnesses provide complete
3 disclosure at the depositions – which should not be a problem given that they have already
4 purportedly completed the work that justified the enforcement proceedings.

5 If, however, written testimony is later produced that adds new information that was not
6 timely disclosed at the depositions, then the Delta Parties would need to reserve the right to re-
7 open depositions.

8
9 **F. The Delta Parties Have Every Intent to Coordinate Depositions with All Parties**

10 The Delta Parties agree with the Prosecution Team that depositions of Prosecution Team
11 witnesses should be coordinated between all parties. Recall it was the Delta Parties that initiated
12 this coordination effort with the Prosecution Team’s counsel, which, to date, has not been
13 reciprocated.

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15 **G. The Prosecution Team’s Reliance on the Cachuma and Millview Matters is misplaced.**

16 The Prosecution team cites to *Millview* and *Cachuma* as support for its request for the
17 Protective Orders.

18 *Cachuma*

19 Cachuma was a matter set for review before the State Board in mid-October with
20 additional testimony scheduled to be heard in mid-November. In September counsel for
21 Cachuma set the depositions of four expert witnesses listed on CalTrout’s Revised Notice of
22 Intent to Appear. The depositions were set for early October. In addition to testimony, the notices
23 of deposition sought documents. CalTrout filed a Motion for Protective order. The SWRCB made
24 note that though written discovery and depositions are allowed pursuant to Water Code §1100, a
25 protective order may be issued if “the discovery sought is unreasonably cumulative or deflective,
26 or is attainable from some other source that is more convenient, less burdensome, or less
27 expensive.” (California Code of Civil Procedure §2019(b)).
28

1 The SWRCB found that Cachuma would obtain the information sought through the
2 depositions in the written witness testimony scheduled to be provided to Cachuma on October
3 15th within days of the scheduled depositions. Additionally though Cachuma argued that the
4 depositions were necessary to avoid surprise testimony, the SWRCB did not see merit in that
5 argument due to the fact that CalTrout's case-in-chief was not to be presented until mid-
6 November. Thus, Cachuma would have ample time to review the testimony and prepare for
7 CalTrout's case-in-chief. Finally, the State Board found that it would be unreasonably
8 burdensome to force CalTrout to present its expert witnesses for depositions in such close
9 proximity to the hearing since CalTrout also had to prepare for the hearing at that time.

10 In contrast to Cachuma, the present BBID matter will not occur until February and the
11 WSID matter may not occur until March. The Prosecution Team will bear no burden by providing
12 their witnesses for deposition in the coming weeks. Even more importantly, because the State
13 Board's water availability work has already been completed, there is no burden to asking these
14 witnesses to explain what they have done.

15 Millview

16 The Prosecution also cited Millview. In that matter, prior to propounding or noticing any
17 discovery, Millview requested SWRCB's authorization to conduct prehearing discovery pursuant
18 to the Civil Discovery Act per Water Code §1100. Millview contended it needed to conduct
19 discovery in order to determine "in advance of the hearing" what authority the Board asserted
20 over the issues in the proceeding and what the Board staff relied upon to determine that a portion
21 of a claimed pre-1914 right had been forfeited. Though SWRCB concluded that prior approval of
22 discovery is not necessary, the SWRCB did caution that a protective order could be issued if it
23 protected a party or deponent from undue burden and expense or if the discovery sought was
24 unreasonably cumulative or duplicative. SWRCB further opined that the circumstance before
25 them could warrant a protective order because the information sought was already available to
26 Millview from other sources.

27 Notably the SWRCB stated "Millview et. al. have not served any notice of deposition or
28 subpoena... and this ruling does not necessarily address the appropriateness of any specific

1 discovery request under those provisions....” In essence, the State Water Board cautioned
2 Millview to review the information available first.

3 This case is distinguishable and much more complex. The Millview matter dealt with the
4 loss of a single pre-1914 right due to forfeiture. Here, the foundation of both enforcement actions
5 is the alleged unavailability of water at BBID and WSID’s points of diversion based on a
6 significant new, and untested technical analysis performed on a watershed-wide basis using data
7 gathered by the State Board in recent years. The Prosecution Team’s recent partial public records
8 act request production includes a variety of spreadsheets and additional technical information,
9 with very little explanation. The Delta Parties experts cannot understand the produced
10 information without further explanation and there is plenty of time to conduct deposition to obtain
11 this information before testimony and exhibits are due.

12 Further, the decisions in this case will have far reaching impacts –beyond the single water
13 user in Millview – evidenced by the number of parties involved. The hearing team should not
14 tolerate “hide the ball” tactics here. All parties should be able to understand all of the evidence as
15 soon as possible so that we can have a full and fair hearing on these important issues.

16 Without these timely depositions, the Delta parties will not be able to prepare their own
17 testimony and will be prejudiced.

18
19 III. Conclusion

20 For these reasons, the Delta Parties respectfully request that the Hearing Officer denyof
21 the Prosecution Team’s request for protective orders and order the Prosecution Team to appear
22 for the three noticed depositions, and immediately provide available dates for the remainder of its
23 witnesses.

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