

1 SOMACH SIMMONS & DUNN
A Professional Corporation
2 DANIEL KELLY, ESQ. (SBN 215051)
MICHAEL E. VERGARA, ESQ. (SBN 137689)
3 500 Capitol Mall, Suite 1000
Sacramento, California 95814-2403
4 Telephone: (916) 446-7979
Facsimile: (916) 446-8199
5

6 Attorneys for Petitioner/Plaintiff BYRON-
BETHANY IRRIGATION DISTRICT
7

8 BEFORE THE
9 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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

SWRCB Enforcement Action ENF01951
MOTION TO QUASH SUBPOENA,
OR ALTERNATIVELY, MOTION
FOR PROTECTIVE ORDER

15 I. INTRODUCTION

16 Under to Government Code section 11450.30, Byron-Bethany Irrigation District (BBID)
17 moves to quash the State Water Resources Control Board’s (SWRCB) Office of Enforcement’s
18 subpoena duces tecum issued in *In the Matter of Enforcement Action ENF01951 –*
19 *Administrative Civil Liability Complaint Regarding Unauthorized Diversion of Water From the*
20 *Intake Channel to the Banks Pumping Plant (Formerly Italian Slough) in Contra Costa County*
21 (ENF01951) served on BBID on October 29, 2015 (Subpoena). The scope of the adjudicative
22 proceeding is framed by the Administrative Civil Liability Complaint in ENF01951 (ACL
23 Complaint), which limits the timeframe of the alleged violations to thirteen (13) days between
24 June 13, 2015 and June 25, 2015. The SWRCB’s demand for documents and information
25 relating to dates outside of this timeframe, and irrelevant personal information, is an improper
26 use of its subpoena power in this adjudicative proceeding, and is unreasonably oppressive and
27 burdensome. BBID attempted to meet and confer with the SWRCB regarding the unreasonable
28 and improper scope of the Subpoena, to no avail. Accordingly, BBID brings this motion to

1 quash the Subpoena. In addition or in the alternative, BBID seeks a protective order limiting the
2 scope of any further discovery in this enforcement proceeding to relevant scope.

3 II. SCOPE OF THE ADJUDICATIVE PROCEEDING
4 AND THE SUBPOENA

5 The ACL Complaint states the SWRCB is seeking civil penalties against BBID for
6 unauthorized diversions during thirteen (13) days between June 13, 2015 and June 25, 2015.
7 (Declaration of Michael E. Vergara (Vergara Decl.), Exh. A at ¶¶ 26, 33-34.) The letter
8 accompanying the ACL Complaint also specifically identifies the alleged violation as: “BBID is
9 alleged to have diverted a total of approximately two thousand sixty-seven (2,067) acre-feet over
10 the course of thirteen days, from June 13 through June 25, 2015, during which water was
11 unavailable to serve BBID’s water right. The violation is further described in the enclosed ACL
12 Complaint.” (Letter dated July 20, 2015, from John O’Hagan to Rick Gilmore and Daniel Kelly,
13 attached as Exhibit B to the Vergara Decl.)

14 On October 29, 2015, the SWRCB issued the Subpoena in this adjudicative proceeding,
15 demanding BBID produce documents relating to the timeframe between June 1, 2015 and
16 September 30, 2015 (Subpoena Duces Tecum and Addendum to Subpoena at pp. 7-9, attached as
17 Exhibit C to the Vergara Decl.), and stating, the “time period covered by this subpoena is from
18 **June 1, 2015 to up to five days before YOUR full compliance with this subpoena**” (*id.*, Exh.
19 C, Addendum to Subpoena at p. 4 (bold in original).) The SWRCB demands that the documents
20 be produced on or before November 13, 2015. (*Id.*, Addendum to Subpoena at p. 2.) The
21 Subpoena further seeks broad categories of documents relating to water supply contracts and
22 agreements, and documents and communications relating to water delivery to any person within
23 or outside of BBID’s boundaries between June 1, 2015 and September 30, 2015. (*Id.*,
24 Addendum to Subpoena at pp. 8-9.) Based on the broad language in the Subpoena, such
25 documents include confidential client records unrelated to the underlying proceeding.

26 Commencing October 30, 2015, BBID attempted to meet and confer with the SWRCB
27 regarding the unreasonable scope of the Subpoena and the November 13, 2015 production date.
28 (Correspondence and email exchange between counsel, attached as Exhibit D to the Vergara

1 Administrative Procedure Act and the Civil Discovery Act (Title 4 [commencing with Section
2 2016.010] of Part 4 of the Code of Civil Procedure). (See generally Wat. Code, § 1100; Gov.
3 Code, § 11400 et seq.; Cal. Code Regs., tit.23, §§ 648, 648.4.)

4 Government Code section 11450.30 allows a person served with an improper subpoena in
5 a SWRCB adjudicative proceeding to seek a motion for protective order and to move to quash the
6 subpoena, as follows:

7 (a) A person served with a subpoena or a subpoena duces tecum may object to its
8 terms by a motion for a protective order, including a motion to quash.

9 (b) The objection shall be resolved by the presiding officer on terms and
10 conditions that the presiding officer declares. The presiding officer may make
11 another order that is appropriate to protect the parties or the witness from
12 unreasonable or oppressive demands, including violations of the right to privacy.

13 ...

14 (Gov. Code, § 11450.30.)

15 In light of the SWRCB's refusal to limit the scope of the Subpoena to relevant and
16 pertinent documents, BBID moves to quash the Subpoena and in addition, or in the alternative,
17 for a protective order.

18 IV. ARGUMENT

19 The SWRCB is trying to use discovery in this proceeding to embark on a fishing
20 expedition that deviates from the confines of the ACL Complaint in the ENF01951 adjudicative
21 proceeding. "Employing a discovery method in a manner or to an extent that causes unwarranted
22 annoyance, embarrassment, or oppression, or undue burden and expense" is a misuse of the
23 discovery process. (Code Civ. Proc., § 2023.010, subd. (c).) Even if the Hearing Officer were to
24 find that the subpoenaed documents have some marginal relevance, she must consider whether
25 the proposed discovery is "unduly burdensome or expensive, taking into account the needs of the
26 case, the amount in controversy, and the importance of the issues at stake" in this proceeding.

27 (Code Civ. Proc., § 2019.030, subd. (a)(2).)

28 A. The Subpoena is Overly Broad and Not Reasonably Calculated to Lead to the Discovery of Admissible Evidence

The Subpoena seeks documents in an overly expansive fashion, which are not "relevant to

1 the subject matter involved in the pending actions,” and do not “appear[] reasonably calculated to
2 lead to the discovery of admissible evidence.” (Code Civ. Proc., § 2017.010.) The scope of the
3 adjudicative proceeding is limited to BBID’s alleged unlawful diversions between June 13, 2015
4 and June 25, 2015, and only documents relating to those dates are relevant and pertinent to the
5 underlying enforcement action. (Vergara Decl., Exh. A at ¶¶ 26, 33-34.) Accordingly, many of
6 the requested documents are simply not discoverable under Code of Civil Procedure section
7 2017.010. (See *Catholic Mut. Relief Soc’y v. Superior Court* (2007) 42 Cal.4th 358, 366 [both
8 requirements of section 2017.010 must be met to enforce a subpoena].)

9 Any and all documents relating to activities outside of the June 13, 2015 through June 25,
10 2015 timeframe are also not reasonably calculated to lead to the discovery of admissible
11 evidence. The SWRCB cannot make a prima facie showing that the requested documents are
12 relevant and necessary to prove a material element of its claims or in determining the level of
13 penalties sought in this proceeding. The SWRCB’s Subpoena is thus a burdensome and
14 oppressive distraction and a “fishing expedition” for records unrelated to the ACL Complaint
15 adjudicative proceeding. Such improper methods of “fishing” should be controlled by the
16 Hearing Officer. (*Calcor Space Facility v. Superior Court* (1997) 53 Cal.App.4th 216, 225
17 (citing *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355); see, e.g., *Tylo v. Superior*
18 *Court* (1997) 55 Cal.App.4th 1379, 1387 [“the rules of discovery do not allow unrestricted access
19 to all species of information”].) The Subpoena should be quashed because the requests exceed
20 the permissible bounds of Code of Civil Procedure section 2017.020.

21 B. The Subpoena is Unduly Burdensome and Harassing

22 BBID should not be forced to bear the burden and expense of responding to the SWRCB’s
23 overbroad requests, especially when the information sought is of no relevance to the allegations
24 and claims set forth in the ACL Complaint. Discovery that will result in little or no benefit to the
25 propounding party should be denied on even a small showing of annoyance, oppression, burden,
26 or expense. (*W. Pico Furniture Co. of L.A. v. Superior Court* (1961) 56 Cal.2d 407, 417
27 [unreasonable burden exists where, “the burden [of responding] is incommensurate with the result
28 sought”].) The benefit to SWRCB of this discovery is far outweighed by the annoyance,

1 oppression, burden, and expense of BBID in gathering the documents demanded, which would
2 include significant man-hours and monetary expenditure. (Vergara Decl. at ¶ 6.)

3 Courts are sensitive to attempts to abuse the discovery system and recognize that “[a]ny
4 discovery request, even an initial one, can be misused in an attempt to general settlement leverage
5 by creating burden, expense, embarrassment, distraction, etc.” (*Obregon v. Superior Court*
6 (1998) 67 Cal.App.4th 424, 431.) “When discovery requests are grossly overbroad on their face,
7 and hence do not appear reasonably related to a legitimate discovery need, a reasonable inference
8 can be drawn of an intent to harass and improperly burden.” (*Ibid.*) Based on the clear scope of
9 this adjudicative proceeding as set forth in the ACL Complaint, it is clear that this is the case
10 here. Accordingly, BBID requests that the Hearing Officer control such abuse.

11 C. The Subpoena Seeks Irrelevant Personal Information

12 The Subpoena impermissibly seeks personal information relating to purveyors, customers,
13 and entities irrelevant to the underlying adjudicative proceeding. (See Vergara Decl., Exh. C,
14 Addendum to Subpoena at pp. 8-9 [seeking broad categories of documents relating to water
15 supply contracts and agreements, and documents and communications relating to water delivery
16 to any person within or outside of BBID’s boundaries between June 1, 2015 and September 30,
17 2015].)

18 The person seeking to compel production of personal information has the burden of
19 showing the documents are not just relevant but that they are directly relevant to the issues in the
20 matter. (See *Lantz v. Superior Court* (1994) 28 Cal.App.4th 1839, 1853-54; see also *City of*
21 *Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 130; *Valley Bank of Nev. v. Superior Court*
22 (1975) 15 Cal.3d 652, 657.) “When compelled disclosure intrudes on constitutionally protected
23 areas, it cannot be justified solely on the ground that it may lead to relevant information.”
24 (*Stanford v. Superior Court* (1981) 119 Cal.App.3d 516, 525.) Even if the SWRCB could show
25 the private information is directly relevant to the issues in this matter, which it cannot, it must
26 also demonstrate a compelling need for the documents. (*Lantz v. Superior Court, supra*, 28
27 Cal.App.4th at pp. 1853-54; *Stanford v. Superior Court, supra*, 119 Cal.App.3d at p. 525.) The
28 “compelling need must be so strong as to outweigh the privacy right when these two competing

1 interests are carefully balanced.” (*Lantz v. Superior Court, supra*, 28 Cal.App.4th at pp. 1853-54;
2 *Britt v. Superior Court* (1978) 20 Cal.3d 844, 855-65 [disclosure must be “essential” to fair
3 resolution of the matter].)

4 The SWRCB has made no showing of any legitimate need, let alone a “compelling need,”
5 for any of the personal information sought by the Subpoena. Accordingly, the Subpoena should
6 be quashed.

7 D. Motion for Protective Order

8 The Hearing Officer has wide latitude to control the conduct of discovery and may limit
9 the scope of even relevant discovery if the burden of such discovery will outweigh its utility.
10 (See Code Civ. Proc., § 2017.020, subd. (a).) Government Code section 11450.30 allows a
11 person served with an improper subpoena in a SWRCB adjudicative proceeding to seek a motion
12 for protective order.

13 BBID is entitled to a protective order because the SWRCB’s Subpoena is burdensome,
14 oppressive, and serves no purpose other than to harass and to interfere with BBID’s relationship
15 with other purveyors, entities, customers, and diverters. Thus, for the good cause show herein,
16 BBID requests the Hearing Officer order the SWRCB to reasonably tailor its requests to the
17 relevant information relating to the enforcement proceeding.

18 V. CONCLUSION

19 The Government Code expressly allows the Hearing Officer to issue a motion for
20 protective order and/or a motion to quash a subpoena. The foregoing reasons, BBID’s motion
21 should be granted and the Subpoena quashed. Additionally or in the alternative, a protective
22 order should be issued to limit the scope of discovery to the pertinent and relevant issues in this
23 adjudication proceeding.

24 Dated: November 9, 2015

SOMACH SIMMONS & DUNN
A Professional Corporation

25
26 By: 
27 Michael E. Vergara
28 Attorneys for Petitioner/Plaintiff BYRON-
BETHANY IRRIGATION DISTRICT

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PROOF OF SERVICE

I am employed in the County of Sacramento; my business address is 500 Capitol Mall, Suite 1000, Sacramento, California; I am over the age of 18 years and not a party to the foregoing action.

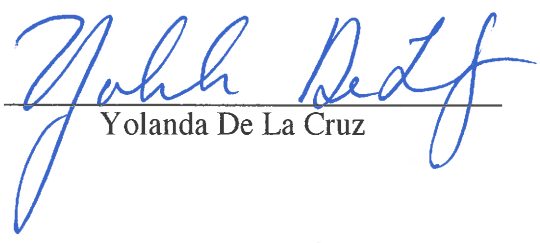
On November 9, 2015, I served the following document(s):

**MOTION TO QUASH SUBPOENA OR ALTERNATIVELY,
MOTION FOR PROTECTIVE ORDER**

X (via electronic mail) by causing to be delivered a true copy thereof to the person(s) and at the email addresses set forth below:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 9, 2015 at Sacramento, California.


Yolanda De La Cruz

**SERVICE LIST OF PARTICIPANTS
 BYRON-BETHANY IRRIGATION DISTRICT
 ADMINISTRATIVE CIVIL LIABILITY HEARING
 (Revised 9/2/15; Revised: 9/11/15)**

SOMACH SIMMONS & DUNN
 A Professional Corporation

<u>VIA ELECTRONIC MAIL</u>	<u>VIA ELECTRONIC MAIL</u>
Division of Water Rights Prosecution Team Andrew Tauriainen, Attorney III SWRCB Office of Enforcement 1001 I Street, 16th Floor Sacramento, CA 95814 andrew.tauriainen@waterboards.ca.gov	Byron-Bethany Irrigation District Daniel Kelly Somach Simmons & Dunn 500 Capitol Mall, Suite 1000 Sacramento, CA 95814 dkelly@somachlaw.com
<u>VIA ELECTRONIC MAIL</u> Patterson Irrigation District Banta-Carbona Irrigation District The West Side Irrigation District Jeanne M. Zolezzi Herum\Crabtree\Suntag 5757 Pacific Avenue, Suite 222 Stockton, CA 95207 jzolezzi@herumcrabtree.com	<u>VIA ELECTRONIC MAIL</u> City and County of San Francisco Jonathan Knapp Office of the City Attorney 1390 Market Street, Suite 418 San Francisco, CA 94102 jonathan.knapp@sfgov.org
<u>VIA ELECTRONIC MAIL</u> Central Delta Water Agency Jennifer Spaletta Law PC P.O. Box 2660 Lodi, CA 95241 jennifer@spalettalaw.com Dante John Nomellini Daniel A. McDaniel Dante John Nomellini, Jr. NOMELLINI, GRILLI & MCDANIEL 235 East Weber Avenue Stockton, CA 95202 ngmplcs@pacbell.net dantejr@pacbell.net	<u>VIA ELECTRONIC MAIL</u> California Department of Water Resources Robin McGinnis, Attorney P.O. Box 942836 Sacramento, CA 94236-0001 robin.mcginis@water.ca.gov
<u>VIA ELECTRONIC MAIL</u> Richard Morat 2821 Berkshire Way Sacramento, CA 95864 rmorat@gmail.com	<u>VIA ELECTRONIC MAIL</u> San Joaquin Tributaries Authority Tim O'Laughlin Valerie C. Kincaid O'Laughlin & Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95816 towater@olaughlinparis.com vkincaid@olaughlinparis.com

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VIA ELECTRONIC MAIL

South Delta Water Agency
John Herrick
Law Offices of John Herrick
4255 Pacific Avenue, Suite 2
Stockton, CA 95207
Email: Jherrlaw@aol.com

VIA ELECTRONIC MAIL

State Water Contractors
Stefani Morris
1121 L Street, Suite 1050
Sacramento, CA 95814
smorris@swc.org