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September 2, 2015

Via Hand Delivery

State Water Resources Control Board
Division of Water Rights
Attention: Jane Farwell-Jensen
1001 I Street, 2nd Floor Sacramento, CA 95814

Re: BBID ACL Hearing

Dear Ms. Farwell-Jensen:

As mandated by the State Water Resources Control Board's (SWRCB) August 19, 2015 Notice of Public Hearing and Pre-Hearing Conference (Hearing Notice), attached is a Notice of Intent to Appear on behalf of the Byron-Bethany Irrigation District (BBID). BBID submits its Notice of Intent to Appear without waiving its objections to the SWRCB's improper assertion of jurisdiction over the subject matter of SWRCB Enforcement Action ENF01951 (ENF01951).

ENF01951 was issued on July 20, 2015. Nearly one month prior to the issuance of ENF01951, BBID filed an action in Contra Costa Superior Court challenging the SWRCB's unlawful curtailment of BBID's pre-1914 appropriative water right and otherwise unlawful conduct, including the SWRCB's unlawful issuance of the June 12, 2015 Notice of Unavailability of Water And Need For Immediate Curtailment (Curtailment Notice). BBID's action challenging the SWRCB's unlawful conduct is currently pending before the Santa Clara Superior Court. As BBID's action was filed prior to the SWRCB issuing ENF01951, the Santa Clara Superior Court has jurisdiction over the matter. As such, the SWRCB's attempt to undermine the Court's jurisdiction over the subject matter of the pending litigation is unlawful and otherwise inappropriate. BBID will seek relief from the Santa Clara Superior Court through an application for stay to prevent the SWRCB from unlawfully impeding on the Court's exercise of jurisdiction over the subject matter of the pending litigation.

Notwithstanding the jurisdictional defect, the timeline proposed by the SWRCB in the Hearing Notice for ENF01951 undermines BBID's ability to prepare for and present its case, thereby creating significant due process issues. The Hearing Notice was issued on August 19, 2015, and received via U.S. Mail by BBID on August 24, 2015.¹ With a noon September 2, 2015 deadline to identify witnesses and submit a Notice of Intent to Appear, BBID has *less than nine days* to identify witnesses to testify at a



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accepted by PCW*

¹ BBID has not agreed to accept service via electronica mail.

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hearing in which the SWRCB proposes to impose a financial penalty of five million one hundred eighty thousand five hundred dollars (\$5,180,500). While BBID has diligently proceeded to identify witnesses to testify in general subject matters at the hearing currently scheduled to commence on October 28, 2015, BBID simply requires additional time to identify the appropriate witnesses to testify at the hearing.

Additionally, while the stated purpose of the hearing, as outlined in the Hearing Notice, is to determine the amount of financial penalty to impose on BBID, as provided in Water Code section 1055.3, for alleged unauthorized diversions, BBID expects to present evidence regarding the foundational question that would be a predicate to any proper determination of an appropriate amount of penalty, that is, whether there was even a violation of Water Code section 1052 or, was water, in fact available for diversion by BBID. In this regard, BBID is in the process of obtaining expert witnesses that will be available to testify on BBID's behalf at the hearing. Those experts will need to undertake a review of the water availability analysis supporting ENF10951, the database relied upon by the SWRCB in conducting that analysis, as well as conducting independent modeling to confirm the availability of water at BBID's point of diversion during the June 13 through June 25, 2015 period. BBID cannot be expected to engage consultants and have expert witnesses prepared to testify within the short time frames provided for in the Hearing Notice.

BBID will also need to prepare to address the criteria for imposing civil liability as provided for in Water Code section 1055.3, which will also necessitate engaging expert witnesses to determine whether any downstream water right holders were injured by BBID's activities or whether any other harm occurred, as well as addressing the other criteria contained in Section 1055.3. BBID also anticipates having to re-engage these same, or perhaps different, expert consultants to develop testimony to rebut whatever evidence the SWRCB Prosecution Team presents in its case-in-chief at the hearing. The short timeframes within which to request a hearing and to prepare for a hearing wherein the SWRCB proposes to impose "the biggest civil liability ever"² on a water right holder itself operates to deprive BBID of its rights to adequately prepare for the hearing on ENF01951.

The short timeframes identified in the Hearing Notice are also problematic in that BBID will not be able to conduct appropriate discovery to defend itself against the nearly \$5.2 million fine proposed by the SWRCB. BBID is entitled and, to the extent the Santa Clara Superior Court does not stay the proceedings on ENF01951, expects to notice depositions pursuant to Water Code section 1100 of various SWRCB staff and management to discovery evidence critical to BBID's defense of ENF01951. It is likely

² *California Farm District Accused of Diverting Water*, New York Times, July 20, 2015, quoting Andrew Tauriainen.

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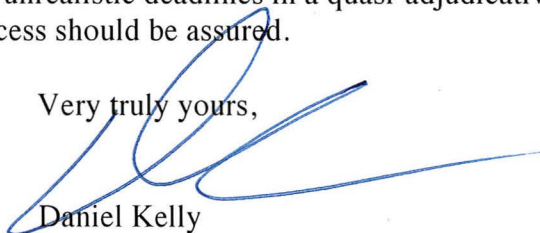
that BBID will need to depose third parties and will therefore require the SWRCB to issue subpoenas and subpoenas duces tecum as provided by section 649.6 of title 23 of the California Code of Regulations to allow BBID to depose persons not party to the Public Hearing. It is highly unlikely that this will occur prior to the currently scheduled hearing date of October 28, 2015.

To complicate matters further, BBID's General Manager, Rick Gilmore, is traveling on pre-scheduled District business on both the Pre-Hearing date of September 25, 2015, and the Public Hearing date of October 28-29, 2015. Mr. Gilmore's testimony will be required for BBID's defense of ENF01951.

Given the substantial amount of preparation work BBID needs to undertake to prepare for ENF01951, where the SWRCB will seek to impose "the biggest civil liability ever", the discovery that will need to occur, and the unavailability of BBID's main witness, the SWRCB should reschedule the Public Hearing on ENF01951 to provide BBID with sufficient time to prepare for and defend itself in the proceedings in ENF01951. BBID expects that it can be prepared to participate in a Public Hearing on ENF01951 in May 2016. This should provide BBID with sufficient time to complete its hydrologic analysis, analyze the data and modeling relied upon by the SWRCB in issuing the Curtailment Notice, and conduct discovery in preparation for the Public Hearing.³

With the alleged unlawful conduct occurring over a 13-day period in June 2015, there should be no need to impose unrealistic deadlines in a quasi-adjudicative process where some semblance of due process should be assured.

Very truly yours,



Daniel Kelly
General Counsel
Byron-Bethany Irrigation District

DK:yd

cc: Senator Cathleen Galgiani, Senate District 05
Assemblywoman Dr. Susan Talamantes Eggman, District 13

³ The proposed Public Hearing date of May 2016 assumes that the only parties to the Public Hearing on ENF01951 are the SWRCB's Prosecution Team and BBID. Should other parties submit Notices of Intent to Appear, the time to prepare to address the positions of all participating parties will necessitate adjustments to the schedule.

NOTICE OF INTENT TO APPEAR

Byron-Bethany Irrigation District plans to participate in the water right hearing regarding
(name of party or participant)

Administrative Civil Liability
against
Byron-Bethany Irrigation District

scheduled to commence
**Wednesday, October 28, 2015 and continue, if necessary,
on October 29 and 30, 2015
at 9:00 a.m.**



*hand-delivered
accepted by P&W*

1) Check only one (1) of the following:

- I/we intend to present a policy statement only.
- I/we intend to participate by cross-examination or rebuttal only.
- I/we plan to call the following witnesses to testify at the hearing. (Fill in the Following Table)

NAME	SUBJECT OF PROPOSED TESTIMONY	ESTIMATED LENGTH OF DIRECT TESTIMONY	EXPERT WITNESS (YES/NO)
See Attached			

(If more space is required, please add additional pages or use reverse side.)

2) Fill in the following information of the Participant, Party, Attorney, or Other Representative:

Name (Print): Daniel Kelly

Mailing Address: 500 Capitol Mall, Suite 1000, Sacramento, CA 95814

Phone Number: (916) 446-7979 Fax Number: (916) 446-8199

E-mail: dkelly@somachlaw.com

Optional:

- I/we decline electronic service of hearing-related materials.

Signature:  Dated: 9/2/2015

Name	Subject of Proposed Testimony	Estimated Length of Direct Testimony	Expert Witness (Yes/No)
Rick Gilmore	Water diversions and related issues	1 hour	No
TBD	Water availability	2 hours	Yes
TBD	SWRCB water availability analysis	1 hour	Yes
TDB	SWRCB water demand database	1 hour	Yes
TBD	SWRCB water supply data	1 hour	Yes
Mountain House Community Services District	Mountain House demand and use	1 hour	No
Mariposa Energy Project	MEP use	20 minutes	No
Contra Costa Airport	Airport use	20 minutes	No
Tom Howard	Curtailments, water supply, and related matters	1 hour	No
John O'Hagan	Curtailments, water supply, and related matters	4 hours	No
Kathy Mrowka	Curtailments, water supply, and related matters	2 hours	No
Michael George	Curtailments, water supply, and related matters	1 hour	
TBD	Criteria in Water Code section 1055.3	4 hours	Yes

Byron-Bethany Irrigation District reserves the right to amend or supplement this draft witness list any time prior to the hearing based upon relevant information discovered or developed subsequent to the submittal of this draft witness list.

BBID anticipates that it will not have written testimony to submit for Tom Howard, John O'Hagan, Kathy Mrowka, or Michael George. BBID intends on deposing these witnesses and may be able to rely, at least in part, on the deposition transcripts of each witness in place of written testimony. If so, the estimated times for direct testimony will likely be substantially less than provided above.