

CITY AND COUNTY OF SAN FRANCISCO



DENNIS J. HERRERA  
City Attorney

OFFICE OF THE CITY ATTORNEY

JONATHAN P. KNAPP  
Deputy City Attorney

Direct Dial: (415) 554-4261  
Email: jonathan.knapp@sfgov.org

October 22, 2015

Via Electronic Mail

Ms. Tam M. Doduc  
Hearing Officer  
State Water Resources Control Board  
Post Office Box 2000  
Sacramento, CA 95814-0100  
Tam.Doduc@waterboards.ca.gov  
wr\_hearing.unit@waterboards.ca.gov

**Re: *Legal Issues for Briefing in the Matter of Alleged Unauthorized Diversion by Byron-Bethany Irrigation District***

Hearing Officer Doduc:

In your letter of October 2, 2015, you invited the parties to submit concise statements of legal issues to be addressed in pre-hearing legal briefing. As described below, San Francisco believes there must be an opportunity to fully develop and present arguments regarding two threshold jurisdictional issues raised in this proceeding.

First, San Francisco requests legal briefing regarding whether the State Water Resources Control Board ("State Water Board") is authorized to curtail pre-1914 appropriative water right holders based on the authority referenced in the Administrative Civil Liability ("ACL") complaint against Byron-Bethany Irrigation District ("BBID"). The ACL presumes that the State Water Board may enjoin diversions by a pre-1914 appropriative water right holder whenever it determines that there is insufficient water supply available for that pre-1914 water right. The ACL alleges that such diversions are "an unauthorized use of water" governed by Water Code section 1052:

*Diversion or use of water by an appropriative water right holder when there is insufficient water supply available for that water right is an unauthorized diversion or use of water subject to Division 2 of the Water Code. Water Code section 1052, subdivision (a) provides that unauthorized diversion or use of water is a trespass.<sup>1</sup>*

San Francisco respectfully submits that there is no existing authority that stands for the proposition that "[d]iversion or use of water by [a pre-1914] appropriative water right holder when there is insufficient water supply available for that water right is an unauthorized diversion or use of water subject to Division 2 of the Water Code," and requests an opportunity to test this assertion, which represents a threshold jurisdictional issue, through legal briefing.

---

<sup>1</sup> BBID ACL, at ¶ 30 (italics added).

Ms. Tam M. Doduc  
Hearing Officer  
State Water Resources Control Board  
Page 2  
October 22, 2015

Second, San Francisco requests legal briefing regarding whether the State Water Board is authorized to curtail pre-1914 appropriative water right holders based on an aggregate analysis of water supply and demand for an entire watershed. Application of such an aggregate, watershed level approach to pre-1914 water rights is unprecedented. San Francisco respectfully submits that there is no existing authority that supports the State Water Board's use of such an approach to curtail pre-1914 water rights and requests the opportunity to brief this issue as well.

San Francisco understands that the State Water Board typically allows for the filing of contemporaneous opening and closing briefs by participants in adjudicative water right proceedings, and believes that this process should provide ample opportunity to fully develop and present legal arguments regarding the two threshold jurisdictional issues discussed above.

Thank you for consideration of our request.

Very truly yours,

DENNIS J. HERRERA  
City Attorney

/s/

Jonathan P. Knapp  
Deputy City Attorney

cc: Service List, attached  
Jane Farewell-Jensen  
Dean Ruiz, Esq.

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

<b>PARTIES</b>	
<p>THE FOLLOWING <b><u>MUST BE SERVED</u></b> WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (All have AGREED TO ACCEPT electronic service, pursuant to the rules specified in the hearing notice.)</p>	
<p><b>Division of Water Rights</b>            Prosecution Team            Andrew Tauriainen, Attorney III            SWRCB Office of Enforcement            1001 I Street,            16th Floor            Sacramento, CA 95814  <a href="mailto:andrew.tauriainen@waterboards.ca.gov">andrew.tauriainen@waterboards.ca.gov</a></p>	<p><b>Byron Bethany Irrigation District</b>            Daniel Kelly            Somach Simmons &amp; Dunn            500 Capitol Mall, Suite 1000,            Sacramento, CA 95814  <a href="mailto:dkelly@somachlaw.com">dkelly@somachlaw.com</a></p>
<p><b>Patterson Irrigation District            Banta-Carbona Irrigation District            The West Side Irrigation District</b>            Jeanne M. Zolezzi            Herum\Crabtree\Suntag            5757 Pacific Ave., Suite 222            Stockton, CA 95207  <a href="mailto:jzolezzi@herumcrabtree.com">jzolezzi@herumcrabtree.com</a></p>	<p><b>City and County of San Francisco</b>            Jonathan Knapp            Office of the City Attorney            1390 Market Street, Suite 418            San Francisco, CA 94102  <a href="mailto:jonathan.knapp@sfgov.org">jonathan.knapp@sfgov.org</a></p> <p>Robert E. Donlan            Ellison, Schneider &amp; Harris L.L.P.            2600 Capitol Avenue, Suite 400            Sacramento, CA 95816            (916) 447-2166  <a href="mailto:red@eslawfirm.com">red@eslawfirm.com</a></p>
<p><b>Central Delta Water Agency</b>            Jennifer Spaletta            Spaletta Law PC            PO Box 2660            Lodi, CA 95241  <a href="mailto:jennifer@spalettalaw.com">jennifer@spalettalaw.com</a></p> <p>Dante Nomellini and Dante Nomellini, Jr.            Nomellini, Grilli &amp; McDaniel  <a href="mailto:ngmplcs@pacbell.net">ngmplcs@pacbell.net</a>  <a href="mailto:dantejr@pacbell.net">dantejr@pacbell.net</a></p>	<p><b>California Department of Water Resources</b>            Robin McGinnis, Attorney            PO Box 942836            Sacramento, CA 94236-0001  <a href="mailto:robin.mcginnis@water.ca.gov">robin.mcginnis@water.ca.gov</a></p>
<p><b>Richard Morat</b>            2821 Berkshire Way            Sacramento, CA 95864  <a href="mailto:rjmorat@gmail.com">rjmorat@gmail.com</a></p>	<p><b>San Joaquin Tributaries Authority</b>            Valerie Kincaid            O'Laughlin &amp; Paris LLP            2617 K Street, Suite 100            Sacramento, CA 95814  <a href="mailto:vkinaid@olaughlinparis.com">vkinaid@olaughlinparis.com</a>  <a href="mailto:lwood@olaughlinparis.com">lwood@olaughlinparis.com</a></p>

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

<p><b>South Delta Water Agency</b> John Herrick, Esq. 4255 Pacific Ave., Suite 2 Stockton, CA 95207 <a href="mailto:jherrlaw@aol.com">jherrlaw@aol.com</a></p>	<p><b>State Water Contractors</b> Stefani Morris, Attorney 1121 L Street, Suite 1050 Sacramento, CA 95814 <a href="mailto:smorris@swc.org">smorris@swc.org</a></p>
--	--