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## State Water Resources Control Board

September 11, 2015

### VIA ELECTRONIC MAIL

TO: ENCLOSED SERVICE LIST OF PARTICIPANTS

### PRE-HEARING CONFERENCE IN THE MATTER OF ALLEGED UNAUTHORIZED DIVERSION BY BYRON-BETHANY IRRIGATION DISTRICT

This letter addresses procedural issues related to the hearing in this matter. During the pre-hearing conference, participants shall be prepared to discuss these and other issues related to the conduct of the hearing.

#### Scope of the Hearing

The purpose of the hearing is for the State Water Resources Control Board (State Water Board) to receive evidence relevant to determining: (1) whether Byron-Bethany Irrigation District (BBID) engaged in the unauthorized diversion of water; (2) whether to impose administrative civil liability against BBID for the alleged unauthorized diversions; and (3) whether to impose administrative civil liability in the amount of \$1,553,250 or some other amount.

#### Participation in the Evidentiary Portion of the Hearing

I have determined that it is in the public interest to grant party status to the following participants who submitted Notices of Intent to Appear requesting an opportunity to call witnesses or participate by cross-examination or rebuttal: **Patterson Irrigation District, Banta-Carbona Irrigation District, West Side Irrigation District, City and County of San Francisco, Central Delta Water Agency, California Department of Water Resources, Richard Morat, State Water Contractors, South Delta Water Agency, and San Joaquin Tributaries Authority.**

The consent of parties other than the Prosecution Team and BBID is not required for the State Water Board, or the Executive Director, to approve a proposed settlement agreement. As Hearing Officer, I may also accept a stipulation of facts submitted by the Prosecution Team and BBID notwithstanding a lack of consent of the other parties.

Because the South Delta Water Agency is granted party status, its pending request for the State Water Board to issue four deposition subpoenas is set aside as moot. (See Water Code § 1100.) If you intend to issue any subpoenas for this proceeding, please use this [Subpoena Form](#), which is used in administrative proceedings before the State Water Board. You must provide copies to the parties on the service list and file copies with the State Water Board together with the proof of service.

### **Requests Regarding Postponement of Hearing**

BBID, Central Delta Water Agency, and South Delta Water Agency have requested that the hearing be delayed due to pending litigation in Santa Clara County Superior Court, Case No. 1-15-CV-285182, and to allow additional time for discovery and preparation of testimony. The parties are invited to comment on the requests for postponement. Comments received by **noon, September 23, 2015**, will be considered prior to my ruling on the requests. In addition, the Prosecution Team shall submit a status report by **noon, September 23, 2015**, on pending requests for records pursuant to the Public Records Act relevant to this matter.

BBID has indicated that its General Manager, Mr. Rick Gilmore, will be unavailable on October 28 and 29, 2015, due to pre-scheduled business. In considering whether to alter the hearing schedule due to Mr. Gilmore's unavailability, I require that BBID submit by **noon, September 18, 2015**, additional information as to the nature of Mr. Gilmore's pre-scheduled business and whether his testimony can be accommodated on the final scheduled hearing date of October 30, 2015.

### **Stipulations as to Matters not in Dispute**

To facilitate the efficient conduct of the hearing, I require the Prosecution Team and BBID to meet and confer in advance of the pre-hearing conference regarding the stipulation of material facts not in dispute. The Prosecution Team and BBID are directed to jointly prepare and submit an initial written stipulation as to any undisputed facts by **noon, September 23, 2015**.

The Prosecution Team and BBID shall discuss the possibility of stipulation with respect to the following factual matters:

- 1) Did BBID divert water from the intake channel to the Banks Pumping Plant from June 13 through June 25, 2015? If so, (a) at what rate and in what quantity was water diverted; (b) under what claim of right was water diverted?
- 2) Does BBID hold or claim any appropriate, contractual or riparian water rights other than the pre-1914 rights claimed in Statement of Water Diversion and Use S021256?
- 3) Did BBID divert water from June 13 through June 25, 2015, for health and safety needs or for critical power generation? If so, (a) when and for how long did the diversions occur; (b) what quantity of water was diverted and at what rate; and (c) for what beneficial uses was the water diverted?

### **Time Limits**

Because of the number of parties to this matter, I expect the parties to be prepared to discuss how to consolidate their presentation of evidence in their cases-in-chief and rebuttal by coordinating with one another on the conduct of direct and cross-examination.

At this time, I am requiring adherence to the time limits provided in the attachment to the August 19, 2015 Hearing Notice, "Information Concerning Appearance at Water Right Hearings." As stated on page 5, written testimony shall not be read into the record. Written testimony affirmed by the witness is direct testimony. Witnesses will be allowed up to twenty (20) minutes to **summarize** or **emphasize** their written testimony on direct examination. The Prosecution Team and BBID will each be allowed one hour to present all direct testimony.

Cross-examiners initially will be limited to a total of one hour per witness or panel of witnesses. Parties other than the Prosecution Team and BBID whose interests in the matter are aligned, will collectively be allowed up to twenty (20) minutes per witness and a total of one hour to present all direct testimony, and will be limited to one cross-examiner and a total of one hour of cross-examination per witness or panel of witnesses. Redirect examination may be allowed at my discretion.

The parties should be prepared at the pre-hearing conference to discuss groupings of parties whose interests in the matter are aligned, coordination of direct and cross-examination, and any requests to vary from the time limits described above, including requests for additional time for the direct examination of involuntary witnesses for whom written testimony cannot be submitted in advance of the hearing. Those parties requesting additional time must submit a specific written request with an offer of proof as to the substance, purpose, and relevancy of the expected testimony, and the reason that the testimony cannot be adequately submitted in writing by October 12, 2015.

### **Other Procedural Issues for Discussion**

I expect the parties to be prepared to discuss the following additional procedural issues related to the conduct of the hearing: 1) opening statements for parties with no case-in-chief; 2) order of presentation; 4) timing of rebuttal; and 5) closing briefs.

### **Court Reporting**

A court reporter will be present at the pre-hearing conference. The transcript will be available on the Project website:

[http://www.swrcb.ca.gov/waterrights/water\\_issues/programs/hearings/byron\\_bethany/index.shtml](http://www.swrcb.ca.gov/waterrights/water_issues/programs/hearings/byron_bethany/index.shtml)  
or you may make arrangements with the Court Reporting Service.

### **Ex Parte Communications**

I would like to take this opportunity to remind the parties that *ex parte* communications concerning substantive or controversial procedural issues relevant to this hearing are prohibited. Please be sure to copy the service list on any correspondence to me, the other Board Members, or the hearing team related to this matter.

Thank you for your continued cooperation. Questions regarding non-controversial procedural matters should be directed to Staff Counsel Nicole Kuenzi at (916) 322-4142 or by email to [Nicole.Kuenzi@waterboards.ca.gov](mailto:Nicole.Kuenzi@waterboards.ca.gov); or to Jane Farwell-Jensen at (916) 341-5349 or by email to [Jane.Farwell-Jensen@waterboards.ca.gov](mailto:Jane.Farwell-Jensen@waterboards.ca.gov). (Gov. Code, § 11430.20, subd. (b).)

Sincerely,



Tam M. Doduc  
Hearing Officer

Cc:

Enclosures: Service List

**SERVICE LIST OF PARTICIPANTS  
BYRON-BETHANY IRRIGATION DISTRICT  
ADMINISTRATIVE CIVIL LIABILITY HEARING  
(09/02/15; Revised: 09/11/15)**

<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> Johnathan 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><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> Valeri Kincaid O'Laughlin &amp; Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95814 <a href="mailto:vkincaid@olaughlinparis.com">vkincaid@olaughlinparis.com</a></p>
<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>