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BEFORE THE

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

ENFORCEMENT ACTION ENFO1949 DRAFT CEASE AND DESIST ORDER REGARDING UNAUTHORIZED DIVERSIONS OR THREATENED UNAUTHORIZED DIVERSIONS OF WATER FROM OLD RIVER IN SAN JOAQUIN COUNTY

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

SWRCB Enforcement Action ENF01951 and ENF01949

BYRON-BETHANY IRRIGATION DISTRICT'S AND SOUTH DELTA WATER AGENCY'S MOTIONS IN LIMINE

1. EXCLUDE PAUL HUTTON'S TESTIMONY AND EXHIBITS
2. EXCLUDE PAUL MARSHALL'S TESTIMONY AND EXHIBITS
3. EXCLUDE MAUREEN SERGENT'S TESTIMONY AND EXHIBITS

4. EXCLUDE KATHY MROWKA'S TESTIMONY AND EXHIBITS

5. EXCLUDE BRIAN COATS'S TESTIMONY AND EXHIBITS

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I. INTRODUCTION

Less than a month before the State Water Resources Control Board's (SWRCB) March 21, 2016 hearing in this matter, the Department of Water Resources (DWR) and the State Water Contractors (SWC) attempt to introduce new case-in-chief expert testimony by improperly labeling the testimony as "rebuttal." DWR and SWC submitted the testimony of Paul Marshall (Marshall), Paul Hutton (Hutton) and Maureen Sergent (Sergent) on February 22, 2016 under the guise of rebutting direct testimony of Byron-Bethany Irrigation District (BBID) and Westside Irrigation District (WSID) experts. However, the testimony submitted by Marshall and Hutton is almost exclusively comprised of new testimony, including extensive technical analyses, having nothing to do with rebuttal. The testimony of Sergent submitted by DWR is replete with her interpretation of legal agreements in violation of applicable law and the Hearing Officer's instructions.

BBID and SDWA additionally seek exclusion of the testimony of Kathy Mrowka (Mrowka) and Brian Coats (Coats) because their testimony and opinions are beyond the field of their expertise, lack factual foundation and/or are otherwise based on an assumption of facts and speculation without evidentiary support. Mrowka's and Coats's testimony and opinions also constitute improper interpretations of the law and/or other legal conclusions, and are duplicative and cumulative.

Thus, BBID and South Delta Water Agency (SDWA) move to exclude the entirety of the Marshall, Hutton, Sergent, Mrowka and Coats testimony, along with any exhibits submitted in support of their opinions and conclusions.[1]

II. STATEMENT OF FACTS

In July 2015 the SWRCB issued a Draft Cease and Desist Order to the West Side Irrigation District (WSID), Enforcement Action ENFO1949 (CDO), and an Administrative

[1] BBID and SDWA join in any and all motions in limine filed on behalf of Central Delta Water Agency, Banta-Carbona Water District, Patterson Irrigation District, San Joaquin Tributaries Authority, and the West Side Irrigation District.

Civil Liability Complaint to BBID, Enforcement Action ENFO1951 (ACL).

On August 19, 2015, the Hearing Team issued a pre-hearing conference order stating, "[r]ebuttal testimony is limited to evidence that is responsive to evidence presented in connection with another party's case-in-chief, and it does not include evidence that should have been presented during the case-in-chief of the party submitting rebuttal evidence." (Declaration of Michael Vergara in Support of Motion in Limine to Exclude the Paul Marshall Testimony and the Paul Hutton Testimony (Vergara Decl.), Exh. A at p. 6, ¶ 9(c) (Pre-Hearing Order).)[2]

On August 28, 2015, the SWC submitted a Notice of Intent to Appear (SWC NOI). (Vergara Decl., Exh. C at p. 1.) No witnesses were disclosed. (*Ibid.*) Instead, SWC indicated that they "intend to participate by cross-examination or rebuttal only." (*Ibid.*) On September 2, 2015, DWR submitted a Notice of Intent to Appear (DWR NOI) listing Paul Marshall as the only witness. (Vergara Decl., Exh. D.)

From October 2015 through late January 2016, a lengthy discussion ensued between the parties regarding the date for Marshall's deposition. (Vergara Decl., Exh. E.) After many scheduling difficulties, the deposition was scheduled for December 30, 2015. (*Ibid.*). However, counsel for DWR advised that Marshall could not appear on December 30, 2015 and the parties began to discuss January 2016 dates. (*Ibid.*) On January 19, 2016, the DWR submitted an Amended Notice of Intent to Appear (DWR Amended NOI) in the BBID and WSID hearings, which removed Marshall as a witness. (Vergara Decl., Exh. F at pp. 1-3.) DWR did not add any expert witnesses. (*Ibid.*) Because DWR removed Marshall from the witness list, the parties agreed that they would not to proceed with the Marshall deposition. (Vergara Decl., Exh. E.)

On January 19, 2016 The Prosecution Team filed direct expert witness testimony by Kathy Mrowka (Mrowka) (Vergara Decl., Exh. G); anddirect expert witness testimony by Brian Coats (Coats). (Vergara Decl., Exh. H)

[2] The Hearing Team repeats this admonition in its Second Pre-Hearing Order, dated February 18, 2016. (Vergara Decl., Exh. B at p. 3.)

On January 22, 2016, BBID filed expert witness testimony by Susan Paulsen (Paulsen) and Rick Gilmore (Gilmore).

During the February 8, 2016 Pre-Hearing Conference, Hearing Officer Dudoc advised the participants that the Hearing Team will not allow the parties and intervenors to present testimony and exhibits that certain legal theories, legal opinions, or legal conclusions. (Vergara Decl. at p. 3:1-4.) Hearing Officer Dudoc further noted that such evidence will properly be subject to a motion in limine on the ground that it invades the SWRCB's responsibility to decide the legal issues raised in this matter and issue judgments. (*Id.* at p. 3:4-6.)

On February 22, 2016, DWR submitted Paul Marshall's and Maureen Sergent's Rebuttal Testimony and SWC submitted Paul Hutton's Rebuttal Testimony. (Vergara Decl., Exh.'s I, J and K, respectively.) Marshall and Hutton purport to rebut the Paulsen and Burke testimony submitted by BBID and WSID. Sergent purports to rebut the Gilmore testimony submitted by BBID. On February 22, 2016, the Prosecution Team submitted the Mrowka and Coats rebuttal testimony. (Vergara Decl., Exh.'s L and M, respectively.)

The Hearing of the CDO and ACL is currently set for March 21, 2016.

III. LEGAL STANDARD

All SWRCB adjudicative proceedings are governed by SWRCB regulations, select portions of the Administrative Procedure Act (commencing with Gov. Code, § 11400), Evidence Code sections 801-805, and Government Code section 11513. (Cal. Code Regs., tit. 23, § 648.) Under the provisions of Government Code sections 11511(b)(12) and 11513(b), as well as Evidence Code sections 350 and 352, the SWRCB has the power to exclude evidence, and promote the orderly conduct of a hearing.

A party may move in limine to exclude evidence before trial on the grounds that it is inadmissible and prejudicial. (*Peat, Marwick, Mitchell & Co. v. Superior Court* (*The People*) (1988) 200 Cal.App.3d 272, 288; *People v. Morris* (1991) 53 Cal.3d 152, 188 (*Morris*), overruled on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 889.)

Motions in limine also provide for meticulous consideration of evidentiary issues and improved efficiency because "potentially critical issues" can be resolved "at the outset" rather than during trial. (*Morris*, *supra*, 53 Cal.3d at p. 188.) Further, Evidence Code section 352 provides, in pertinent part, that the adjudicator has the power to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will [consume] undue ... time or ... create substantial danger of undue prejudice of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) If a motion in limine is granted, then counsel, the parties, and witnesses may not refer to the excluded material during trial. (*Ibid.*)

In an administrative hearing, relevant evidence "is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." (Gov. Code, § 11513(c).) Although administrative adjudications follow a relaxed standard of admissibility, the evidence still "must be relevant and reliable." (*Aengst v. Bd. of Medical Quality Assurance* (1980) 110 Cal.App.3d 275, 283 (*Aengst*).) Additionally, pursuant to California Evidence Code section 350, no evidence is admissible unless it is relevant. (Evid. Code, § 350.) Relevant evidence is defined by Evidence Code section 210 as "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (*People v. Kelly* (1992) 1 Cal.4th 495, 523; *People v. Haston* (1968) 69 Cal.2d 233, 245.) Speculative evidence is irrelevant evidence. (*People v. Babbitt* (1988) 45 Cal.3d 660, 682.)

IV. HUTTON, MARSHALL AND SERGENT'S OPINIONS SHOULD BE EXCLUDED BECAUSE THEY VIOLATE THE APPLICABLE LAW

The rebuttal testimony by Hutton, Marshall and Sergent, and their supporting exhibits, violate California Code Regulations, title 23, section 648.4(a), and the Pre-Hearing Orders. They are also inconsistent with the procedural safeguards in Code of Civil Procedure, sections 2034.230, 2034.260, and 2034.300, because they seek to evade required disclosure for the purpose of prejudicial surprise. Additionally, Sergent's Testimony is improper expert opinion, and is subject to exclusion because she

improperly offers expert opinion testimony on legal theories, legal opinions, and legal conclusions.

"It is the policy of the State and Regional Boards to discourage the introduction of surprise testimony." (Cal. Code Regs., tit. 23, § 648.4(a).) Under SWRCB regulations, each witness that a party intends to call should be identified, and their testimony and any exhibits may be required to be submitted in writing, prior to the hearing. (Cal. Code Regs., tit. 23, § 648.4(b-c); see also Code Civ. Proc., §§ 2034.230, 2034.260, 2034.300 [addressing disclosure requirements for expert witnesses].) Further, on August 19, 2015, and February 18, 2016, the Hearing Team issued Pre-Hearing Orders stating, "[r]ebuttal evidence is limited to evidence that is responsive to evidence presented in connection with another party's case-in-chief, and it does not include evidence that should have been presented during the case-in-chief of the party submitting rebuttal evidence." (Vergara Decl., Exh. A at p. 6, ¶ 9(c), and Exh. B at p. 5.)

Although Hutton, Marshall and Sergent purport to rebut the direct testimony of experts Paulsen, Burke, and Gilmore, the testimony must be excluded as untimely case-in-chief expert testimony.

A. The Marshall, Hutton and Sergent Opinions Are New Case-In-Chief Evidence, Not Rebuttal

The majority of Hutton's testimony is new evidence:

- Paragraph 17 improperly presents new opinions from Hutton on Delta salinity based on his modeling work, which does not directly respond to Paulson's testimony, and should have been presented in SWC's case-in-chief. (Vergara Decl., Exh. K at pp. 3-4.)
- Paragraphs 18 and 19 improperly include new non-expert testimony on DWR's attempts to satisfy Bay-Delta Water Quality Control Plan obligations in 2015, which does not directly respond to Paulson's testimony, and should have been presented in SWC's case-in-chief. (*Id.* at p. 4.)
- Paragraphs 20 and 21 improperly include new opinion testimony by Hutton on Delta salinity, which does not directly respond to Paulson's testimony, and should have been presented in SWC's case-in-chief. (*Id.* at p. 4.)
- Paragraphs 26 through 33 improperly include new opinion testimony by Hutton on Delta salinity, crop damage, costs of salinity damage, and water quality, which does not directly respond to Paulson's testimony, and should have been presented in SWC's case-in-chief. (*Id.* at pp. 5-7.)

- Moreover, the modeling effort that forms the backbone of Hutton's Testimony is not in the public domain and includes modeling parameter modifications that are unavailable for WSID, BBID, the Delta Agencies, and their experts to review, understand or verify. Yet, this modeling work was purportedly done in June 2015, more than 6 months before SWC's case-in-chief testimony was due.

Similarly, the majority of Marshall's Testimony is not for rebuttal:

- Parts 1 through 6 improperly provide new expert testimony summarizing State Water Project and Central Valley Project operations, Delta water quality standards, and BBID historical diversions, which does not directly address either Paulson or Burke's testimony, and should have been presented in DWR's case-in-chief. (Vergara Decl., Exh. I at pp. 1-15.)
- Part 7 tangentially discusses Paulson and Burke's testimony of 1931 salinity levels as it relates to current water quality objectives, but does not directly rebut their testimony, and therefore should have been presented in DWR's case-in-chief. Moreover, Marshall's testimony relies heavily on hearsay memoranda from Bob Suits, Kamyar Guivetchi, and Dr. Glenn J. Hoffman without demonstrating why an expert would need to rely on these other technical memoranda or discussing whether this is the type of material upon which an expert would rely. (*Id.* at p. 16-17.)
- Part 10 improperly provides new expert testimony, which does not directly respond to either Paulson or Burke's testimony, and therefore should have been presented in DWR's case-in-chief. (*Id.* at p. 22-28.)
- Marshall spends the last 8 pages of his testimony describing DWR model run results related to salinity, which are not in the public domain or available to BBID, WSID, and the Delta Agencies to review, understand, or verify prior to the hearing.

Significant portions of Hutton's Testimony and Marshall's Testimony, and their exhibits, violate the Pre-Hearing Orders and the Code of Civil Procedure. Thus, the SWRCB should exclude the untimely case-in-chief expert testimony.

Further, the Code of Civil Procedure clarifies that a party may only call a previously undisclosed expert witness when either (1) that expert was previously disclosed by another party and deposed, or (2) the expert is called solely to impeach the testimony of another witness as to a foundational fact. (Code Civ. Proc., § 2034.310.) In other words, the rebuttal expert witness cannot contradict the other expert's opinion, and may testify only to the falsity or nonexistence of a fact. (Code Civ. Proc., § 2034.210.) Sergent's Testimony fails to meet this standard as it repeatedly challenges the conclusions that Rick Gilmore reaches, rather than facts essential to reaching that

conclusion. (Vergara Decl., Exh. J, pp. 2-4.) Instead, Sergent's Testimony lays foundation for DWR's case-in-chief in violation of the Pre-Hearing Order and the Code of Civil Procedure. Therefore, BBID and SDWA respectfully request that the SWRCB exclude Sergent's Testimony.

B. The Exclusion of Hutton's, Marshall's and Sergent's Testimony Is Consistent with Prior Rulings and Will Prevent Undue Prejudice

The DWR and SWC waited until February 22, 2016, less than a month before the Hearing, to submit complex expert testimony that should have been part of their respective cases-in-chief. Hutton's testimony is primarily based on modeling work done in June 2015, at least six months before the opening briefs were due. Hutton's testimony clearly could have been submitted in advance of the hearing given when his work was performed. Marshall was initially included as a case-in-chief witness in early September 2015, and after months of back and forth to set his deposition, DWR removed him as a witness. Now, Marshall's purported rebuttal testimony primarily consists of new and complex analyses that are not related or responsive to BBID or WSID's direct witness testimony. DWR removed Marshall from their NOI, and cannot now be permitted to introduce Marshall's testimony.

If DWR and SWC timely disclosed the intention of these experts to offer case-in-chief testimony, WSID, BBID, and the Delta Agencies would have immediately sought the data and model runs underlying the analyses and conducted depositions to prepare rebuttal. Now, it is improbable for WSID, BBID, and the Delta agencies to (1) obtain the data, assumptions, and modeling used and relied on by Hutton and Marshall, (2) understand and analyze the data, assumptions, modeling, and expert opinions, (3) take informed expert depositions, and (4) adequately prepare to rebut the expert testimony during the hearings. The modeling and data analyses relied on by both experts are simply too complex to be dealt with in such a short period of time, particularly given the other tasks to be completed between now and the hearing.

Further, excluding the testimony is necessary to ensure that both sides are treated

fairly and held to the same standards. The Prosecution Team previously sought to exclude a WSID witness. On January 23, 2016, the Prosecution Team objected to WSID's addition of Harringfeld, arguing (1) prejudice to its ability to conduct effective discovery; (2) prejudice to its ability to prepare effective rebuttal or cross-examination; and (3) the rapidly approaching hearing date. (Vergara Decl., Exh. N.) The Prosecution Team demanded that "any witness statements or evidence from previously unnamed witnesses should be excluded as surprise testimony, prejudicial to other parties and expressly discouraged by 23 Cal. Code Regs. Section 648.4, subdivision (a)." (*Ibid.*)

On February 1, 2016, the Hearing Team issued its ruling, noting that Harrigfeld "was not previously listed by any party as a witness. (Vergara Decl., Exh. O at p. 1.) Her late addition to WSID's witness list means that the Prosecution Team and other parties had no opportunity to conduct discovery concerning Ms. Harrigfeld prior to the deadline to submit a case-in-chief." (*Id.* at pp. 1-2.) The SWRCB excluded Harrigfeld's Testimony due to of "the risk that the Prosecution Team and other parties would be prejudiced by the late addition of Ms. Harrigfeld . . ." (*Ibid.*) Here, BBID and WSID are prejudiced in the same degree complained by the Prosecution Team regarding Harrigfeld.

Hutton's, Marshall's and Sergent's respective testimony, and their supporting exhibits, must be excluded in their entirety as constituting an untimely and improper attempt to file new case-in-chief expert testimony through the rebuttal process, which is prohibited by the Hearing Team's Pre-Hearing Orders.

C. Sergent's Testimony Violates Applicable Law and the Hearing Officer's Instructions Prohibiting Testimony on Legal Theories, Opinions, or Conclusions

DWR submitted Sergent's Testimony to explain and draw conclusions regarding a series of legal agreements. Generally, "experts may not give opinions on matters essentially within the province of the courts to decide." (*Asplund v. Selected Invs. in Fin. Equities* (2000) 86 Cal.App.4th 26, 50 (*Asplund*).) The application of law to facts is a legal question that may be briefed and argued, but cannot be subject to expert opinion.

(*Downer v. Bramet* (1984) 152 Cal.App.3d 837, 841 (*Downer*).) This legal principle exists so that parties cannot sneak legal conclusions into evidence under the guise of expert opinion. (*People v. Stevens* (2015) 62 Cal.4th 325, 336 (*Stevens*).)

Additionally, at the February 8, 2016 Pre-Hearing Conference, Hearing Officer Dudoc stated the Hearing Team will not allow the parties and intervenors to present testimony and exhibits that are based on legal theories, legal opinions, or legal conclusions. (Vergara Decl. at p. 3:1-4.) Hearing Officer Dudoc noted that such evidence will properly be subject to a motion in limine on the ground that it invades the SWRCB's responsibility to decide the legal issues raised in this matter. (*Id.* at 3:4-6.)

Sergent admits that the foundation of her testimony is based on legal opinion. Sergent bases her opinion on her "[d]irect[] involve[ment] in the negotiation of certain agreements with BBID as well as evaluation of proposals from BBID for the transfer of water. (Vergara Decl., Exh. J, p. 1.) She states in her introduction that the purpose of her testimony is to "correct certain representations made by BBID in its testimony as to the purpose and scope of agreements with DWR and representations it made regarding 2015 discussions with or decisions by DWR with respect to BBID's efforts to obtain alternate supplies." (*Ibid.*)

Sergent further admits that the sum of her testimony is to interpret legal agreements, using the following headings to her testimony: (1) 1964 Right-of-Way Agreement; (2) 1993 Mountain House Agreement; (3) 2003 Agreement; and (4) 2015 Proposals to DWR for Alternate Water Supply. Thus, the framework of all of her testimony is to discuss the foregoing legal agreements, ending each segment with her legal conclusions as follows:

- "The agreement granted an easement to BBID to construct, operate, and maintain pumping facilities on the intake channel. The agreement was a right-of-way agreement only." (Sergent testimony, Exh. J, p. 1.)
- "The agreement did not expand BBID's pre-1914 water right and contained no provisions addressing diversions by BBID for use outside the irrigation season other than winter deliveries to the Mountain House Community. This 1993 Exchange Agreement was terminated as of the effective date of the 2003 Agreement." (*Id.*, p. 2.)

- "The 2003 Agreement does not provide BBID with a SWP water supply outside that of the winter water provided consistent with the Mountain House exchange which was incorporated in the 2003 Agreement. (Exhibit BBID208 at p. 2.) As noted earlier, the exchange for winter water in the 1993 Agreement was based on an equivalent reduction in irrigation season use by BBID under its pre-1914 water right which was to be provided to DWR. The 1993 Exchange Agreement was terminated as of the effective date of the 2003 Agreement." (*Id.* at p. 4.)

- "Although BBID had agreed in its June 17, 2015 letter agreement with Zone 7 that any idling would be consistent with the Water Transfer White Paper, BBID objected to DWR having specific terms on water management and reporting consistent with the Water Transfer White Paper and declined to sign the exchange agreement." (*Id.*, p. 5.)

Testimony and exhibits must be relevant and reliable to be submitted into evidence. (*Aengst, supra,* 110 Cal.App.3d at p. 283.) Evidence is not relevant if it requires drawing speculative or conjectural inferences to prove or disprove a fact. (*People v. Louie* (1984) 158 Cal.App.3d Supp. 28, 47 (*Louie*).) Sergent's testimony contains legal opinions that require speculative or conjectural inferences to establish whether they prove or disprove a disputed fact. Thus, BBID respectfully requests that the Hearing Officer exclude Sergent's testimony and supporting exhibits in their entirety.

V. MROWKA'S AND COATS'S TESTIMONY AND ALL SUPPORTING EXHIBITS SHOULD BE EXCLUDE IN THEIR ENTIRETY

The SWRCB regulations recognize that "all adjudicative proceedings before the State Board . . . shall be governed by . . . sections 801-805 of the Evidence Code." (Cal. Code Regs., tit. 23, § 648(b).) These evidentiary standards control the admissibility of opinion testimony. Evidence Code section 801 limits an expert opinion to those subjects that are beyond the competence of persons of common experience, training, and education as follows:

> (b) Based on matter (including his special knowledge, skill, experience, training and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion. (Evid. Code, § 801; *People v. Cole* (1956) 47 Cal.2d 99, 103.)

Under Evidence Code section 720(a), in the face of an objection to an expert's qualifications, "such special knowledge, skill, experience, training, or education must be

shown before the witness may testify as an expert." (*People v. King* (1968) 266 Cal.App.2d 437, 444 (*King*) [before a witness may testify as an expert, there must be a preliminary showing that the witness is qualified as an expert on the expected testimony].) Courts have the obligation to restrain expert testimony within the area of the professed expertise, and to require adequate foundation for the opinion. (*Kotla v. Regents of the University of California* (2004) 115 Cal.App.4th 283, 291-292 (*Kotla*).)

A. Mrowka's and Coats's Testimony on Water Availability Should Be Excluded

The Prosecution Team designated Mrowka and Coats as experts, and submitted direct and rebuttal testimony on various issues. Mrowka and Coats both offer purported expert testimony on a highly complicated hydrological question: whether water was available in the Delta in the summer of 2015. Mrowka's direct testimony addresses the "drought water availability supply and demand analysis". (Vergara Decl., Exh. G at pp. 1-4). Her rebuttal testimony likewise addresses the water availability analysis. (*Id.,* Exh. L at pp. 11-13.) Coats's direct testimony addresses a water "supply and demand analysis." (*Id.,* Exh. H at pp. 6-20). The entirety of his rebuttal testimony involves the water availability analysis. (*Id.,* Exh. M at pp. 1-11.)

1. Coats Is Not Qualified to Render Expert Testimony On Water Availability Issues

There is no evidence supporting a preliminary showing that Coats has the requisite "special knowledge, skill, experience, training, or education" to offer testimony in this complicated area of hydrology. (*King, supra,* 266 Cal.App.2d at p. 444). Without meeting this threshold showing of expertise in the subject matter, there is no foundation for the opinions offered, rendering the opinions speculative and improper. (*Kotla, supra,* 115 Cal.App.4th at pp. 291-292).

The Prosecution Team submitted expert testimony from Coats regarding the evidence, actions, and rationale in support of the enforcement actions against West Side Irrigation District (WSID) and BBID. (Vergara Decl., Exh. H at p. 1.) However, prior to conducting the supply and demand analysis at issue, Coats had never

conducted a formal water availability analysis. (*Id.*, Exh. P at pp. 31:24-32:4.) He testified at his deposition that his only related work experience is the current "water availability determination with respect to the supply and demand analysis." (*Id.*, Exh. P at p. 32:1-4.)

In addition to Coats's lack of experience in conducting the analysis, Coats' methodological approach was not the product of his own decisions or planning. At his deposition, he explained one aspect of his analysis as follows:

> Q: So my question was, why did you only look at full natural flow for the water availability analysis?
> A: That's what we were instructed to do by management.
> Q: Who instructed you to do that?
> A: John O'Hagan.
> Q: Anyone else?
> A: No.
> Q: Did you have any input in that decision?
> A: No. (Vergara Decl., Exh. P at pp. 49:18- 50:1.)

In fact, even the geographic area of the water availability analysis was not developed or created by Coats. (Vergara Decl., Exh. P at pp. 130:25-131:12.) Rather, John O'Hagan directed the scope of the analysis without any input from Coats. (*Ibid.*)

Coats likewise based numerous factors of the analysis on unverified data, and some potentially influential factors were ignored. For example, when asked whether the "return flow factors" that were used in the analysis were accurate, Coats replied that his analytical team "used what was available to us. As far as the accuracy, I'd have to actually go out and measure that." (Vergara Decl., Exh. P at p.79:16-25.) However, when asked if any measurement of return flows had been done to confirm the accuracy of the factors used in the analysis, Coats replied "no." (*Id.* at p. 79:22-25.) Similarly, when asked why groundwater return flow was not included in the analysis, Coats replied that there was no "third party source from a public agency to support using that number in addition to any way to qualify those numbers." (*Id.*, at p. 80:14-18.) Coats's lack of experience in water supply analyses was made apparent during his deposition when he responded that his sole understanding of "water availability" comes from nothing "more than just what [he has] been directed to do by [his] supervisors." (*Id.*,

Exh. P at pp. 124:15-125:2.)

Based on his deposition testimony, Coats is not a hydrologist or otherwise qualified to testify on this subject. It is apparent that the Prosecution Team attempts to rely on Coats's role in the water-availability determinations at issue herein as a means for finding him qualified to testify as an expert on water availability generally. The conclusion contravenes the fact that Coats is not qualified to perform the water-availability determinations in the first place. At best, his recent involvement in the water-availability determinations for BBID and WSID is simply a learning experience. He cannot now claim to be an expert on water availability based only upon his first learning experience.

2. The Prosecution Team Cannot Meet Its Burden to Show that Coats's Testimony Is Based On a Scientific Technique that Has Been Generally Accepted

Coats's testimony is based on a new scientific technique that has not been shown to be generally accepted in the scientific community.

Expert testimony based on the application of a "new" scientific technique must satisfy what has been referred to as the *Kelly* standard. This standard requires the proponent to show "(1) the technique has gained general acceptance in the particular field to which it belongs, (2) any witness testifying on general acceptance is properly qualified as an expert on the subject, and (3) correct scientific procedures were used in the particular case.' [Citation.]" (*People v. Therrian* (2008) 113 Cal.App.4th 609, 614.) As demonstrated *ante*, the Prosecution Team cannot show that Coats satisfies the second and third prong of this standard. Nor can it show that Coats's testimony is based on a technique that has gained general acceptance in the scientific community.

First, it is clear that Coats's method of determining water availability is a new scientific technique. In determining whether a scientific technique is "new" for *Kelly* purposes, courts consider whether a technique has seen "repeated use, study, testing and confirmation by scientists or trained technicians." (*People v. Leahy* (1994) 8 Cal.4th 587, 605 (*Leahy*).) Coats's method of determining water availability appears to

be used only by the SWRCB, and only in 2014 and 2015, is inconsistent with the one other curtailment model Coats reviewed (Vergara Decl., Exh. P at pp. 20:17-22:12), and was reviewed, if at all, by only one other person outside of the SWRCB. (*Id.,* Exh. P at p. 105:1-20.) Coats's water-availability method is plainly a new scientific technique. (See, e.g., *Leahy* at p. 605 [a type of field sobriety test found to be a "new" scientific technique despite police officer's long-standing use of the test; "long-standing use by police officers seems less significant a factor than repeated use, study, testing and confirmation by scientists or trained technicians"].)

The Prosecution Team cannot introduce Coats's testimony unless it shows his technique has gained general acceptance in the scientific community. To meet this burden, the Prosecution Team is required to present a disinterested expert (i.e., one not personally invested in establishing the technique's acceptance) who is qualified to testify to the technique's general acceptance in the relevant scientific community. (*In re Jordan R.* (2012) 205 Cal.App.4th 111, 130.) However, the two experts the Prosecution Team offers to meet this requirement are Coats and Jeffrey Yeazel – persons who, as the lead preparers of the SWRCB's water-availability determinations, are the very definition of interested experts.

Coats's testimony must be rejected. The entire purpose of Coats's written testimony – which reads more like an essay paper than testimony – is to present his water-availability analysis as a scientific, authoritative method that justifies these enforcement actions against WSID and BBID. If the *Kelly* standard serves any purpose, it is to exclude this type of testimony to protect the trier of fact "from techniques which, though 'new,' novel, or ' "experimental," ' convey a ' "misleading aura of certainty." ' [Citations.]" (*Leahy*, *supra*, 8 Cal.4th at p. 606.)

3. Mrowka's Reliance on the Coats's Water Availability Analysis Renders Her Testimony Void of Foundation, Speculative and Unreliable

Mrowka is the Supervising Water Control Engineer. (Vergara Decl., Exh. G at p. 1.) She assumed that role in September of 2014. (*Ibid.*) She supervises Coats, who

supervises Jeffery Yeazell (Yeazell), who also provides expert testimony on the water availability issues. (*Ibid.*) Mrowka testifies that she is "familiar" with the supply and demand analyses by Coats and Yeazell and "concurs" with their opinions. (*Id.* at p. 2.) She admits that she did not conduct the supply and demand analysis in this matter. (*Id.* at pp. 2-3.) Rather, it was conducted by staff. (*Ibid.*)

Significantly, even if Mrowka qualifies as an expert in the area of hydrology, when a witness qualifies as an expert, that expert does not "possess a carte blanche" to express opinions within her field of expertise. (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117 (*Jennings*).) Expert opinions have no evidentiary value if their basis is unsound. (*Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 564.) Thus, although an expert opinion may be based on inadmissible matter, an expert's opinion based on an assumption of facts without evidentiary support, or on speculation or conjecture, "has no evidentiary value . . . and may be excluded from evidence." (*Jennings* at p. 1117; Evid. Code, § 801(d).)

All of Mrowka's testimony on water availability is no more than a regurgitation of the Coats's testimony and Coats, as discussed above, is not qualified to perform a water availability analysis, particularly as an "expert." Mrowka cannot now attempt to provide expert testimony based upon the inherently flawed and unreliable data compiled by Coats, who lacks the requisite knowledge, skill, experience, training, or education to perform a complicated hydrology analysis. (*King, supra,* 266 Cal.App.2d at p. 444). Thus, her testimony lacks foundation, is speculative and must be excluded.

B. Mrowka's and Coats's Opinions Are Replete with Improper Legal Conclusions

Generally, "experts may not give opinions on matters essentially within the province of the courts to decide." (*Asplund, supra,* 86 Cal.App.4th at p. 50.) The application of law to facts is a legal question that may be briefed and argued, but cannot be subject to expert opinion. (*Downer, supra,* 152 Cal.App.3d at p. 841.) This legal principle exists so that parties cannot sneak legal conclusions into evidence under the guise of expert opinion. (*Stevens, supra,* (2015) 62 Cal.4th at p. 336.)

Consistent with this body of law, at the February 8, 2016 Pre-Hearing Conference, Hearing Officer Dudoc stated she would not allow the parties and intervenors to present testimony and exhibits that are based on legal theories, legal opinions, or legal conclusions. (Vergara Decl at p.3:1-6.) Hearing Officer Dudoc noted that such evidence would properly be subject to a motion in limine on the ground that it invades the SWRCB's responsibility to decide the legal issues of this matter and issue judgments. (*Ibid.*) This admonition is contained in the Hearing Team's Second Pre-Hearing Order issued on February 18, 2016. (Vergara Decl., Exh. B.)

Mrowka's and Coats's testimony violates the Hearing Team's Order and the evidentiary rules governing this proceeding. Mrowka's testimony is comprised primarily of legal conclusions with only minor factual assertions intertwined with the legal theories. Therefore, the testimony should be excluded in its entirety.

1. Mrowka's and Coats's Factual Assertions and Opinions Constitute Improper Legal Conclusions

Mrowka's and Coats's expert testimony violate the legal principle that "experts may not give opinions on matters essentially within the province of the courts to decide." (*Asplund, supra,* 86 Cal.App.4th at p. 50.)

Mrowka offers legal conclusion opinions throughout discussions regarding water availability (Vergara Decl., Exh. G at pp. 1-4), the Cease and Desist (CDO) against WSID (*id.*, Exh. G at pp. 4-15), the civil liability complaint against BBID (ACL) (*id.*, Exh. G at pp. 17-18), and the "Proposed Liability Amount" (*id.*, Exh. G at pp. 18-20). Regarding water availability, she concludes that "there was no water available under the priority of License 1381 as of May 1, 2015". (*Id.* at p. 3). She similarly concludes that "no water was available under the priority of BBID's claimed pre-1914 right as of June 12, 2015." (*Ibid.*) Mrowka goes on to identify "applicable periods of non-availability" determined on the basis of "an appropriate drought water availability analysis methodology . . . ." (*Ibid.*) These legal issues are precisely what the parties are litigating herein, and her self-serving legal conclusions are strictly prohibited.

In her testimony addressing WSID, Mrowka repeatedly asserts that "unauthorized diversions actually occurred in 2014 . . . and [also] in 2015 . . ." (Vergara Decl., Exh. G at p. 5; see also at p. 4 ["West Side . . . diverted . . . when there was insufficient water to divert under the priority of License 1381."]; see also at p. 5 ["West Side's history of actual unauthorized diversions . . . indicates that West Side remains a threat to resume such unauthorized diversions . . ."].) Mrowka's testimony runs the gamut of legal opinions and conclusions, even going as far as recommending revised terms of the Cease and Desist Order against WSID. (*Id.* at p. 6.)

Similar conclusions are made when discussing BBID. Mrowka opines that "BBID diverted . . . without a basis of right." (Vergara Decl., Exh. G at p. 16.) At multiple points of her testimony she expresses legal judgments regarding evidence. (*Ibid.* ["Diversions when water is not available under the claimed priority of the water right are unauthorized diversions under Water Code section 1052."]; *id.* at p. 17 ["there is no evidence indicating whether BBID or any other entity diverted water under BBID's claimed pre-1914 appropriative right in order to satisfy these agreements during the alleged violation period"]; *id.* at p. 18 ["there is no available evidence indicating that BBID may have had alternate supplies to explain the diversions during the alleged violations period"].)

Mrowka and Coats offer almost identical discussions regarding the "Proposed Liability Amount," and render their own legal interpretations of Water Code sections 1052 and 1055.3. (Vergara Decl., Exh. G at pp. 18-19, and Exh. H at pp. 20-22.) They both discuss legal penalties available for unauthorized diversions, interpret evidence, make conclusions regarding unavailability of water and weigh circumstances they consider relevant to arrive at the same final legal determination of an appropriate penalty. (*Ibid.*) These legal conclusions constitute improper expert testimony because the questions of whether diversions were unauthorized and whether certain penalties apply for any such unlawful diversions are the ultimate issues that must be decided by the Hearing Officers.

The governing legal authorities, as referenced *supra*, uniformly reject the proposition that a witness may simply posit conclusions about how a matter should ultimately be resolved. Such decisions can only be properly issued by the Hearing Officers. For these reasons, the testimony must be excluded.

2. Mrowka's and Coats's Legal Conclusions Are Irrelevant and Unreliable

The rules governing administrative adjudications mandate that submitted testimony and exhibits must be relevant and reliable. (*Aengst, supra,* 110 Cal.App.3d at p. 283.) Evidence is not relevant if it requires drawing speculative or conjectural inferences to prove or disprove a fact. (*Louie, supra,* (1984) 158 Cal.App.3d Supp. at p. 47.) Mrowka's written testimony includes legal opinions throughout her testimony, which require speculative or conjectural inferences to establish whether they prove or disprove a disputed fact. As such, they are irrelevant, unreliable, and should be excluded.

C. Mrowka's and Coats' Testimony Is Improperly Cumulative and Should Be Excluded In Its Entirety

BBID and SDWA seek to exclude all direct and rebuttal testimony offered by Mrowka and Coats as cumulative and duplicative of multiple other experts offering testimony on behalf of the Prosecution Team. The SWRCB is vested with very broad discretion in ruling on the admissibility of evidence, and may use its discretion to exclude cumulative and duplicative evidence. (Evid. Code, § 352; *Vossler v. Richards Manufacturing Co.* (1983) 143 Cal.App.3d 952.)

The Prosecution Team offers Kathy Mrowka, Brian Coats, and Jeff Yeazel to testify as experts on precisely the same subjects related to the BBID enforcement action: water availability determination and Key issues 1 and 2. (Vergara Decl., Exh. Q.) Additionally, the Prosecution Team offers 7 experts, including Mrowka and Coats, to offer testimony on Key issues 1 and 2 as it relates to the CDO against WSID. (Vergara Decl., Exh. R.) Parading multiple experts before the Hearing Team to all testify about the same facts and conclusions is improperly duplicative and cumulative and designed

to prejudice BBID and WSID, and waste time and resources of both the Hearing Team and the parties. Thus, all of Mwroka's and Coats's testimony should be excluded.

VI.
THE SWRCB SHOULD BE BARRED FROM PROFERRING POST-JUNE 12, 2015 EVIDENCE IN SUPPORT OF WATER UNAVAILABLITY

Adjudicative review of an agency's decision is based on an examination of whether there was substantial evidence to support the disputed decision. (*California Assn. of Nursing Homes etc. v. Williams* (1970) 4 Cal.App.3d 800, 810; *Bixby v. Pierno* (1971) 4 Cal.3d 130, 143.) Here, the SWRCB's prosecution of the consolidated enforcement action against BBID and WSID is premised on its finding set forth in the initial Curtailment Notice – that no water was available to diverters as of June 12, 2015. (Vergara Dec., Exh. S.)

The Curtailment Notice explicitly states the following:

> Based upon the most recent reservoir storage and inflow projections, along with forecasts for future precipitation events, the existing water supply in the Sacramento-San Joaquin watersheds and Delta watersheds is insufficient to meet the needs of some pre-1914 claims of right. (*Ibid.*)

The SWRCB's determination that no water was available to divert and the methodology relied on by the SWRCB to arrive at that conclusion as of June 12, 2015 forms the basis for this proceeding. (U.S. Const., Amend. 5, 14; Cal. Const., art. I, § 9; Gov. Code §§ 11340 et seq.; Gov. Code §§ 11347.3, 11350(b-d); *Agricultural Lab. Rel. d. v. Exeter Packers* (1986) 184 Cal.App.3d 483, 492.)

As such, any evidence proffered by the Prosecution Team in support of its finding of water unavailability as of June 12, 2015 must pre-date the June 12, 2015 Curtailment Notice. All testimony and/or documents purporting to support the June 12, 2015 water unavailability determination that were generated, discovered, prepared or otherwise created by the SWRCB after June 12, 2015 must be excluded.

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VII. CONCLUSION

For the foregoing reasons, BBID and SDWA respectfully request the SWRCB to exclude the Hutton, Marshall, Sergent, Mrowka and Coats testimony, and the supporting exhibits, in their entirety.

Dated: February 29, 2016

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Dated: February 29, 2016

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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 February 29, 2016, I served the following document(s):

BYRON-BETHANY IRRIGATION DISTRICT'S MOTION IN LIMINE TO EXCLUDE PAUL HUTTON AND PAUL MARSHALL'S REBUTTAL TESTIMONY AND EXHIBITS

__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 February 29, 2016 at Sacramento, California.

Michelle Bracha

SOMACH SIMMONS & DUNN
A Professional Corporation

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(Revised 9/2/15; Revised: 9/11/15)

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