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MORONGO BAND OF MISSION INDIANS
7

8 BEFORE THE STATE WATER RESOURCES CONTROL BOARD
9 STATE OF CALIFORNIA
10

11 In Re Matter of License No. 659,
Morongo Band of Mission Indians

**REQUEST FOR SWRCB TO DIRECT
PROSECUTION TEAM TO PROVIDE
MORE SPECIFICITY OF
ALLEGATIONS SUPPORTING
PROPOSED REVOCATION AND
REQUEST TO RESCIND NOTICE OF
PROPOSED REVOCATION**

16 **I. INTRODUCTION**

17
18 Several notices and other communications have been issued by the State Water Resources
19 Control Board (“SWRCB”) as part of the proposed revocation of License 659. The notices
20 include, among other things, a Notice of Proposed Revocation, issued on April 28, 2003, and
21 various hearing notices, most recently a Notice of Rescheduling of Public Hearing (“Hearing
22 Notice”) pertaining to the Proposed Revocation of License 659 (Application 553) of The
23 Morongo Band of Mission Indians, Millard Canyon in Riverside County.

24 While the notices include various levels of detail, make certain allegations, and identify
25 various issues, there has yet to be a document issued or provided by the Prosecution Team that
26 will identify what facts and legal theories the Prosecution Team alleges support revocation – facts
27 and events that the Prosecution Team will need to prove at the hearing in order for the SWRCB to
28

1 revoke License 659.¹ Requiring the Prosecution Team to file or issue something with specific
2 allegations supporting a request to have License 659 revoked is critical to provide the Morongo
3 Band of Mission Indians (“Morongo”) an opportunity to prepare for a hearing and to defend its
4 vested rights.

5 II. BACKGROUND

6 On or about January 26, 2012, the SWRCB issued its Hearing Notice pertaining to the
7 Proposed Revocation of License 659 (Application 553) of The Morongo Band of Mission
8 Indians, Millard Canyon in Riverside County. The Hearing Notice identifies three key issues to
9 be determined at the hearing:

- 10 1. Should License 659 (Application 553) be revoked, in whole or in part, in
11 accordance with Water Code section 1675?
- 12 2. Did licensee or its predecessors-in-interest fail to use beneficially and in
13 accordance with the Water Code, in whole or in part, the water authorized to be
14 used under License 659 for the applicable statutory period? If so, what amount of
15 water was unused during what period or periods of time?
- 16 3. Did licensee or its predecessors-in-interest fail to comply with any of the terms or
17 conditions of License 659? If so, which terms or conditions did licensee or its
18 predecessors-in-interest violate?

19 On or about February 10, 2012, the SWRCB issued a Notice of Rescheduling of Public
20 Hearing (“Rescheduling Notice”), moving the commencement of the hearing from April 25, 2012
21 to May 21, 2012.² The Rescheduling Notice sets new dates for submittal of Notice of Intent to
22 Appear and submittal of proposed testimony, exhibits, etc., but otherwise leaves the January 26,
23 2012 Hearing Notice intact. (See Rescheduling Notice, p. 2 [“The January 26, 2012 notice
24 remains in effect except for the changes in dates noted herein.”].)

25 Morongo has never received, nor is Morongo aware of, any document or pleading
26 prepared or filed by the Prosecution Team that would identify facts and/or allegations that the
27 Prosecution Team intends to prove at the hearing to support revocation.
28

¹ The Prosecution Team bears the burden of proof. (See generally SWRCB Order WRO-2012-0004 [“After consideration of the evidence presented at the hearing and written closing statements, the State Water Board finds the Prosecution did not support its assertions that waste or unreasonable use has occurred.”].)

² The hearing date was moved, at the request of Morongo, because one of Morongo’s potential witnesses was unavailable on the April 25, 2012 hearing date.

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II. DISCUSSION

A. The SWRCB's Hearing Is an Adjudicatory Hearing Involving a Vested Property Right Protected by Due Process Protections

California Courts "have uniformly defined the right to appropriate water as a possessory property right." (*Fullerton v. State Water Resources Control Bd.* (1979) 90 Cal.App.3d 590, 598 ("Fullerton").) Once water rights are acquired, they become vested property rights and cannot be infringed without due process protections. (*United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 101.) It is beyond cavil that the SWRCB/Prosecution Team must provide Morongo with proper notice sufficient to allow Morongo to prepare and defend its vested property right.

B. The Prosecution Team, or Enforcement Section, Has Failed to Provide Morongo with Any Document That Identifies What Facts Support Revocation

As explained above, the Prosecution Team bears the burden of proving that License 659 should be revoked. While there are various allegations and issues raised in the various notices issued by the SWRCB, Morongo has yet to receive any document, such as a complaint or allegation, that would identify precisely what the Prosecution Team intends to prove at the hearing. The failure to provide Morongo with such facts and allegations makes it virtually impossible to adequately prepare for a hearing, as described more particularly below.

C. The Hearing Notice Fails to Provide Sufficient Information to Put the Morongo Band of Mission Indians on Notice of the Scope of This Adjudicatory Proceeding

While not issued by the Prosecution Team, the Hearing Notice fails to provide sufficient information and specificity to allow Morongo to adequately prepare for the hearing on the proposed revocation of Morongo's water right.

Due process requires notice and an opportunity to be heard before the governmental deprivation of a significant property interest. (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612.) Adequate notice requires, among others things, clear and sufficient information regarding the scope of the hearing prior to the time a party has to make an election of whether to even request a hearing. (*Tafti v. County of Tulare* (2011) 198 Cal.App.4th 891, 900.) Due process

1 defects are not cured where a party later learns of the specific matters to be heard at the hearing
2 and where that party actually participates in the hearing. (*Ibid.*) Due process requires the specific
3 nature of the hearing to be included in the notice so that the party subject to the hearing has an
4 opportunity to decide whether to request a hearing and to adequately prepare for any such
5 hearing. The SWRCB's Hearing Notice, which sets the "key issues" to be heard at the hearing on
6 the proposed revocation, is insufficient to provide Morongo with notice of the scope of the
7 proposed proceedings and therefore violates Morongo's due process rights.

8 The Hearing Notice identifies three key issues for determination at the hearing.³ The first
9 "key issue" is simply whether License 659 (Application 553) should be revoked, in whole or in
10 part, in accordance with Water Code section 1675. License 659 has a priority date of January 3,
11 1917. Water use has been authorized under License 659 for approximately the past 95 years. Not
12 only is there no way to tell, from the Hearing Notice, what timeframe over the past 95 years is at
13 issue, but the first "key issue" also fails to identify what the alleged defect is with the use of
14 water. The language of Water Code section 1675 is quite broad, providing:

15 (a) If, at any time after a license is issued, the board finds that the licensee has not
16 put the water granted under the license to a useful or beneficial purpose in
17 conformity with this division or that the licensee has ceased to put the water to
18 that useful or beneficial purpose, or that the licensee has failed to observe any of
19 the terms and conditions in the license, the board may revoke the license and
20 declare the water to be subject to appropriation in accordance with this part.

21 (b) The board may revoke the license upon request of the licensee or after due
22 notice to the licensee and after a hearing, when a hearing is requested by the
23 licensee pursuant to Section 1675.1.

24 (c) As used in this section "licensee" includes the heirs, successors, or assigns of
25 the licensee.

26 The Hearing Notice does not provide sufficient factual detail regarding the nature of any
27 proposed failure to use water beneficially, what terms and conditions, if any, a particular holder⁴

28 ³ The hearing on the proposed revocation will be conducted in accordance with the Hearing Notice. While the
Notice of Proposed Revocation, issued on April 28, 2003, provides some specificity, there is nothing in the Notice of
Proposed Revocation or Hearing Notice that provides for any time or subject matter limitations at the hearing.
Indeed, there is no specificity at all in the Hearing Notice regarding time or subject matter, which leaves Morongo in
the position of having to potentially prepare for potential allegations of deficient use over a 95-year period.

⁴ License 659 has been the subject of many transfers of ownership since being issued by the SWRCB.

1 of the water right violated. Without more particular allegations, Morongo cannot adequately
2 prepare a case-in-chief as Morongo does not know what terms and conditions were allegedly
3 violated and who committed those violations or who failed to put water to beneficial use.

4 The next two "key" issues appear related to the first, but are nonetheless identified as
5 separate and distinct "key" issues. One of the two remaining "key" issues is whether Morongo or
6 its predecessors-in-interest failed to use beneficially and in accordance with the Water Code, in
7 whole or in part, the water authorized to be used under License 659 for the applicable statutory
8 period and, if so, a determination of both the amount of water that went unused and the period or
9 periods of time it went unused. This "key" issue fails to inform Morongo of whether it is
10 Morongo that failed to use water or whether it was some other person; whether the alleged
11 deficiency is the failure to use water beneficially or whether someone is alleged to have used
12 water in violation of some yet-to-be-revealed provision in the Water Code; whether it is a failure
13 to use all or some part of the water; whether the alleged nonuse or inconsistent use occurred 95
14 years ago, 50 years ago, 20 years ago, or last year. Without some specificity, Morongo is being
15 deprived of an opportunity not only to determine whether to participate in a hearing, but also how
16 to prepare for a hearing that could involve allegations spanning nearly a century.

17 The final "key" issue is whether Morongo or its predecessors-in-interest failed to comply
18 with any of the terms or conditions of License 659 and, if so, the identification of the terms or
19 conditions Morongo or its predecessors-in-interest allegedly violated. Without more specificity
20 in these "key" issues, it is not possible for Morongo to prepare its case-in-chief for the hearing.
21 For example, Morongo does not know whether the SWRCB will consider evidence of alleged
22 violation of permit terms/conditions in the 1920s, 1930s, 1940s, 1950s, 1960s, 1970s, 1980s,
23 1990s, 2000s, or 2010s. Nor does Morongo know what terms and/or conditions were allegedly
24 violated. Morongo cannot prepare for hearing without knowing whether it needs to find
25 witnesses associated with the use of water from as many as six decades ago, whether it needs to
26 find evidence of methods of diversion from four decades ago, rates of diversion from three
27 decades ago, or of continuous diversions rates over any given 30-day period from two decades
28 ago. The specific allegations are also necessary to allow Morongo to prepare appropriate

1 affirmative defenses. For example, if the SWRCB is going to consider alleged nonuse or
2 violation of permit terms and conditions from decades ago, various legal doctrines such as laches
3 and unclean hands could apply. Morongo, however, cannot be left to guess at the scope and
4 nature of the proposed revocation proceeding.

5 **D. The Notice of Proposed Revocation Is Improper and Should Be Rescinded**

6 On or about April 28, 2003, the SWRCB issued a Notice of Proposed Revocation of
7 License 659 (Application 553). While it is not clear whether this Notice was prepared by the
8 SWRCB or by the Prosecution Team, the Notice, as communicated to Morongo, is improper,
9 denies Morongo its due process rights, and demonstrates that the SWRCB has predetermined the
10 outcome of the proceeding.

11 The Notice appears to have been mailed to Great Spring Waters of America, Inc, with a
12 cover letter signed by Larry Attaway, Program Manager, Application and Petition Section of the
13 SWRCB. The letterhead for this letter is SWRCB letterhead and there is nothing to indicate it
14 originated from the Prosecution Team. The purpose of the letter appears to attempt to put the
15 recipient on notice of the requirement to request a hearing to oppose revocation. To that end, the
16 letter provides:

17 If the SWRCB conducts a hearing, *you will be expected to present evidence disproving*
18 *the facts and conclusions set forth in the Notice of Proposed Revocation* or provide
19 other evidence showing that License 659 should not be revoked. (Emphasis added.)

20 What this letter makes clear is that the SWRCB has already accepted as true, without any
21 hearing, cross examination, or appropriate burden of proof, that the factual allegations and
22 proposed conclusions contained in the Notice of Proposed Revocation are true. This
23 predetermination is a clear and serious violation of Morongo's due process rights and is improper.
24 The Notice of Proposed Revocation should be rescinded.

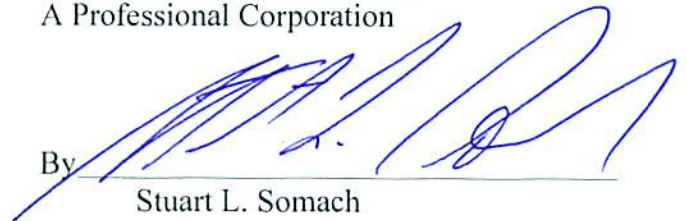
25 **III. CONCLUSION**

26 The SWRCB should direct the Prosecution Team to file a document that provides
27 sufficient facts and allegations that the Prosecution Team will seek to prove at the hearing to
28 support revocation. The SWRCB must reissue the Hearing Notice with sufficient specificity to

1 apprise Morongo of the nature and scope of the proceeding sufficient to allow Morongo an
2 opportunity to decide whether to request a hearing and, if so, to meaningfully participate and
3 prepare its case-in-chief. The SWRCB should also rescind the Notice of Proposed Revocation, as
4 it confirms a predetermination of facts and conclusions without providing Morongo an
5 opportunity to cross examine any of the evidence the SWRCB has now accepted as true.
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7 SOMACH SIMMONS & DUNN
8 A Professional Corporation

9 DATED: March 2, 2012

10 By 
11 Stuart L. Somach

12 Attorneys for Petitioner
13 Morongo Band of Mission Indians
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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 95814; I am over the age of 18 years and not a party to the foregoing action.

On March 2, 2012, I served a true and correct copy of

REQUEST FOR SWRCB TO DIRECT PROSECUTION TEAM TO PROVIDE MORE SPECIFICITY OF ALLEGATIONS SUPPORTING PROPOSED REVOCATION AND REQUEST TO RESCIND NOTICE OF PROPOSED REVOCATION

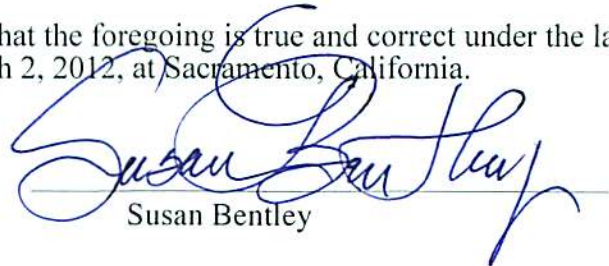
(by mail) on all parties in said action listed on the attached service list, in accordance with Code of Civil Procedure §1013a(3), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At Somach Simmons & Dunn, mail placed in that designated area is given the correct amount of postage and is deposited that same day, in the ordinary course of business, in a United States mailbox in the City of Sacramento, California.

AND

(by electronic service) I hereby certify that a true and correct copy of the foregoing will be e-mailed on March 2, 2012 as listed below:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct under the laws of the State of California. Executed on March 2, 2012, at Sacramento, California.


Susan Bentley

SOMACH SIMMONS & DUNN
A Professional Corporation

SERVICE LIST

1		
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3	Division of Water Rights Prosecution Team	Desert Water Agency
4	c/o Samantha Olson	P.O. Box 1710
5	State Water Resources Control Board	Palm Springs, CA 92263
6	1001 I Street	dluker@dwa.org
	Sacramento, CA 95814	sbaca@dwa.org
	solson@waterboards.ca.gov	
7	Coachella Valley Water District	Bold, Polisner, Maddow, Nelson & Judson
8	P.O. Box 1058	500 Ygnacio Valley Road, Suite 325
9	Coachella, CA 92236	Walnut Creek, CA 94596
	srobbins@cvwd.org	cpanelson@prodigy.net
	customerservice@cvwd.org	rbmaddow@prodigy.net
10	Brownstein Hyatt Farber Schreck	Redwine & Sherrill
11	21 East Carrillo Street	1950 Market Street
12	Santa Barbara, CA 93101-2706	Riverside, CA 92501
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13	The Morongo Band of Mission Indians	
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