
State Water Resources Control Board

June 1, 2021

Re: Kings River FAS Hearing – Ruling on Motions to Exclude Evidence from Phase 1A Hearing

TO ALL PARTIES:

On December 2, 2020, the Administrative Hearings Office (AHO) of the State Water Resources Control Board (State Water Board or Board) issued a Notice of Public Hearing and Pre-Hearing Conference (Notice of Public Hearing) on two pending petitions to revoke or revise the Declaration of Fully Appropriated Stream Systems (FAS Declaration) with respect to the Kings River System and related issues raised in a complaint (Semitropic Complaint) filed by Semitropic Improvement District of Semitropic Water Storage District (Semitropic) against Kings River Water Association (KRWA) and its member units.

Phase 1A of this hearing, which is to begin on June 2, 2021, will address the threshold question of whether there is evidence tending to show that Licenses 11517 and 11521 should be revoked or a violation of a requirement described in Water Code section 1831, subdivision (d), is occurring or threatening to occur. The AHO will consider the evidence and determine whether the evidence supports giving notice pursuant to Water Code sections 1675.1 and 1834 with a statement of facts and information on which the Board's consideration during Phase 1B of the hearing of a proposed revocation of Licenses 11517 and 11521 and a proposed cease-and-desist order would be based. The February 19, 2021 procedural ruling includes additional details about the phases of the hearing and the March 19, 2021 Amended Notice of Public Hearing and Pre-Hearing Conference (March 19 Amended Notice) identifies the issues to be addressed in Phase 1A.

Because Phase 1A is a preliminary proceeding, this hearing is not required to be conducted in accordance with State Water Board regulations applicable to adjudicative proceedings. (Cal. Code Regs, tit. 23, § 648, subd. (a).) However, the rules governing the admission of evidence in adjudicative proceedings before the Board provide helpful guidance that may be applied here to determine whether evidence should be admitted into or excluded from the evidentiary record for Phase 1A. These rules are found in California Code of Regulations, title 23, section 648 et seq.; chapter 4.5 of the Administrative Procedure Act (commencing with section 11400 of the Government Code); sections 801 to 805 of the Evidence Code; and section 11513 of the

E. JOAQUIN ESQUIVEL, CHAIR | EILEEN SOBECK, EXECUTIVE DIRECTOR

Government Code. (Cal. Code Regs., tit. 23, § 648.) The State Water Board is not bound in its proceedings by other technical rules relating to evidence and witnesses that would apply in a court of law. (See Gov. Code, § 11513, subd. (c); Cal. Code Regs., tit. 23, § 648.) Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. (Gov. Code, § 11513, subd. (c).) “The [hearing officer] has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission would necessitate undue consumption of time.” (*Id.*, § 11513, subd. (f).)

KRWA and TLBWSD’s Motions to Exclude Evidence in Phase 1A

On March 21, 2021, KRWA and Tulare Lake Basin Water Storage District (TLBWSD) filed motions to exclude some of the evidence submitted by Semitropic in Phase 1A of this hearing. TLBWSD moves to exclude the written proposed testimony of Jason Gianquinto (Semitropic-001), David Sunding (Semitropic-085), and Douglas Littlefield (Semitropic-012). KRWA moves to exclude this same testimony as well as the proposed testimony of Ali Taghavi (Semitropic-055).

1. Testimony of Jason Gianquinto

KRWA and TLBWSD moves to exclude the written proposed testimony of Jason Gianquinto as irrelevant to the issues presented in Phase 1A and, because of its alleged irrelevance, as evidence of which the probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time. (See Gov. Code, § 11513, subs. (c) & (f).)

Mr. Gianquinto is the General Manager of Semitropic. In his written proposed testimony, Mr. Gianquinto provides background information about Semitropic and its operations and describes Semitropic’s proposed Tulare Lake Storage and Floodwater Protection Project.

This information is not relevant to any of the issues for Phase 1A identified in the March 19 Amended Notice. Although the presence of a “conflicting claim” is a factor that the Board may consider when deciding whether to exercise its discretion to revoke a water-right license, a conflicting claim is not necessary to establish the statutory pre-requisites for revocation. (Order WR 2016-0001, pp. 17-18) Furthermore, Semitropic’s petition to revoke or revise the Fully Appropriated Streams Declaration with respect to the Kings River, Semitropic’s water-right application, and Semitropic’s Complaint are already included in the AHO’s administrative record. Therefore, I grant the motions to exclude Mr. Gianquinto’s written proposed testimony (Semitropic-001) from the evidentiary record for Phase 1A. This determination does not address whether Mr. Gianquinto’s testimony may be relevant to the issues presented in a later phase of this proceeding.

2. Testimony of David Sunding

KRWA and TLBWSD moves to exclude the written proposed testimony of David Sunding as irrelevant to the issues presented in Phase 1A and, because of its alleged

irrelevance, as evidence of which the probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time. (See Gov. Code, § 11513, subds. (c) & (f).)

Dr. Sunding is an economist whose testimony addresses three issues: (1) the importance of enforcing state laws regarding forfeiture and abandonment of appropriative water rights; (2) the value of crops grown in the Tulare Lakebed; and (3) considerations for determining the feasibility of water supply augmentation projects proposed in the Kings River Basin. (Semitropic-085, ¶ 7.)

The first and third of these subjects are not relevant to the issues for Phase 1A identified in the March 19 Amended Notice. The issues identified for this phase of the proceeding do not include factors relevant only to the Board's discretion whether to exercise its authority to revoke a water-right license once the statutory requirements for that authority have been met. Here, we are concerned only with whether there is sufficient evidence tending to show that the statutory requirements have been met, to support a notice for a hearing Phase 1B. If the AHO conducts a hearing Phase 1B, that phase will be the appropriate time for presentation of evidence relevant to the Board's discretion whether or not to revoke the licenses. Therefore, I grant the motions to exclude the portions of Mr. Sunding's written proposed testimony that address the first and third subjects (Semitropic-085, ¶¶ 9-17; Semitropic-085, ¶¶ 30-33). This determination does not address whether these portions of Mr. Sunding's testimony may be relevant to the issues in a later phase of this proceeding.

The second subject of Mr. Sunding's testimony – the value of crops grown in the Tulare Lakebed – may be relevant to show whether the licensee has not or has ceased to put the water authorized to be diverted under the licenses to a useful or beneficial purpose or to other sub-issues identified in the March 19 Amended Notice. Semitropic asserts that Dr. Sunding's testimony on this topic provides circumstantial evidence regarding historical diversions and use under the licenses. Given the liberal standards that govern the admissibility of evidence in administrative proceedings before the State Water Board, I deny the motions to exclude this portion of Mr. Sunding's written proposed testimony (Semitropic-085, ¶¶ 18-29).

3. Testimony of Douglas Littlefield

KRWA and TLBWSD moves to exclude the written proposed testimony of Douglas Littlefield as irrelevant to the issues presented in Phase 1A and, because of its alleged irrelevance, as evidence of which the probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time. (See Gov. Code, § 11513, subds. (c) & (f).)

Dr. Littlefield is a professional historian who specializes in the history of western water rights and related subjects. His written proposed testimony summarizes historical information about the development and uses of water from the Kings River and Tulare Lake from the middle of the nineteenth century through 1984. Although this time period pre-dates issuance of Licenses 11517 and 11521, the historical information included in

his written proposed testimony provides relevant context for the disputed issues presented in Phase 1A. The hydrology of the Kings River and Tulare Lake and the development of water supplies from these sources are highly complex and have been engineered over time, resulting in the current system. The historical context of this development is therefore generally relevant to an understanding of recent and current water supply conditions and operations.

KRWA also objects to Dr. Littlefield's written proposed testimony as lacking a proper foundation, based on hearsay, and including unsubstantiated inferences. Given the more liberal standards that govern the admissibility of evidence in administrative proceedings before the State Water Board, I will consider these objections as arguments regarding the weight that I should give the evidence rather than objections to its admissibility. Therefore, I deny the motions to exclude Dr. Littlefield's written proposed testimony. (Semitropic-012.)

4. Testimony of Ali Taghavi

KRWA moves to exclude the written proposed testimony of Ali Taghavi as irrelevant to the issues presented in Phase 1A and, because of its alleged irrelevance, as evidence of which the probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time. (See Gov. Code, § 11513, subds. (c) & (f).)

Dr. Taghavi is a registered civil engineer specializing in water resources engineering, with an extensive background in water resources modelling. Dr. Taghavi's proposed written testimony describes a water balance for the Kings River system that he developed: (1) to provide a better understanding of the flow regime and movement of water through the Kings River system, and (2) to further assess the opportunities for availability of excess water that has not been put to beneficial use and has exited the Kings River system in the South Fork and North Fork. (Semitropic-055, ¶ 3.) Although this second purpose of his proposed written testimony is not within the scope of Phase 1A, an assessment of water availability in the Kings River during the relevant time period and information about the presence of excess water in the Kings River system is relevant to whether water was available for diversion under Licenses 11517 or 11521. Because this testimony is for both purposes, one of which is directly related to the Phase 1A issues, I deny KRWA's motion to exclude Dr. Taghavi's testimony.

Semitropic's Motion to Exclude Evidence in Phase 1A

On March 21, 2021, Semitropic filed a motion to exclude the written proposed testimony of thirteen witnesses and ten exhibits submitted by the Upper River Districts, KRWA, TLBWSD, and the McMullin Area GSA from the evidentiary record for Phase 1A of this hearing.

- 1. Testimony of Kassy Chauhan, Dr. Joaquin Arambula, David Cardenas, Thomas Esqueda, Ernest Mendes, Amanda Monaco, and Doug Verboon.*

Semitropic moves to exclude the written proposed testimony of Kassy Chauhan (UR-001), Dr. Joaquin Arambula (UR-050), David Cardenas (UR-051), Thomas Esqueda (UR-052), Ernest Mendes (UR-059), Amanda Monaco (KRWA-10), and Doug Verboon (KRWA-9) as irrelevant to the issues presented in Phase 1A. The written proposed testimonies of these witnesses address the social and economic impacts of a potential reduction in water supplies available to KRWA and its member units. Although this information may be relevant to any future decision by the Board as to whether to exercise its discretion to revoke Licenses 11517 or 11521, this written proposed testimony is not relevant to issues regarding the statutory pre-requisites for license revocation identified in the March 19 Amended Notice. Furthermore, the testimony does not explicitly distinguish between water diverted and used pursuant to the two licenses at issue in Phase 1A and water diverted and used under KRWA's other water-rights licenses. Therefore, I grant the motion to exclude the written proposed testimony of these witnesses in their entirety from the evidentiary record for Phase 1A. This determination does not address whether any of these witnesses' testimony may be relevant to the issues presented in a later phase of this proceeding.

I recognize that several of these witnesses are elected officials who have set aside time to appear as witnesses in this proceeding to represent the significant interests of their communities and constituents in the outcome of this hearing. I invite Dr. Arambula, Mr. Cardenas, Mr. Mendes, and Mr. Verboon to present non-evidentiary policy statements, either orally or in writing, at the opening of Phase 1A for inclusion in the administrative record.

2. Testimony of Chad Wegley, Phillip Desatoff, Bill Stretch, and Matt Hurley.

Semitropic moves to exclude the written proposed testimony of Chad Wegley (UR-008), Phillip Desatoff (UR-019), Bill Stretch (UR-030), and Matt Hurley (MAGSA, unidentified rebuttal exhibit) as irrelevant to the issues presented in Phase 1A. The written proposed testimonies of these witnesses address the requirements of the Sustainable Groundwater Management Act (SGMA) and the need for additional water supplies to implement SGMA and achieve sustainable groundwater management in the groundwater subbasins adjacent to the Kings River. Although this information may be relevant to any future decision by the Board as to whether to exercise its discretion to revoke Licenses 11517 or 11521, this written proposed testimony is not relevant to issues regarding the statutory pre-requisites for license revocation identified in the March 19 Amended Notice. Furthermore, the written proposed testimony does not explicitly distinguish between water diverted and used or proposed to be diverted and used pursuant to the two licenses at issue in Phase 1A and water diverted and used or proposed to be diverted and used under KRWA's other water-rights licenses. Therefore, I grant the motion to exclude the written proposed testimony of these witnesses in their entirety from the evidentiary record for Phase 1A. This determination does not address whether any of these witnesses' testimony may be relevant to the issues presented in a later phase of this proceeding.

3. Testimony of Gary Serrato.

Semitropic moves to exclude the written proposed testimony of Gary Serrato (UR-043), the General Manager of the Fresno Irrigation District, which addresses the California Water Commission's evaluation of a grant application submitted by Semitropic for its proposed project. This information is not relevant to any of the issues for Phase 1A identified in the March 19 Amended Notice. In addition, much of Mr. Serrato's written proposed testimony responds to Mr. Gianquinto's written proposed testimony about Semitropic's project which I have excluded from Phase 1A because it is not relevant to this phase of the proceeding. Therefore, I exclude the written proposed testimony of Mr. Serrato in its entirety from the evidentiary record for Phase 1A. This determination does not address whether any of Mr. Serrato's testimony may be relevant to the issues presented in a later phase of this proceeding.

4. Testimony of Damon Hess and Related Exhibits.

Semitropic moves to exclude the proposed testimony of Damon Hess and exhibits UR - 60, -61, & -62, from the evidentiary record for Phase 1A. Mr. Hess is a Water Resource Control Engineer with the Enforcement Section of the Division of Water Rights. Exhibits UR -60, -61, and -62 are correspondence between counsel for Semitropic and the Enforcement Section about the Semitropic Complaint. Because we do not have any written proposed testimony from Mr. Hess in advance of the hearing, it is not clear whether his testimony will be relevant to the issues presented in Phase 1A. Given that Exhibits UR -60, -61, and -62 directly address the Semitropic Complaint, which raises the issues presented in Phase 1A, and given Mr. Hess's involvement with the Division's processing of the Semitropic Complaint, I deny Semitropic's motion to exclude this evidence. I will, however, entertain a similar motion during the hearing if the parties' questioning of Mr. Hess and his testimony move beyond the scope of the issues presented in Phase 1A.

5. Exhibits TLBWSD -24 to -30.

On May 10, 2021, TLBWSD submitted seven exhibits (TLBWSD-24 to -30) generally about Semitropic, John Vidovich, and Sandridge Partners, a partnership associated with Mr. Vidovitch, and their use of water in Kern County. These exhibits do not appear to be relevant to any of the issues for Phase 1A identified in the March 19 Amended Notice. Furthermore, the exhibits were submitted after the deadline for submission of case-in-chief exhibits on May 3, 2021. I allowed a limited extension of that deadline for evidence arising out of a party's review of public records produced by the Division of Water Right's Enforcement Section. TLBWSD has not demonstrated any connection between its review of those records and TLBWSD-24 to -30. For both reasons, I grant Semitropic's motion to exclude Exhibits TLBWSD-24 to -30 from the evidentiary record for Phase 1A. This determination does not address whether any of these exhibits may be relevant to the issues presented in a later phase of this proceeding.

Conclusion

The written proposed testimony of Jason Gianquinto (Semitropic-001), Kassy Chauhan (UR-001), Dr. Joaquin Arambula (UR-050), David Cardenas (UR-051), Thomas

Esqueda (UR-052), Ernest Mendes (UR-059), Amanda Monaco (KRWA-10), and Doug Verboon (KRWA-9), Chad Wegley (UR-008), Phillip Desatoff (UR-019), Bill Stretch (UR-030), Matt Hurley (MAGSA, unidentified rebuttal exhibit), and Gary Serrato (UR-043) and Exhibits TLBWSD-24 to -30 shall be excluded in their entirety from the evidentiary record for Phase 1A.

The written proposed testimony of David Sunding (Semitropic-085) shall be excluded in part (Semitropic-085, ¶¶ 9-17; Semitropic-085, ¶¶ 30-33) from the evidentiary record for Phase 1A.

Sincerely,

SIGNATURE ON FILE

Nicole L. Kuenzi
Hearing Officer
Administrative Hearings Office

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