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8
9 BEFORE THE CALIFORNIA

10 STATE WATER RESOURCES CONTROL BOARD

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

PRE-HEARING BRIEF ON IDENTIFIED
LEGAL ISSUES BY THE CITY AND COUNTY
OF SAN FRANCISCO

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INTRODUCTION

1
2 The City and County of San Francisco (San Francisco) submits this brief in response
3 to the Hearing Officer's October 30, 2015 *Ruling on Motion for Protective Order and Other*
4 *Procedural Issues in the Matter of the Administrative Civil Liability Complaint Issued Against*
5 *Byron-Bethany Irrigation District* (Ruling) that requested briefing on the following legal issues:
6 "[w]hether, and in what circumstances: (1) does the State Water Resources Control Board
7 have the authority to curtail, and (2) does Water Code section 1052 apply to diversions made
8 under claim of a pre-1914 or riparian water right?" The Ruling states that the briefing "should
9 address the extent to which these legal issues are or are not relevant to and determinative of
10 the Administrative Civil Liability Complaint issued against Byron-Bethany Irrigation District."

11 San Francisco's Hetch Hetchy Water and Power System (HHWPS) provides water to
12 over 2.6 million people in San Francisco and the Bay Area. Approximately eighty-five
13 percent of the water used to supply the HHWPS is diverted from the Tuolumne River under
14 San Francisco's pre-1914 appropriative water rights. The threshold jurisdictional issues
15 raised in this proceeding, and specifically identified in the Ruling, may have ramifications for
16 pre-1914 water right holders throughout California. Thus, as a pre-1914 water right holder,
17 San Francisco writes separately to share its perspective on these important legal questions.

18 In short, as explained below, San Francisco respectfully submits that the instant
19 proceeding must be dismissed for lack of jurisdiction because Water Code section 1052¹
20 does not authorize the State Water Resources Control Board's (State Water Board)
21 enforcement of the Administrative Civil Liability complaint (ACL) against Byron-Bethany
22 Irrigation District (BBID).

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28 ¹ All further statutory references are to the California Water Code unless otherwise specified.

ARGUMENT

I. Water Code Section 1052 Does Not Authorize the State Water Board's Enforcement of the Administrative Civil Liability Complaint Against BBID Because the Water at Issue is Not Subject to the State Water Board's Permitting Authority.

A. Water Code Section 1052(a) Does Not Apply to the Diversion of Water Consistent with a Valid Pre-1914 Appropriative Water Right.

Subsection (a) of section 1052 provides that “[t]he diversion or use of water *subject to this division* other than as authorized in this division is a trespass.” (Wat. Code, § 1052 (italics added).) The “division” referenced in subsection (a) of section 1052 is division 2 of the Water Code. Part 2 of division 2 of the Water Code “provides a comprehensive scheme for the appropriation of water.” (*People v. Shirokow* (1980) 26 Cal.3d 301, 306.) All water subject to appropriation under this statutory scheme “is water subject to the provisions of division 2.” (*Id.*) Pre-1914 appropriative and riparian water rights are not subject to these statutory appropriation procedures, (*id.* at 309), and thus pre-1914 and riparian water right holders “need neither a permit nor other governmental authorization to exercise their water rights,” (*Millview County Water District v. State Water Resources Control Board* (2014) 229 Cal.App.4th 879, 889, *as modified on denial of reh’g* (Oct. 14, 2014), *review denied* (Dec. 17, 2014) (citing *California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 428–429).)

As previously explained by the State Water Board, “the diversion of water consistent with a valid riparian or pre-1914 appropriative right would not constitute an unauthorized diversion of water subject to division 2 of the Water Code.” *In the Matter of Draft Cease and Desist Order Against Unauthorized Diversions by Woods Irrigation Company*, Order No. WR 2011-0005, February 1, 2011, 2011 WL 684674, at *6 (citing Wat. Code, §§ 1201, 1202). “Accordingly, the diversion of water as authorized under a valid pre-1914 appropriative right would not be subject to enforcement pursuant to Water Code sections 1052 and 1831, subd. (d)(1).”² *In the Matter of the Threat of Unauthorized Diversion and Use of Water by Thomas*

² The Water Code provides the State Water Board with three mechanisms for enforcing the prohibition against the unauthorized diversion or use of water prescribed by section 1052. First, section 1052(b) authorizes the State Water Board to request the Attorney General institute an action to enjoin the unauthorized diversion or use of water. Second, Water Code

1 Hill, Steven Gomes, and Millview County Water District, Order WR 2011-0016, October 18,
2 2011, 2011 WL 5375142, at *13.

3 **B. In Cases Involving Pre-1914 Rights, the State Water Board's Enforcement**
4 **Authority Under Water Code Section 1052 Depends on Whether the Water**
5 **at Issue is Unappropriated Water Subject to Its Permitting Authority.**

6 In *Young v. State Water Resources Control Board*, the Court of Appeal held that in
7 cases involving pre-1914 rights, the State Water Board has enforcement authority under
8 sections 1052 and 1831(d)(1) only when the water at issue may be unappropriated water that
9 would be subject to the State Water Board's permitting authority.³ ((2013) 219 Cal.App.4th
10 397, 404, *as modified* (Sept. 20, 2013).) In *Young*, the trial court set aside a cease-and-
11 desist order (CDO) on the ground that the State Water Board lacks jurisdiction to issue a
12 CDO for illegal diversion of water if the diverter claims a riparian or pre-1914 right. (*Id.* at
13 402.) Thus, the Court identified the question on appeal as "whether the Water Code gives
14 the [State] Water Board jurisdiction in enforcement proceedings to determine initially whether
15 a diverter has either the riparian or pre-1914 appropriative rights it claims." (*Id.* at 404.)

16 The Court stated that "[s]everal statutes provide the answer" and proceeded to
17 analyze statutes in part 2 of division 2 of the Water Code, including sections 1201, 1202,
18 1225, and 1240. (*Id.* at 404-406.) Significantly, the Court prefaced its analysis by explaining
19 that the State Water Board has "permitting authority over all water not otherwise properly
20 diverted or used under a riparian or pre-1914 right." (*Id.* at 404.) For example, the Court

21 _____
22 section 1055(a) provides that "[t]he executive director of the board may issue a complaint to
23 any person or entity on which administrative civil liability may be imposed pursuant to section
24 1052." Third, Water Code section 1831(d)(1) authorizes the State Water Board to "issue a
25 cease and desist order in response to a violation or threatened violation of [section 1052]."

26 ³ The *Young* Court's holding is consistent with the State Water Board's appellate briefing in
27 that case. (See e.g., Appellant State Water Resources Control Board's Opening Brief,
28 *Dianne E. Young, et al., v. State Water Resources Control Board*, 2012 WL 5024308
(Cal.App. 3 Dist.), at *20 (citations omitted) (emphasis added) (stating that Water Code
section 1202 defines "unappropriated water" to include "[w]ater that has never been
appropriated," "[w]ater subject to a pre-1914 right, but which was not perfected by putting the
water to beneficial use with due diligence," and "[w]ater for which a right had been perfected
by putting the water to use under a pre-1914 right, but where the use later ceased," and
explaining that "[u]nder this definition of unappropriated water, *only the water claimed under
a pre-1914 right that exceeds the actual right constitutes unappropriated water subject to the
State Water Board's regulation.*")

1 noted that under Water Code section 1202(b) “unappropriated water includes . . . water
2 subject to a pre-1914 right but that was not perfected by putting the water to beneficial use
3 with due diligence.” (*Id.* at 404 (*citing* Wat. Code, § 1202(b).) The Court reasoned that the
4 State Water Board is authorized to regulate the diversion and use of “water claimed under
5 pre-1914 appropriative rights but never perfected” because it is “unappropriated water”
6 subject to appropriation under the statutory procedures, as codified in part 2 of division 2.
7 (*Young*, 219 Cal.App.4th at 406 (*citing* Wat. Code, §§ 1201, 1202(b), 1225.)⁴

8 Significantly, the Court delimited the parameters of the State Water Board’s
9 jurisdiction as follows:

10 No one disputes that the Water Board does not have jurisdiction to
11 regulate riparian and pre–1914 appropriative rights. Nevertheless, the
12 Water Board does have authority to prevent illegal diversions and to
 prevent waste or unreasonable use of water, regardless of the basis
 under which the right is held.

13 (*Young*, 219 Cal.App.4th at 404 (citations omitted).) As described above, the *Young* Court
14 “harmonized these potentially conflicting principles by noting a permit is required for the
15 diversion of certain categories of water” and that the State Water Board has the authority
16 under section 1831 “to issue a CDO against the unpermitted diversion of such water.”
17 (*Millview*, 229 Cal.App.4th at 893-94 (*citing Young*, 219 Cal.App.4th at 404).) Thus, the
18 Court concluded that the State Water Board has jurisdiction in enforcement proceedings
19 involving pre-1914 and riparian rights holders only if there is a claim that they are diverting or
20 using unappropriated water that would be subject to the State Water Board’s permitting
21 authority. (*Id.* at 406-407.)

23
24 ⁴ See Appellant State Water Resources Control Board’s Opening Brief, *Dianne E. Young,*
25 *et al., v. State Water Resources Control Board*, 2012 WL 5024308, at *19) (italics added)
26 (where the State Water Board presented similar examples to illustrate how a pre-1914
27 appropriator’s improper diversions could become subject to the State Water Board’s
28 permitting authority over unappropriated water and thus subject to its enforcement authority
under section 1052: “for example, where a diverter has demonstrated a riparian or pre-1914
right to 77.7 [cubic feet per second or “cfs”] of water, but is diverting 90 cfs, the Board has
jurisdiction to issue a cease and desist order limiting the diverter to a diversion rate of 77.7
cfs. Similarly, a pre-1914 right to divert in May through August *would not immunize a diverter*
from Board regulation of unauthorized diversions in January.”)

1 The Court of Appeal in *Millview* applied this reasoning from *Young*, which the Court
2 found to be “straightforward and persuasive.” (229 Cal.App.4th at 894.) Thus, the *Millview*
3 Court reiterated that section 1052 applies in cases involving pre-1914 rights only if water is
4 not being properly diverted or used under the pre-1914 right and therefore is subject to
5 appropriation under the State Water Board’s permitting authority: “as *Young* noted, only
6 water diverted under a *valid* pre-1914 water right is protected from such regulation; a permit
7 *is* required to divert water appropriated pursuant to a claimed pre-1914 water right that was
8 never perfected, or has been forfeited, or is otherwise invalid.” (*Id.* (citing *Young*, 219
9 Cal.App.4th at 404).) The *Millview* Court further explained that “[u]nauthorized diversion
10 includes not merely the diversion of water under a claimed but invalid pre-1914 right, but also
11 diversion *beyond the proper scope of a valid pre-1914 right*, whether because the diversion
12 exceeds the maximum perfected amount of water under the right or because an intervening
13 forfeiture has reduced the proper scope.” 229 Cal. App. 4th at 895 (italics added).
14 Accordingly, in *Millview* the Court of Appeal held that the State Water Board can only enforce
15 section 1052 against a water right holder with a validly established pre-1914 right if water is
16 allegedly being diverted beyond the proper scope of the right, *i.e.*, because the right – or
17 some portion thereof – was never perfected, water is being diverted in excess of the right, or
18 the right has been reduced or lost due to forfeiture, and thus, the water diverted is subject to
19 the State Water board’s permitting authority over unappropriated water. (229 Cal.App.4th at
20 894-895.)

21 **C. The State Water Board Cannot Enforce the ACL Against BBID Under**
22 **Water Code Section 1052 Because the Water at Issue is Not Subject to the**
23 **State Water Board’s Permitting Authority.**

24 The rationale underlying the Court’s decisions in *Young* and *Millview* cannot be relied
25 on to support the State Water Board’s purported enforcement of the ACL against BBID under
26 sections 1052(a) and 1055 because the ACL does not allege that BBID improperly diverted
27 or used water under its pre-1914 right that could have potentially been subject to the State
28

1 Water Board’s permitting authority.⁵ More specifically, the ACL does not allege that BBID’s
2 pre-1914 right is invalid. Nor does the ACL allege that BBID diverted water beyond the
3 proper scope of its pre-1914 right and thereby diverted unappropriated water subject to the
4 State Water Board’s permitting authority, *i.e.*, because BBID’s pre-1914 right – or some
5 portion thereof – was never perfected, BBID diverted in excess of its right, or BBID’s right
6 was reduced or lost due to forfeiture. (See *Millview*, 229 Cal.App.4th at 894-895.) Instead,
7 the ACL alleges that “BBID’s normal diversions” during the period from June 13-25, 2015 in
8 accordance with its pre-1914 right constituted an unauthorized diversion under section 1052
9 because BBID had been notified that as of “June 12, 2015, available supply was insufficient
10 to meet the demands of appropriative rights with priority dates of 1903 and later throughout
11 the Sacramento and San Joaquin River watersheds and the Delta.” (ACL at ¶¶ 4, 24, 27
12 (emphasis added), 28, 30-31.) The ACL charges that BBID diverted water that was entitled
13 to more senior water right holders, specifically pre-1914 appropriators with priority dates
14 earlier than 1903.⁶ (ACL at ¶¶ 24-28.) If the water was not available to BBID in June of 2015
15 because, as alleged by the State Water Board, more senior water right holders were entitled
16 to divert and/or use it during that period, then by definition, it cannot be considered
17 unappropriated water. (Wat. Code, § 1201 (italics added) (defining unappropriated water as
18 “[a]ll water flowing in any natural channel, *excepting so far as it has been or is being applied*
19 *to useful and beneficial purposes upon . . . or otherwise appropriated . . .*”); Wat. Code, §
20 1202 (declaring that “unappropriated water” includes, *inter alia*, “[a]ll water which has never
21 been appropriated”).) Thus, the water at issue does not meet any of the statutory definitions
22 of “unappropriated water,” (see Wat. Code, §§ 1201, 1202), and is not subject to the State
23 Water Board’s permitting authority. Because the water at issue was allegedly entitled to pre-

24 _____
25 ⁵ See ACL ¶¶ 4, 25 (noting that “BBID claims a pre-1914 appropriative water right to the
26 Intake Channel to the Banks Pumping Plant, formerly Italian Slough, in Contra Costa County”
with “a priority date of May 18, 1914”).

27 ⁶ San Francisco is unaware of any complaint by any senior water right holder regarding
28 BBID’s diversions during the period in question. However, to the extent that a senior water
right holder(s) alleges injury as a result of BBID’s diversions, any such complaint could be
properly adjudicated in superior court.

1 1914 appropriators with priority dates earlier than 1903 and thus was not – and could not
2 have been – subject to the State Water Board’s permitting authority over unappropriated
3 water, BBID’s “normal diversions” during the period in question are not subject to
4 enforcement under sections 1052 and 1055. Accordingly, pursuant to the Court of Appeal’s
5 decisions in *Young* and *Millview* the State Water Board must dismiss the ACL against BBID
6 for lack of jurisdiction.

7
8 Dated: January 25, 2015

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11 By: /s/ Jonathan Knapp
JONATHAN KNAPP

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13 Attorneys for City and County of San Francisco
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1 **PROOF OF SERVICE**

2 I, Linda Ma, declare as follows:

3 I am a citizen of the United States, over the age of eighteen years and not a party to
4 the above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox
Plaza Building, 1390 Market Street, Suite 418, San Francisco, CA 94102.

5 On **January 25, 2016**, I served the following document(s):

6 **PRE-HEARING BRIEF ON IDENTIFIED LEGAL ISSUES BY THE CITY AND**
7 **COUNTY OF SAN FRANCISCO**

8 on the following persons at the locations specified:

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See attached Service List	
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11
12 in the manner indicated below:

13 **BY UNITED STATES MAIL:** Following ordinary business practices, I sealed true and
14 correct copies of the above documents in addressed envelope(s) and placed them at
15 my workplace for collection and mailing with the United States Postal Service. I am
16 readily familiar with the practices of the San Francisco City Attorney's Office for
collecting and processing mail. In the ordinary course of business, the sealed
envelope(s) that I placed for collection would be deposited, postage prepaid, with the
United States Postal Service that same day.

17 **BY PERSONAL SERVICE:** I sealed true and correct copies of the above documents
18 in addressed envelope(s) and caused such envelope(s) to be delivered by hand at the
19 above locations by a professional messenger service. **A declaration from the
messenger who made the delivery** **is attached** or **will be filed separately
with the court.**

20 **BY OVERNIGHT DELIVERY:** I sealed true and correct copies of the above
21 documents in addressed envelope(s) and placed them at my workplace for collection
22 and delivery by overnight courier service. I am readily familiar with the practices of the
23 San Francisco City Attorney's Office for sending overnight deliveries. In the ordinary
course of business, the sealed envelope(s) that I placed for collection would be
collected by a courier the same day.

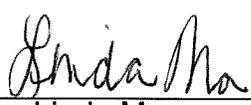
24 **BY FACSIMILE:** Based on a written agreement of the parties to accept service by
25 fax, I transmitted true and correct copies of the above document(s) via a facsimile
26 machine at telephone number 415-255-0733 to the persons and the fax numbers
listed above. The fax transmission was reported as complete and without error. The
transmission report was properly issued by the transmitting facsimile machine.

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BY ELECTRONIC MAIL: I caused the document(s) to be sent to each of the parties listed on the Service List of Participants for the Byron-Bethany Irrigation District, Administrative Civil Liability Hearing. Such document(s) were transmitted via electronic mail from the electronic address: linda.ma@sfgov.org in portable document format ("PDF") Adobe Acrobat or in Word document format.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed **January 25, 2016**, at San Francisco, California.



Linda Ma

**SERVICE LIST OF PARTICIPANTS
BYRON-BETHANY IRRIGATION DISTRICT
ADMINISTRATIVE CIVIL LIABILITY HEARING
(09/02/15; Revised: 09/10/15; Revised 10/06/15; Revised 10/22/15)**

PARTIES	
<p>THE FOLLOWING <u>MUST BE SERVED</u> WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (All have AGREED TO ACCEPT electronic service, pursuant to the rules specified in the hearing notice.)</p>	
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(09/02/15; Revised: 09/10/15; Revised 10/06/15; Revised 10/22/15)**

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