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10 WATER RESOURCES

11 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

12 **In the matter of the Draft Cease and Desist
13 Order issued to The West Side Irrigation
14 District, Enforcement Action ENF01949;**

15 **and**

16 **In the Matter of the Administrative Civil
17 Liability Complaint issued to
18 Byron-Bethany Irrigation District,
19 Enforcement Action ENF01951.**

20 **CALIFORNIA DEPARTMENT OF
21 WATER RESOURCES' OPENING
22 STATEMENT**

23 California Department of Water Resources ("DWR") submits this opening statement for
24 Phase I of Enforcement Actions ENF01949 and ENF01951 and Phase II of ENF01951. DWR
25 supports the actions taken by the State Water Resources Control Board ("Board") in these actions
26 and its authority to prevent illegal diversions of water. DWR opposes the theory that water is
27 always available for diversion in the Delta because water is stored in Delta channels. DWR also
28 opposes the way Byron-Bethany Irrigation District ("BBID") has described agreements between
BBID and DWR.

DWR's rebuttal testimony offers evidence in response to information and assertions made
in direct testimony of The West Side Irrigation District ("WSID") and BBID. Although DWR
objects to and argues that portions of WSID and BBID evidence is beyond the scope of the
hearing, DWR's testimony is necessary to inform the Board of hydrologic and hydrodynamic
drought conditions in the Delta during the diversion periods in question. DWR testimony also

1 explains State Water Project ("SWP") and Central Valley Project ("CVP," jointly referred to as
2 "Projects") operations during these drought conditions and how unauthorized diversions can
3 impact the Projects' ability to manage scarce water resources for ecosystem protection and health
4 and safety needs. In addition, the testimony provides facts and background on its agreements with
5 BBID.

6 I. INTRODUCTION

7 The evaluation of the right to divert water under specific water right priorities requires an
8 analysis of many different factors, including the availability of natural flow at a specific location
9 and whether that water can be diverted for beneficial use without adversely impacting other legal
10 users of water or other beneficial uses. This analysis is the responsibility of the Board and is
11 reflected in its water availability analysis.

12 The Sacramento-San Joaquin Delta is a complex system. It is a large lowland area with a
13 labyrinth of natural channels in and around the confluence of the Sacramento and San Joaquin
14 Rivers. (*U.S. v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 107.) Water
15 released from SWP and CVP reservoirs flows through the Delta to pumping plants in the south
16 Delta. (*Id.*, at pp. 98–100.) One of the distinctive features of the Projects is the great distance
17 between the point of storage and the point of re-diversion for these storage releases. (*Id.*, at p.
18 107.) After being released from the reservoirs, stored water flows some 300 miles into the Delta
19 where it is diverted for transport to the Bay Area, San Joaquin Valley, and Southern California.
20 (*Ibid.*)

21 Salt water entering from San Francisco Bay extends well into the Delta, and intrusion of the
22 saline tidal waters is checked only by the natural barrier formed by fresh water flowing out from
23 the Delta. (*Ibid.*) Over the years, as more fresh water has been diverted from the Delta and its
24 tributaries for agricultural, industrial, and municipal development, salinity intrusion has
25 intensified, particularly during the dry summer months and in years of low precipitation and
26 runoff into the river systems. (*Ibid.*) To prevent saltwater from intruding deeper into the Delta
27 during dry periods, Project operators repel it with the tools available to them: either by reducing
28 the exports of water from the south Delta; or by increasing the amount of water flowing into the

1 Delta from releases of stored water from upstream reservoirs. (See DWR-3, at p. 2.) Yet in the
2 critically dry years of 2014 and 2015, exports during the dry summer months were largely
3 minimized to only water needed for critical needs, thereby reducing the tools available to the
4 Projects for salinity control. (*Id.*, at pp. 5, 11.)

5 **II. LIMITATIONS OF THESE HEARINGS**

6 In their cases-in-chief and legal briefs, other parties have attempted to enlarge the scope of
7 these hearings beyond what is appropriate to be heard and decided in these enforcement actions
8 against these two parties. The issues the Board should consider at the hearings should be limited
9 to those listed in the hearing notices for the enforcement actions. The nature of the alleged
10 violations defines the scope of the hearings. The proper issues before the Board at these hearings
11 are set forth in the hearing notices. For WSID, they are: (1) whether the Board should adopt, with
12 or without revision, the July 16, 2015 draft Cease and Desist Order (“CDO”) against WSID; and
13 (2) has WSID violated, or is WSID threatening to violate, the prohibition set forth in Section
14 1052 against the unauthorized diversion or use of water? (See Notice of Public Hearing dated
15 September 1, 2015.) For BBID, they are: (1) whether the Board should impose administrative
16 civil liability (“ACL”) upon BBID for trespass and, if so, in what amount and on what basis; and
17 (2) what other relevant circumstances should be considered by the Board in determining the
18 amount of any civil liability? (See Notice of Public Hearing dated August 19, 2015.)

19 The January 8, 2016 revised hearing notice further clarified the scope by explaining that the
20 purpose of Phase I of the consolidated hearings would be to receive evidence regarding the
21 following issues: (1) was the water diverted by BBID from June 13 through June 25, 2015, if any,
22 unavailable under its claimed pre-1914 appropriative right and all other claims of right by BBID?;
23 and (2) was the water diverted by WSID after May 1, 2015, if any, unavailable under License
24 1381 and all other claims of right by WSID? (See Revised Notice of Public Hearing dated
25 January 8, 2015.) The Board reserved Phase 2 of the BBID ACL complaint hearing and the
26 WSID draft CDO hearing for the remaining issues within the scope of the above notices. (*Ibid.*)

27 The Board issued the draft CDO to WSID pursuant to Water Code Sections 1052 and 1831
28 and the ACL Complaint to BBID pursuant to Water Code sections 1052 and 1055, all of which are

1 in Division 2 of the Water Code. The purposes of Division 2 of the Water Code are: (1) to further
2 the constitutional policy in favor of beneficial use and against waste and unreasonable use of the
3 waters of the state; and (2) to use water for the welfare and benefit of the people of the state and
4 for the improvement of their prosperity and their living conditions. To carry out these purposes,
5 the Board may investigate, take testimony, and determine whether water appropriations are legal.
6 (Wat.Code, § 1051; see also *Farm Bur. Federation v. Cal. State Water Resources Control Bd.*
7 (2011) 51 Cal.4th 421, 429, as modified (Apr. 20, 2011) (The Board has “authority to prevent
8 illegal diversions and to prevent waste or unreasonable use of water, regardless of the basis under
9 which the right is held.”).) Thus, the issues the Board should consider at the hearings should be
10 limited to the alleged violations and how they relate to the purposes of Division 2 of the Water
11 Code, and not be expanded to other topics such as consumptive use of all Delta diversions, SWP
12 and CVP operations, historical Delta diversions and water quality conditions, and interpretation
13 of the agreements between DWR and BBID.

14 The scope of the hearings does not need to be enlarged to include historical water quality
15 and water supply conditions, whether water is stored in Delta channels, and the priority of rights
16 of others because these matters are not relevant to whether WSID was diverting water illegally
17 after May 1, 2015 or whether BBID was diverting water illegally from June 13 to 25, 2015. For
18 example, BBID’s evidence regarding how much water it was able to divert in 1931 or when each
19 molecule of water present in the Delta in June 2015 entered the system is not relevant to its
20 diversions subject to enforcement. Specifically, WSID and BBID need to demonstrate they had a
21 right to divert water during the alleged violation period, either under their water rights or obtained
22 under some other legal means.

23 **III. THE BOARD’S AUTHORITY**

24 The Board is authorized to prevent the illegal use of water that harms other water users.
25 Whether the Board is able to prevent the illegal use of water affects DWR’s ability to manage
26 scarce water resources, especially during drought. During the ongoing drought and pursuant to
27 Board orders, DWR and U.S. Bureau of Reclamation (“Reclamation”) released stored water to
28 meet Delta water quality standards, including salinity requirements. (See Board temporary

1 urgency change orders that temporarily modified D-1641 due to drought conditions (Feb. 3, 2015,
2 March 5, 2015, April 6, 2015, July 3, 2015 & Dec. 15, 2015), available at:

3 http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/tucp/index.shtml).

4 As DWR's testimony shows, illegal diversions during these extraordinarily dry conditions cause
5 DWR and Reclamation to release more water from reservoirs than would be released in the
6 absence of those diversions. (See DWR-3, at pp. 5, 11.) These additional releases have the effect
7 of reducing the stored water available for critical water needs, endangered species protection, and
8 Delta water quality protection. If the Board cannot effectively curtail water use in a timeframe
9 relevant to water shortage conditions presented by the ongoing drought, then statewide water
10 management would be significantly more difficult, including the ability to protect endangered
11 species and the limited water supply .

12 **A. Drought Conditions relevant to these Actions.**

13 In 2014 and 2015, due to serious drought conditions, DWR and the Reclamation petitioned
14 the Board for temporary modifications to their water rights permits, requesting changes in the D-
15 1641 objectives. (See Proclamation of a State of Emergency (Jan. 17, 2014); Proclamation of a
16 Continued State of Emergency (April 25, 2014); Executive Order B-29-15 (April 1, 2015).) In
17 both years, the Board issued orders that allowed a reduced level of Delta outflow and/or a
18 modified salinity objective, conditioned upon a reduction in exports by the Projects. The orders
19 also required that stored water in Project reservoirs be used for ecosystem protection and health
20 and safety needs and the order provided flexibility in operation of the Delta Cross-Channel gates
21 in order to help manage interior Delta water quality. Project exports were restricted to serving
22 health and safety purposes only, storage in reservoirs was at critically low levels, and releases
23 were constrained to protect against the drought's continuation. Protections for some fish and
24 wildlife values were cut back and urban water use was curtailed by 25% across the state in
25 response to the drought emergency. (Cal. Code Regs., tit. 23, § 863 et seq.)

26 Term 91 conditions were in effect for much of the summer and fall of 2015. (See DWR-3,
27 at p. 5.) When the Board finds that Term 91 applies, this indicates a dry hydrologic scenario in
28 which the SWP and CVP are making storage withdrawals of project water to meet some of the in-

1 basin water quality needs of the Delta's watershed. (*Ibid.*) These needs include flow and water
2 quality standards contained in D-1641 as necessary conditions of the Projects' water rights. (*Ibid.*)
3 Under Term 91 conditions, when project water is diverted without authorization, the amount of
4 water releases that are available to meet authorized in-basin needs is reduced by a corresponding
5 amount. (*Ibid.*) DWR's testimony shows how this water must then be "made up" later by the
6 Projects with additional storage withdrawals. (*Ibid.*) Furthermore, SWP stored water, also referred
7 to as "foreign water," necessary for satisfying D-1641 requirements is not available to other water
8 users. (*El Dorado Irr. Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937,
9 976; *State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674, 738-743, 771.)

10 **B. BBID and WSID's Claim of Available Water is Flawed.**

11 BBID and WSID submitted evidence intended to show that water users in the south Delta
12 were able to divert water all summer long in 1931. This evidence is not relevant to whether WSID
13 was diverting water illegally after May 1, 2015 or whether BBID was diverting water illegally
14 from June 13 to 25, 2015. Although the year 1931 was a dry year, it was also before the Projects
15 were built and supplementing the Delta with their reservoir storage releases. The evidence
16 submitted shows that BBID diverted water all summer. BBID and WSID's implication is that
17 since BBID was able to divert water all summer long in 1931, there was water available to water
18 users in the south Delta all summer long in 2015. However, BBID and WSID left out key pieces
19 of information.

20 BBID and WSID selectively cite Bulletin 23 by not including information provided on
21 salinity bulletins mailed out by the State Water Supervisor in 1931 that reported high salinity
22 levels in order to help agricultural diverters manage their water use and reduce or prevent damage
23 to crops. (*Id.*, at p. 19.) BBID and WSID also did not include the estimated loss in market value
24 of Delta crops caused by high channel salinity in 1931, which was \$1,263,716, of which \$890,906
25 was estimated to have resulted from *curtailment* of irrigation. (*Id.*, at p. 17.)

26 If the Board were to find that information from 1931 is relevant to the enforcement
27 proceedings, this information in fact supports the enforcement actions taken by the Board's
28 Division of Water Rights by demonstrating that agricultural water users themselves limit their

1 diversions during drought conditions because of lack of available water. A lack of available Delta
2 water during the drought is the basis for the Board's 2015 curtailment notices. Partly in response
3 to BBID's and WSID's direct testimony on 1931 diversions, DWR's rebuttal testimony will show
4 that Project storage releases supplement water in Delta channels and this water is not available for
5 their use. This testimony is consistent with the Board's water availability analysis that underpins
6 the curtailment notices.

7 **C. The Agreements between BBID and DWR do not impact BBID's water rights**
8 **or the Board's authority.**

9 BBID argues it is not subject to the Board's enforcement authority because its water use is
10 pursuant to its contract with DWR, and therefore any issues related to its use of water are contract
11 interpretation issues. This is not correct, because the agreements specify that they neither enlarge
12 nor restrict the District's water rights. (See DWR-4, Testimony of Maureen Sergent, at pp. 1, 3.)
13 BBID diverts under its water rights, which are subject to Board review. The rights and obligations
14 of the parties subject to these agreements are matters of contract law, but issues related to BBID's
15 water use are subject to the Board's authority.

16 Dated: February 29, 2016

CALIFORNIA DEPARTMENT OF WATER
RESOURCES



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19 Robin McGinnis
Office of the Chief Counsel

1 **SERVICE LISTS (VIA E-MAIL)**

2 **PARTIES**
3 **THE WEST SIDE IRRIGATION DISTRICT**
4 **CEASE AND DESIST ORDER HEARING**

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<p>PARTIES BYRON-BETHANY IRRIGATION DISTRICT ADMINISTRATIVE CIVIL LIABILITY HEARING</p>
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