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BETHANY IRRIGATION DISTRICT  
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8  
9 BEFORE THE  
10 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

11 ENFORCEMENT ACTION ENF01949  
12 DRAFT CEASE AND DESIST ORDER  
REGARDING UNAUTHORIZED  
13 DIVERSIONS OR THREATENED  
UNAUTHORIZED DIVERSIONS OF WATER  
14 FROM OLD RIVER IN SAN JOAQUIN  
COUNTY

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

SWRCB Enforcement  
Action ENF01951 and ENF01949

MOTION TO DISMISS  
ADMINISTRATIVE CIVIL  
LIABILITY COMPLAINT  
IN ENF01951 FOR VIOLATION OF  
DUE PROCESS

1 I. INTRODUCTION

2 The administrative civil liability complaint (ACL Complaint)<sup>1</sup> forming the basis of the  
3 State Water Resources Control Board's (SWRCB) enforcement proceeding against  
4 Byron-Bethany Irrigation District (BBID) in Enforcement Action ENF01951 (Enforcement  
5 Action) is premised upon the SWRCB's prior determination that water was unavailable for  
6 BBID to divert under its pre-1914 appropriative water right in June 2015. The SWRCB  
7 alleges that BBID knew of this predetermined "fact" when BBID diverted water between  
8 June 13 and 25, 2015; a finding of "fact" that was made without any hearing and,  
9 therefore, deprived BBID of its right to contest the finding. Such a result constitutes a  
10 taking of BBID's property right with due process of law.

11 As viewed by the SWRCB, the SWRCB first deprived BBID of its property right,  
12 and thereafter through these proceedings, undertook an investigation into the facts and  
13 circumstances to evaluate whether its determination was appropriate. Due process,  
14 however, requires that the factual investigation and hearing be performed before an  
15 agency may deprive a party of its property rights. No hearing at this juncture can cure  
16 this constitutional infirmity. Moreover, BBID never received a hearing on the merits of the  
17 SWRCB's determination prior to an Enforcement Action initiated for the purposes of  
18 punishing BBID. Therefore, BBID respectfully requests that the Hearing Officer dismiss  
19 this enforcement proceeding.

20 II. MATERIAL FACTS

21 BBID holds a pre-1914 appropriative water right to divert and beneficially use water  
22 from watercourses in the California Delta. BBID's water right priority date is at least  
23 May 18, 1914. (See Declaration of Lauren Bernadett in Support of Motion to Dismiss  
24 Administrative Civil Liability Complaint In ENF01951 for Violation of Due Process  
25 (Bernadett Decl.), BBID Exh. 202.) On June 12, 2015, Thomas Howard, the SWRCB's  
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27 <sup>1</sup> For purposes of this motion, "ACL Complaint" refers to the complaint specific to BBID, and "ACL  
28 complaint" refers to ACL complaints in general for the purpose of discussing applicable law.

1 Executive Director, sent a curtailment notice to BBID, which purports to curtail the pre-  
2 1914 appropriative water rights of BBID and others with 1903 and later priority dates<sup>2</sup>  
3 within the entire Sacramento and San Joaquin River watersheds, including the California  
4 Delta (Curtailment Notice). (See Bernadett Decl., BBID Exh. 219.) The Curtailment  
5 Notice directed BBID to “immediately stop diverting” under its pre-1914 water rights, and  
6 provided that any further diversions would subject BBID to “administrative penalties,  
7 cease and desist orders, or prosecution in court.” (*Id.* at p. 2.)

8 In response, BBID filed suit against the SWRCB on June 26, 2015, challenging the  
9 Curtailment Notice, and asserting that the SWRCB exceeded its jurisdiction, violated due  
10 process, and conducted a flawed water availability analysis. Multiple other water right  
11 holders similarly situated to BBID, including The West Side Irrigation District (WSID), also  
12 sued the SWRCB to challenge of the Curtailment Notice. On July 10, 2015, in the WSID  
13 proceedings, Judge Shelleyanne Chang of the Sacramento County Superior Court  
14 granted WSID’s application for a Temporary Restraining Order (TRO), prohibiting the  
15 SWRCB from acting on the basis of the Curtailment Notice, and finding that the  
16 Curtailment Notice violated WSID’s constitutional due process rights (Order). (Bernadett  
17 Decl., Exh. A.)

18 On July 15, 2015, in response to the Order, the SWRCB partially rescinded and  
19 purportedly clarified the Curtailment Notice (Rescission and Clarification). (Bernadett  
20 Decl., BBID Exh. 279.) The stated purpose of the Rescission and Clarification was to  
21 rescind the “curtailment” portions of the Curtailment Notice, and to reiterate the SWRCB’s  
22 determination that there was no water available for post-1902 water right holders to divert  
23 and that further diversions would subject the water right holder to administrative penalties.  
24 (*Id.* at pp. 1-2.)

25 On July 20, 2015, the SWRCB issued the ACL Complaint, alleging that BBID

26 \_\_\_\_\_  
27 <sup>2</sup> Appropriative water rights have a “priority date.” A priority date places the water right holder in a  
28 hierarchical order. When there is a shortage of supply, water right holders with “junior” priority dates are  
the first to recognize the shortage.

1 unlawfully diverted water from June 13, 2015 to June 25, 2015. (Bernadett Decl., BBID  
2 Exh. 277 at ¶¶ 26, 33.) The underlying basis for the ACL Complaint is the SWRCB's  
3 June 12, 2015 determination that there was insufficient water available for diversion by  
4 water right holders with a post-1902 priority date. (*Id.* at ¶ 31.) The period of alleged  
5 violation begins on June 13, 2015, the day after the Curtailment Notice was issued.<sup>3</sup> (*Id.*  
6 at ¶¶ 17, 26, 33.) The Rescission and Clarification does not remedy the due process  
7 violation described by Judge Chang but, rather, continues to violate BBID's due process  
8 rights. Moreover, the SWRCB, through ENF01951, seeks to punish BBID based on the  
9 Curtailment Notice, prior to the SWRCB attempting to cure the constitutional defect in  
10 the Curtailment Notice.

11 III. ARGUMENT

12 A. The Initial June 12, 2015 Curtailment Notice Violates Due Process Because It  
13 Was Issued Without Any Type of Due Process Hearing

14 BBID's pre-1914 appropriative water rights are real property enjoying  
15 Constitutional protections. (*Fullerton v. State Water Resources Control Bd.* (1979)  
16 90 Cal.App.3d 590, 598 (*Fullerton*)). Indeed, and since statehood, water rights in  
17 California have been considered real property.<sup>4</sup> (*Fudickar v. Eastside River Irrigation*  
18 *Dist.* (1895) 109 Cal. 29, 36-37; *Schimmel v. Martin* (1923) 190 Cal. 429, 432; *Kidd v.*  
19 *Laird* (1860) 15 Cal. 161, 179-180.) California courts today continue to rely upon this  
20 fundamental principle when resolving issues regarding water rights. (See, e.g., *Nicoll v.*  
21 *Rudnick* (2008) 160 Cal.App.4th 550, 557-558, citing *Fullerton* at p. 598 ["The concept of  
22 an appropriative water right is a real property interest incidental and appurtenant to  
23 land".])

24 As vested property rights, water rights "cannot be infringed by others or taken by

25 <sup>3</sup> The SWRCB, at the July 8, 2015 hearing in *The West Side Irrigation Dist. v. State Water Resources*  
26 *Control Bd.*, represented that the Curtailment Notice had no relation to the imposition of penalties.  
(Bernadett Decl., BBID Exh. 276.) This representation is entirely inconsistent with paragraphs 17 and 18  
27 of the ACL Complaint. (Bernadette Decl., BBID Exh. 277.)

28 <sup>4</sup> That water rights are considered usufructuary does not make them any less of a real property interest.  
(See *Stupak-Thrall v. United States* (6th Cir. 1996) 89 F.3d 1269, 1296.)

1 governmental action without due process ....” (*United States v. State Water Resources*  
2 *Control Bd.* (1986) 182 Cal.App.3d 82, 101.) Water rights held and managed by an  
3 irrigation district for the benefit of its landowners are not distinguished from private rights  
4 to water, and receive the same constitutional due process protections. (*Ivanhoe*  
5 *Irrigation Dist. v. All Parties and Persons* (1957) 47 Cal.2d 597, 625, revd. on other  
6 grounds *sub nom. Ivanhoe Irrigation Dist. v. McCracken* (1958) 78 S.Ct. 1174.) As a  
7 constitutional matter, due process requires an opportunity to be heard, and an  
8 opportunity to confront and cross-examine adverse evidence. (*Goldberg v. Kelly* (1970)  
9 397 U.S. 254, 268-269.)

10 The Curtailment Notice was a command by the SWRCB to BBID to cease  
11 exercising its property right – its right to divert water under its pre-1914 appropriative  
12 right. However, the SWRCB issued the Curtailment Notice without any due process  
13 hearing, and BBID had no opportunity to challenge any evidence relied upon by the  
14 SWRCB in issuing the Curtailment Notice. Likewise, BBID did not have an opportunity  
15 to present evidence that the Curtailment Notice should not have issued.

16 In the WSID matter, Judge Chang determined that the Curtailment Notice violated  
17 due process, issuing a TRO prohibiting the SWRCB from taking any action against  
18 WSID, et al. on the basis of the Curtailment Notice. (See Bernadett Decl., BBID  
19 Exh. 379.) The basis for the Order and TRO was a violation of due process as  
20 articulated by the United States District Court for the Eastern District of California in  
21 *Duarte Nursery, Inc. v. United States Army Corps of Eng’rs* (E.D. Ca. 2014) 17  
22 F.Supp.3d. 1013 (*Duarte*). Judge Chang held that the Curtailment Notice violated due  
23 process because it is “coercive such that a recipient is likely to believe they are no longer  
24 entitled to divert ... because the Board has already declared in the Curtailment [Notice]  
25 that it has made a determination that they are no longer entitled to divert under their  
26 appropriative water rights, without any sort of pre-deprivation hearing.” (See Bernadett  
27 Decl., BBID Exh. 379 at ¶ 15.)

28 Judge Chang's ruling is equally applicable to the Curtailment Notice issued to

1 BBID because the Curtailment Notice that formed the subject of her Order is identical to  
2 the Curtailment Notice issued to BBID. Thus, because the Curtailment Notice violates  
3 WSID's due process rights, it necessarily violates BBID's due process rights.

4 B. The Subsequent July 15, 2015 Rescission And Clarification Likewise Violates Due  
5 Process Because It Was Issued Without Any Type of Due Process Hearing

6 Responding to the Order, on July 15, 2015, the SWRCB issued its Rescission and  
7 Clarification. (See Bernadett Decl., BBID Exh. 279.) Through the Rescission and  
8 Clarification, the SWRCB attempted to cure the due process violations contained in the  
9 Curtailment Notice. While the Rescission and Clarification claims to "rescind the  
10 'curtailment' portions of the unavailability notices," it reiterates the SWRCB's finding that  
11 there was and is no water available for BBID to divert under its pre-1914 water right, and  
12 maintains that BBID's diversion of water after receiving the Curtailment Notice was and  
13 continues to be unlawful. (*Id.* at p. 1.)

14 The SWRCB's pre-determination of water availability is confirmed in sworn  
15 declarations filed in Superior Court. Specifically, in *Banta-Carbona Irrigation Dist. v.*  
16 *State Water Resources Control Bd.*, San Joaquin County Superior Court Case  
17 No. 39-2015-00326421-CU-WM-WTK (*Banta-Carbona*), the SWRCB filed a declaration  
18 in opposition to Banta-Carbona Irrigation District's request for a TRO. (See Bernadett  
19 Decl., BBID Exh. 299.) John O'Hagan, Assistant Deputy Director of the SWRCB's  
20 Division of Water Rights, oversees the Division's Enforcement Section, and led the  
21 SWRCB's water availability analysis and curtailment effort for at least the past two years.  
22 In his declaration, Mr. O'Hagan declares that the Curtailment Notice reflects the  
23 SWRCB's *determination* that water was unavailable for diversion, and that the  
24 Curtailment Notice represents the SWRCB's "findings of the unavailability of water"  
25 under a water right holder's priority of right, and is subject to enforcement. (*Id.* at ¶ 6.)  
26 Mr. O'Hagan further declares that the "[d]iversion of water when it is unavailable under a  
27 diverter's priority of right constitutes an unauthorized diversion and a trespass against  
28 the state." (*Id.* at ¶ 8.)

1           While the Rescission and Clarification purports to rescind the “commands”  
2 contained in the Curtailment Notice, it maintains and reiterates the SWRCB findings and  
3 determination that water was unavailable for diversion by BBID, and that continued  
4 diversions by BBID subjected it to penalties. Thus, the Rescission and Clarification  
5 perpetuates the same due process violations Judge Chang found in the Curtailment  
6 Notice. Therefore, the Rescission and Clarification, in finding that water was unavailable  
7 for BBID to divert deprived BBID of use of its water right without providing BBID an  
8 opportunity to challenge or present evidence to rebut the deprivation.

9           Additionally, the Rescission and Clarification is ambiguous and does not directly  
10 rescind the unconstitutional Curtailment Notice. Rather, it states the earlier Curtailment  
11 Notice is partially rescinded, “[t]he purpose of this notice is to rescind the ‘curtailment’  
12 portions of the unavailability notices,” and “[t]o the extent that any of the notices  
13 described above contained language that may be construed as an order ... that  
14 language is hereby rescinded.” (Bernadett Decl., BBID Exh. 279, at p. 1.) This  
15 language is ambiguous because a reader cannot reliably determine what, if any, part of  
16 the Curtailment Notice was rescinded, thus continuing the due process violation.

17 C.    The Enforcement Action Perpetuates the Due Process Violations That Started  
18        With the Curtailment Notice and Continued With the Rescission and Clarification

19           The Enforcement Action is expressly based upon the Curtailment Notice and the  
20 subsequent Rescission and Clarification, which fails to cure the due process violation.  
21 Thus, the Enforcement Action improperly perpetuates the due process violations.  
22 Indeed, notwithstanding the Rescission and Clarification, the ACL Complaint states:

23           On June 12, 2015, the [SWRCB] issued [the Curtailment Notice], which  
24 notifies all holders of pre-1914 appropriative water rights with a priority date  
25 of 1903 and later within the Sacramento and San Joaquin River  
26 watersheds of the lack of availability of water to serve their rights....  
27 (Bernadett Decl., BBID Exh. 277 at ¶ 17.)

28           The ACL Complaint further states the SWRCB’s predetermination that there was  
no water for BBID to divert under its water right, as follows:

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The [Curtailment Notice] reflects the [SWRCB's] determination that the existing water available in the Sacramento-San Joaquin River watersheds and the Delta is insufficient to meet the demands of diverters with claims of pre-1914 appropriative rights with a priority date of 1903 and later. Continued diversion when there is no water available under the priority of the right constitutes unauthorized water diversion and use. Unauthorized diversion is subject to enforcement. (Bernadett Decl., BBID Exh. 277 at ¶ 18.)

Mr. O'Hagan signed the ACL Complaint. As explained herein, Mr. O'Hagan's declaration in *Banta-Carbona*, filed on June 23, 2015 and the ACL Complaint, filed July 20, 2015, make clear that the SWRCB made a prior determination that BBID could not lawfully divert water under its pre-1914 water right after June 13, 2015. The SWRCB's pre-determination of water unavailability in the Curtailment Notice is the basis for the SWRCB's proposed imposition of a multi-million dollar penalty. (See Bernadett Decl., BBID Exh. 277 at ¶¶ 31.) The ACL Complaint states that, because BBID received the Curtailment Notice, "BBID was aware that the State Water Board had determined there was insufficient water supply available for BBID's claimed water right." (*Id.* at ¶ 36.) By the phrase "the State Water Board had determined," the SWRCB is referring to its determination in the Curtailment Notice that water was unavailable to meet certain pre-1914 claims of right. (*Id.* at ¶¶ 18, 36.) Yet, BBID was never afforded an opportunity to challenge or present evidence that there was sufficient water available for it to divert.

The SWRCB now argues that BBID will get its "due process" hearing in the Enforcement Action. (See Bernadett Decl., Exh. B at p. 8:4-12.) Granting a post-deprivation hearing does not, however, cure the constitutional infirmity. Constitutional and procedural shortcomings are not curable by offering a hearing. (*Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 559 ["a hearing does not cure arbitrary and high-handed procedural due process violations"].) By arguing that BBID will get its due process hearing on the deprivation of its property rights through this administrative proceeding, the SWRCB turns due process on its head. The SWRCB argues that it is not commanding BBID to cease diversions, but if BBID continues to divert, the SWRCB will fine BBID \$5.2 million based upon the SWRCB's prior finding and determination that

1 there was no water available for BBID to divert. (Bernadett Decl., BBID Exh. 279 at  
2 p. 2.)

3 The SWRCB further argues that the only way BBID may challenge the SWRCB's  
4 finding of water unavailability is to risk an administrative enforcement proceeding.  
5 Threatening enforcement as the only way to obtain a judicial determination of one's  
6 property right is itself a violation of due process. As Judge Karlton explained in *Duarte*:

7 Forcing plaintiffs to wait idly about while [defendant] decides whether to  
8 bring an enforcement action has the effect of continuing to deprive  
9 plaintiffs use of their property, without end. (*Duarte, supra*, 17 F.Supp.3d  
at p. 1023.)

10 The SWRCB's position is at direct odds with *Duarte*. The SWRCB's purported  
11 "rescission" of the command to cease diverting while at the same time retaining the pre-  
12 determination that BBID cannot legally divert, and arguing that BBID can get a fair  
13 hearing when and if the SWRCB brings an enforcement action "has the effect of  
14 continuing to deprive [BBID's] use of [its] property." (*Duarte, supra*, 17 F.Supp.3d at  
15 p. 1023.) The appropriate procedure is for the SWRCB to perform an investigation  
16 pursuant to its prehearing investigatory authority to obtain the necessary information,  
17 and to then have a hearing consistent with due process to determine whether or not  
18 BBID's water rights are subject to curtailment. Instead, the SWRCB predetermined that  
19 BBID's water rights were subject to curtailment in the absence of any hearing. The  
20 SWRCB now attempts to conduct a "post-deprivation hearing" after improperly issuing  
21 the ACL Complaint. However, ENF01951 is not a post-deprivation hearing, it is an  
22 enforcement action.

23 Moreover, the period of alleged unlawful diversions as set forth in the ACL  
24 Complaint is from June 13 through June 25, 2015. The SWRCB did not issue the  
25 Rescission and Clarification until July 15, 2015. Accordingly, even if the Rescission and  
26 Clarification "cured" the due process violation, the SWRCB seeks to assess penalties of  
27 up to \$5.2 million for alleged violations during the time the SWRCB was committing an  
28 ongoing violation of BBID's due process rights. Penalties cannot accrue during the

1 period of a due process violation; otherwise, due process protections would be  
2 meaningless.

3 Because the ACL Complaint was issued in the absence of any due process  
4 hearing and without providing BBID the ability to test or present any evidence regarding  
5 the underlying alleged violation, this Enforcement Action continues to perpetuate the  
6 SWRCB's violation of BBID's due process rights.

7 D. The Enforcement Action Is Infected By the "Fruits of the Poisonous Tree"

8 The SWRCB issued the ACL Complaint based on information contained in the  
9 Curtailment Notice, subsequently found unconstitutional by Judge Chang as set forth in  
10 the Order. Because the Curtailment Notice violates BBID's due process rights, the  
11 SWRCB is prohibited from using the Curtailment Notice as the basis for this  
12 Enforcement Action. Any evidence obtained by such unconstitutional means, according  
13 to the TRO, cannot legally be used in a subsequent administrative enforcement  
14 proceeding. Specifically, the TRO states in relevant part:

15 A temporary restraining order shall issue staying or prohibiting  
16 Respondents/Defendants State Water Resources Control Board and  
17 Thomas Howard from taking any action against the West Side Irrigation  
18 District and landowners of the other petitioner Districts *on the basis of the*  
19 *2015 Curtailment Letters* sent by the Water Board's Executive Director,  
20 Thomas Howard... (Bernadett Decl., BBID Exh. 379 at p. 7:17-21,  
21 emphasis added.)

22 In explaining the TRO's restraint against the SWRCB using the unconstitutional  
23 Curtailment Notice, Judge Chang analogized to the situation prohibiting use of the fruits  
24 of the poisonous tree in criminal proceedings. (Bernadett Decl., Exh. C at p. 33:4-8.)  
25 Evidence obtained by improper government conduct is inadmissible. (*People v. One*  
26 *1960 Cadillac Coupe* (1964) 62 Cal.2d 92, 96-97 ["exclusionary rules should apply to  
27 improper states conduct whether the proceeding contemplates the deprivation of one's  
28 liberty or property"]; *Elder v. Bd. of Medical Examiners* (1966) 241 Cal.App.2d 246,  
29 260-261 [the exclusionary rule applies to proceedings that contemplates the deprivation  
30 of a property right].) As stated by the Supreme Court in *People v. Cahan* (1955)  
31 44 Cal.2d 434, 445, "any process of law that sanctions the imposition of penalties upon

1 an individual through the use of the fruits of official lawlessness tends to the destruction  
2 of the whole system of restraints on the exercise of the public force that are inherent in  
3 the 'concept of ordered liberty.'”

4 The information contained in the unconstitutional Curtailment Notice forms the  
5 basis of the ACL Complaint. Thus, the SWRCB must be precluded from imposing  
6 penalties using the Curtailment Notice or the Rescission and Clarification.

7 IV. CONCLUSION

8 The ACL Complaint and this Enforcement Action continue to rely on findings of  
9 fact made outside of any due process hearing, depriving BBID of its property right. This  
10 due process violation cannot be cured by offering BBID participation in a post-  
11 deprivation hearing. Therefore, BBID requests that the Hearing Officer dismiss this  
12 Enforcement Action for violation of due process.

13 SOMACH SIMMONS & DUNN  
14 A Professional Corporation

15 Dated: January 25, 2016

16 By: \_\_\_\_\_

17 Daniel Kelly

18 Attorneys for Petitioner/Plaintiff  
19 Byron-Bethany Irrigation District  
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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 January 25, 2016, I served the following document(s):

**MOTION TO DISMISS ADMINISTRATIVE CIVIL LIABILITY COMPLAINT  
IN ENF01951 FOR VIOLATION OF DUE PROCESS**

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 January 25, 2016 at Sacramento, California.

  
\_\_\_\_\_  
Yolanda De La Cruz

**SERVICE LIST OF PARTICIPANTS  
BYRON-BETHANY IRRIGATION DISTRICT  
ADMINISTRATIVE CIVIL LIABILITY HEARING  
(Revised 9/2/15; Revised: 9/11/15)**

SOMACH SIMMONS & DUNN  
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<u>VIA ELECTRONIC MAIL</u>	<u>VIA ELECTRONIC MAIL</u>
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**SERVICE LIST  
WEST SIDE IRRIGATION DISTRICT  
CEASE AND DESIST ORDER HEARING**

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8  
9 BEFORE THE  
10 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

11 ENFORCEMENT ACTION ENF01949  
12 DRAFT CEASE AND DESIST ORDER  
REGARDING UNAUTHORIZED  
13 DIVERSIONS OR THREATENED  
UNAUTHORIZED DIVERSIONS OF WATER  
14 FROM OLD RIVER IN SAN JOAQUIN  
COUNTY  
15  
16 In the Matter of ENFORCEMENT ACTION  
ENF01951 – ADMINISTRATIVE CIVIL  
17 LIABILITY COMPLAINT REGARDING  
UNAUTHORIZED DIVERSION OF WATER  
18 FROM THE INTAKE CHANNEL TO THE  
BANKS PUMPING PLANT (FORMERLY  
19 ITALIAN SLOUGH) IN CONTRA COSTA  
COUNTY

SWRCB Enforcement Action  
ENF01951 and ENF01949  
  
MOTION TO DISMISS  
ADMINISTRATIVE CIVIL  
LIABILITY COMPLAINT IN  
ENF01951 FOR LACK OF  
DELEGATION AUTHORITY

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1 I. INTRODUCTION

2 The administrative civil liability complaint<sup>1</sup> forming the basis of the State Water  
3 Resources Control Board's (SWRCB) enforcement proceeding against Byron-Bethany  
4 Irrigation District (BBID) in Enforcement Action ENF01951 (ACL Complaint) is void  
5 because it was issued by John O'Hagan, a state official without legal authority to issue it.  
6 At no relevant time, did John O'Hagan, the Assistant Deputy Director of the Division of  
7 Water Rights at the SWRCB, have express statutory authority, or properly delegated  
8 authority, to issue the ACL Complaint.

9 The authority to issue an ACL complaint under Water Code section 1055 (for an  
10 alleged violation of Water Code section 1052) is vested solely with the Executive  
11 Director of the SWRCB. (Wat. Code, § 1055, subd. (a) ["The *executive director of the*  
12 *Board* may issue a complaint to any person or entity on which administrative civil liability  
13 may be imposed pursuant to Section 1052 ....;" emphasis added].) Indeed, under Water  
14 Code section 1055, the Legislature expressly segregates the authority of the "executive  
15 director" to issue an ACL complaint from the authority of the "board" to issue an *order*  
16 imposing liability for trespass violations. (*Id.* at subds. (a), (c).) There is no statute  
17 authorizing the Assistant Deputy Director of the Division of Water Rights to issue an ACL  
18 complaint. Thus, because Mr. O'Hagan lacked legal authority to issue the ACL  
19 Complaint, BBID requests the Hearing Officer strike the ACL Complaint in ENF01951,  
20 and dismiss this enforcement proceeding.

21 II. MATERIAL FACTS

22 BBID diverts water from the California Delta under a pre-1914 appropriative water  
23 right. (Declaration of Lauren Bernadett in Support of Motion to Strike Administrative Civil  
24 Liability Complaint in ENF01951 for Lack of Delegation Authority (Bernadett Decl.),  
25 BBID Exh. 202.) On July 20, 2015, Mr. O'Hagan signed and issued the ACL Complaint,  
26 alleging BBID's water diversions between June 13, 2015 and June 25, 2015 were

27 \_\_\_\_\_  
28 <sup>1</sup> For purposes of this motion, "ACL Complaint" refers to the complaint specific to BBID, and "ACL  
complaint" refers to ACL complaints in general for the purpose of discussing applicable law.

1 unlawful because there was insufficient water available to satisfy the priority of its water  
2 right during this period. (Bernadett Decl., BBID Exh. 277.) The alleged unlawful  
3 diversions occurred within the legal boundary of the "Delta" as defined in Water Code  
4 section 12220. Mr. O'Hagan signed both the ACL Complaint, and the letter transmitting  
5 the ACL Complaint to BBID. (*Ibid.*)

6 Paragraph 3 of the ACL Complaint describes the putative delegated authority  
7 under which Mr. O'Hagan believed he was authorized to issue the ACL Complaint, as  
8 follows:

9 Water Code section 1055, subdivision (a), provides that the *Executive*  
10 *Director of the State Water Board* may issue a complaint to any person or  
11 entity on whom Administrative Civil Liability (ACL) may be imposed. *On*  
12 *June 5, 2012, the Executive Director delegated this authority to the Deputy*  
13 *Director for Water Rights. State Water Board Resolution 2012-0029*  
14 *authorizes the Deputy Director for Water Rights to issue an order imposing*  
15 *an ACL when a complaint has been issued and no hearing has been*  
16 *requested within 20 days of receipt of the complaint. The Deputy Director*  
17 *for Water Rights has redelegated this authority to the Assistant Deputy*  
18 *Director for Water Rights pursuant to State Water Board Resolution 2012-*  
19 *0029. (Bernadett Decl., BBID Exh. 277 at ¶ 3 (emphasis added).)*

20 During his recent deposition in this administrative proceeding, Mr. O'Hagan was  
21 asked about his authority to issue the ACL Complaint, and he responded as follows:

22 I am redelegated from the Deputy Director. And under water code for the  
23 Administrative Civil Liabilities and Cease and Desist Orders, that is  
24 authorized by water code to the Executive Director. He has delegated that  
25 down to the Deputy Director for Water Rights, and then she has  
26 redelegated that to me. (Bernadett Decl., Exh. A.)

27 When asked for specifics, Mr. O'Hagan stated that he would "supply [BBID] with a  
28 copy of the delegation document and of the redelegation document." (*Id.* at p. 252:2-4.)  
Following the deposition, Andrew Tauriainen (a member of the Prosecution Team)  
provided the July 6, 2012 Redelegation Memorandum from Barbara Evoy  
(Memorandum), and the June 5, 2012 SWRCB Resolution No. 2012-0029 (Resolution  
No. 2012-0029). (Bernadett Decl., Exh. B; Bernadett Decl., BBID Exh. 298; and  
Bernadett Decl., BBID Exh. 300.) However, neither the Memorandum nor Resolution  
No. 2012-0029 provide Mr. O'Hagan with authority to issue an ACL complaint to a Delta  
diverter under Water Code section 1055.

1 III. ARGUMENT

2 A. The Authority to Issue the ACL Complaint Cannot Be Delegated to Mr. O'Hagan  
3 Because Powers Personally Vested in Public Agencies/Officers Cannot Be  
4 Delegated Absent Statutory Authority

5 "As a general rule, powers conferred upon public agencies and officers which  
6 involve the exercise of judgment or discretion are in the nature of public trusts and  
7 cannot be surrendered or delegated to subordinates in the absence of statutory  
8 authorization. [Citations.]" (*California School Employees Assn. v. Personnel Com. of*  
9 *the Pajaro Valley Unified School Dist. of Santa Cruz County* (1970) 3 Cal.3d 139, 144  
10 (*California School Employees Assn.*); see also *Bagley v. City of Manhattan Beach*  
11 (1976) 18 Cal.3d 22, 24-25.) In contrast to discretionary action, "public agencies may  
12 delegate the performance of ministerial tasks, including the investigation and  
13 determination of facts preliminary to agency action. [Citations.]" (*California School*  
14 *Employees Assn.* at p. 144.) When the Legislature provides an official with powers and  
15 duties personal to the individual, however, the powers and duties cannot be delegated.  
16 (See *Central Delta Water Agency v. State Water Resources Control Bd.* (2004)  
17 124 Cal.App.4th 245, 261.)

18 Under Water Code section 1055, the power and authority to issue an ACL  
19 complaint for alleged violations of Water Code section 1052 is personally vested in the  
20 Executive Director. (Wat. Code, § 1055, subd. (a).) Thus, the Executive Director cannot  
21 delegate his authority under Water Code section 1055. (*California School Employees*  
22 *Assn., supra*, 3 Cal.3d at p. 144.) Similarly, the Legislature vested personal powers and  
23 duties in the Delta Watermaster over matters affecting the Delta. (Wat. Code, § 85230,  
24 subd. (b) ["The Delta Watermaster's delegated authority shall include authority to ...  
25 issue a[n] ... administrative civil liability complaint."].) Thus, to the extent that such  
26 authority applies to this enforcement proceeding, the Delta Watermaster has not  
27 delegated this authority. Accordingly, there is no legal support for Mr. O'Hagan's  
28 putative authority to issue the ACL Complaint.

The SWRCB is a five-member board, with each board member appointed by the

1 Governor for a four-year term. (Wat. Code, §§ 175, 177.) The Executive Director, Tom  
2 Howard, oversees all programs and program staff within the SWRCB. (Bernadett Decl.,  
3 BBID Exh. 297.) Mr. Howard is supported by two Chief Deputy Directors who oversee  
4 multiple programs. (*Ibid.*) Relevant to this motion, Caren Trgovcich is the Chief Deputy  
5 Director who oversees the Division of Water Rights program (headed by Deputy Director  
6 Barbara Evoy), which includes the Permitting and Enforcement Branch (headed by  
7 Assistant Deputy Director Mr. O'Hagan). (*Ibid.*) One of the two sections under the  
8 Permitting and Enforcement Branch is the Enforcement Section, managed by Kathy  
9 Mrowka. (*Ibid.*)

10 A separate and direct line of organization runs from the Board to the Executive  
11 Director, Mr. Howard, and, in turn, to the Office of Delta Watermaster (Michael George),  
12 who is an SWRCB-appointed special master for the Delta. (Wat. Code, § 85230, subd.  
13 (a); Bernadett Decl., BBID Exh. 297.) Thus, the Office of the Delta Watermaster is  
14 independent and separate from the programs that are overseen by the Chief Deputy  
15 Directors, and the Delta Watermaster reports directly to the Executive Director, like the  
16 Chief Deputy Directors.

17 In 2009, the Legislature directed the SWRCB to delegate certain powers and  
18 duties to the Delta Watermaster. The Sacramento-San Joaquin Delta Reform Act of  
19 2009, now codified in the Water Code, states that the SWRCB "shall adopt internal  
20 procedures delegating authority to the Delta Watermaster." (Wat. Code, § 85230, subd.  
21 (b).) The Delta Watermaster's authority is limited to diversions within the Delta. (*Ibid.*)

22 Water Code section 1055 provides that: (1) the Executive Director *may* issue ACL  
23 *complaints*; and (2) if the party served timely requests a hearing before the Board, after  
24 the hearing the Board *may* adopt an *order* imposing liability. (Wat. Code, § 1055,  
25 subds. (a), (c).) Under Resolution No. 2012-0029, the Board purports to delegate its  
26 authority to issue an ACL *order* to the Deputy Director of Water Rights (Ms. Evoy), only  
27 when an ACL complaint has issued but no hearing has been requested. (Bernadett  
28 Decl., BBID Exh. 298 at ¶ 4.9.2.) In her Memorandum, the Deputy Director (Ms. Evoy)

1 purports to “redelegate” this specific authority to the Assistant Deputy Director  
2 (Mr. O’Hagan). (Bernadett Decl., BBID Exh. 300 at ¶ 4.9.2.) However, the authority to  
3 issue an ACL complaint is not addressed in either Resolution No. 2012-0029 or the  
4 Memorandum.

5 Moreover, for certain types of ACL complaints arising out of diversions in the  
6 Delta, the Legislature expressly states that “[t]he Delta Watermaster’s delegated  
7 authority *shall* include . . . authority to issue a notice of a proposed cease and desist  
8 order or administrative civil liability complaint.” (Wat. Code, § 85230, subd. (b),  
9 emphasis added.) Consistent with this statutory directive, on October 3, 2012, the Board  
10 adopted Resolution No. 2012-0048, providing the Delta Watermaster with the authority  
11 to take the following actions relating to diversions within the Delta:

12 Issue proposed administrative liability complaints, and, when a hearing has  
13 not been requested, issue an order imposing administrative liability in  
14 accordance with Water Code section 1055 et seq. (Bernadett Decl., BBID  
15 Exh. 304 at ¶ 1.6.)

16 Resolution No. 2012-0048 also provides that the tasks delegated to the Deputy  
17 Director of Water Rights (Ms. Evoy) under Resolution No. 2012-0029 would be  
18 inapplicable to diversions in the Delta “except to the extent the Delta Watermaster  
19 expressly authorizes the Deputy Director for Water Rights or appropriate staff within the  
20 Division of Water Rights to proceed.” (Bernadett Decl., BBID Exh. 304 at ¶ 3.)

21 BBID is unaware of, and the Prosecution Team has not provided, any document  
22 reflecting an express authorization by the Delta Watermaster to the Deputy Director of  
23 Water Rights or any other person regarding the issuance of ACL complaints relating to  
24 diversions in the Delta.<sup>2</sup> Therefore, Mr. O’Hagan is not legally authorized to issue the  
25 ACL Complaint, and it is void.

26  
27 <sup>2</sup> Any redelegation to subordinate staff would be unlawful. As such, the Delta Watermaster cannot  
28 redelegate this authority to the Deputy Director. (*Central Delta Water Agency v. State Water Resources  
Control Bd.* (2004) 124 Cal.App4th at 261.)

1 B. Even If Authority to Issue the ACL Complaint Can Be Delegated to Mr. O'Hagan,  
2 Neither Resolution No. 2012-0029 Nor the Redlegation Memorandum Provide  
3 Mr. O'Hagan with Authority to Issue the ACL Complaint

4 Even assuming that the Executive Director can delegate his authority to issue an  
5 ACL complaint under Water Code section 1055, there are three reasons why Resolution  
6 No. 2012-0029, and the Memorandum do not provide Mr. O'Hagan with delegated  
7 authority to issue the ACL Complaint against BBID:

8 (1) Resolution No. 2012-0029 purports to delegate to the Deputy Director of  
9 the Division of Water Rights only the ability to issue an ACL *order*, not an  
10 ACL *complaint* (i.e., the Deputy Director has the power to “[i]ssue an *order*  
11 imposing administrative civil liability when a complaint has been issued and  
12 no hearing has been requested . . . .” (Bernadett Decl., BBID Exh. 298 at  
13 ¶ 4.9.2, emphasis added.) An ACL complaint describes the actions that  
14 constitute an alleged violation, and provides the alleged violator with an  
15 opportunity to request a hearing. (Wat. Code, § 1055, subds. (a), (b).) In  
16 contrast, an ACL order is adopted to impose administrative civil liability on  
17 the alleged violator, and may only be issued by the Deputy Director for  
18 Water Rights when a hearing is waived or, if a hearing is requested, by the  
19 Board after the hearing on the merits has concluded. (*Id.* at subd. (c).)  
20 Therefore, an ACL order is a distinct and separate document from an  
21 ACL complaint.

22 (2) Contrary to Mr. O'Hagan's representation at his deposition, Resolution  
23 No. 2012-0029 does not address delegation of the Executive Director's  
24 authority to issue an ACL complaint. Under Resolution No. 2012-0029, the  
25 Board delegates to the Deputy Director its authority to issue an ACL order.  
26 The Deputy Director cannot “redelegate” any greater authority than the  
27 authority she had when she issued the Memorandum. Therefore, the  
28 Deputy Director could not delegate authority to issue an ACL complaint  
because no such authority was delegated to her under Resolution

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No. 2012-0029.

(3) Even if Resolution No. 2012-0029 could be read consistent with the Prosecution Team’s interpretation (which it can’t), Resolution No. 2012-0048 expressly nullifies the authorities delegated in Resolution No. 2012-0029 with respect to activities and diversions in the Delta. (Bernadett Decl., BBID Exh. 304 at ¶ 3 [tasks delegated under Resolution No. 2012-0029 are inapplicable “to diversions in the Delta”].) It is undisputed that the diversions forming the basis of this enforcement proceeding were diversions in the Delta. Therefore, Resolution No. 2012-0029 is inapplicable to this proceeding.

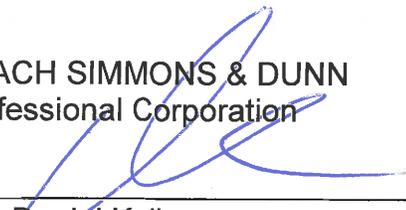
For the reasons stated above, the authority to issue an ACL complaint remains with the Executive Director under Water Code section 1055, subdivision (a), because that authority was not delegated under Resolution No. 2012-0029, relied on by the SWRCB, and could not be “redelegated” to Mr. O’Hagan. Additionally, because the alleged wrongful diversions occurred within Delta, Resolution No. 2012-0029 does not apply.

IV. CONCLUSION

At no relevant time did Mr. O’Hagan have legal authority to issue an ACL complaint under Water Code section 1055 for alleged unlawful diversions under Water Code section 1052, or relating to diversions of water in the Delta. Because Mr. O’Hagan did not have legal authority to issue the ACL Complaint, the ACL Complaint is void. Therefore, BBID respectfully requests that the Hearing Officer strike the ACL Complaint, and dismiss this proceeding.

SOMACH SIMMONS & DUNN  
A Professional Corporation

Dated: January 25, 2016

By:   
Daniel Kelly  
Attorneys for Petitioner/Plaintiff  
Byron-Bethany Irrigation District



SERVICE LIST OF PARTICIPANTS  
 BYRON-BETHANY IRRIGATION DISTRICT  
 ADMINISTRATIVE CIVIL LIABILITY HEARING  
 (Revised 9/2/15; Revised: 9/11/15)

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CEASE AND DESIST ORDER HEARING

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12 ENFORCEMENT ACTION ENF01949  
DRAFT CEASE AND DESIST ORDER  
13 REGARDING UNAUTHORIZED  
DIVERSIONS OR THREATENED  
14 UNAUTHORIZED DIVERSIONS OF WATER  
FROM OLD RIVER IN SAN JOAQUIN  
15 COUNTY

SWRCB Enforcement Action  
ENF01951 and ENF01949

MOTION TO DISQUALIFY  
HEARING OFFICER

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

2 The Byron-Bethany Irrigation District (BBID) holds a pre-1914 appropriative water  
3 right to divert and beneficially use water from watercourses in the California Delta. The  
4 State Water Resources Control Board (SWRCB) issued a Curtailment Notice to BBID  
5 commanding it stop diverting water. BBID filed an action challenging the directive. The  
6 SWRCB later issued the Administrative Civil Liability complaint (ACL Complaint) against  
7 BBID in Enforcement Action ENF01951 (ENF01951). The predicate issue in this  
8 adjudication is whether there was sufficient water available to justify BBID's diversions of  
9 water in June 2015.

10 The right to an unbiased adjudicator in an administrative adjudication is a  
11 fundamental component of due process. Under California law, a hearing officer is  
12 subject to disqualification for bias, prejudice, or interest in the proceeding. To avoid a  
13 violation of due process, the SWRCB must ensure adequate separation of functions  
14 between the individuals acting in a prosecuting capacity from those acting as an  
15 adjudicatory capacity. Additionally, the hearing officer must not have prejudged the  
16 outcome of the adjudication.

17 In ENF01951, the SWRCB appointed Tam M. Doduc, a Board member, as the  
18 Hearing Officer and designated the Hearing Team and Prosecution Team in its Notice of  
19 Public Hearing. The Prosecution Team's members, however, have been key advisers to  
20 Board Members, including the Hearing Officer, regarding both water availability and the  
21 SWRCB's enforcement strategy, and have extensively discussed the same with SWRCB  
22 Executive Management, who also advise the Board. These communications negate the  
23 purpose of the separation of functions requirement, which is to ensure due process.  
24 Furthermore, these extensive communications between members of the Hearing Team,  
25 Prosecution Team and Hearing Officer (as a Board Member) create an unacceptable  
26 probability of actual bias on the part of the Hearing Officer, which is too high to be  
27 constitutionally tolerable. Therefore, BBID requests disqualification of the appointed  
28 Hearing Officer, and immediate appointment of a neutral officer.

1 II. PERTINENT PROCEDURAL BACKGROUND

2 BBID diverts water from the California Delta pursuant to a pre-1914 appropriative  
3 water right. (BBID Exh. 202.)<sup>1</sup> On June 12, 2015, Thomas Howard, the SWRCB's  
4 Executive Director, issued a "Curtailment Notice" purporting to curtail the pre-1914  
5 appropriative water rights of BBID and others with 1903 and later priority dates within the  
6 entire Sacramento and San Joaquin River watersheds, including the California Delta.  
7 (BBID Exh. 219.) BBID and others filed suit against the SWRCB, challenging the  
8 Curtailment Notice, and asserting that the SWRCB exceeded its jurisdiction, violated due  
9 process, and conducted a flawed water availability analysis. (Exh. C.)

10 On July 20, 2015, John O'Hagan, the SWRCB's Assistant Deputy Director of the  
11 Division of Water Rights, issued the ACL Complaint in ENF01951, alleging BBID's water  
12 diversions between June 13, 2015 and June 25, 2015 were unlawful because water was  
13 unavailable under the priority of BBID's water right during this period. (BBID Exh. 277.)  
14 The SWRCB issued a "Notice of Public Hearing and Pre-Hearing Conference" on August  
15 19, 2015 (Hearing Notice), advising that Board Member Doduc will serve as the Hearing  
16 Officer, and designating a "Hearing Team" and a "Prosecution Team." (BBID Exh. 302  
17 at p. 3.) The Hearing Notice states: "[t]he hearing team members will be: Nicole Kuenzi,  
18 Staff Counsel; Jane Farwell-Jensen, Environmental Scientist; and Ernest Mona, Water  
19 Resource Engineer." (*Ibid.*) The purpose of the Hearing Team is to "assist the hearing  
20 officer by providing legal and technical advice." (*Ibid.*) The Prosecution Team members  
21 are Andrew Tauriainen, an attorney in the Office of Enforcement, and Kathy Mrowka, the  
22 Manager of the Enforcement Section. (*Ibid.*) Mr. O'Hagan, who oversees the SWRCB's  
23 Enforcement Section and is Ms. Mrowka's direct supervisor, stated in sworn testimony  
24 that he considers himself part of the Prosecution Team, whether or not expressly  
25 identified in that capacity in the Hearing Notice. (BBID Exh. 297; BBID Exh. 334 at  
26 pp. 13:23-14:2; Exh. F at p. 106:19-23.) Mr. O'Hagan also signed the ACL Complaint,

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28 <sup>1</sup> All exhibits referenced herein are attached to the Declaration of Lauren Bernadett in Support of Motion to Disqualify Hearing Officer submitted concurrently herewith.

1 which is the Prosecution Team's "Complaint." (BBID Exh. 277.) Additionally, Michael  
2 George, the Delta Watermaster, identifies himself as part of the Prosecution Team, and  
3 Thomas Howard signed the Curtailment Notice, which commenced ENF01951. (Exh. A  
4 at p. 49:11-18; BBID Exh. 219.)

5 Under the heading "separation of functions," the Hearing Notice confirms that  
6 "[t]he prosecution team is separated from the hearing team and is prohibited from having  
7 *ex parte* communications with any members of the State Water Board and any members  
8 of the hearing team regarding substantive issues and controversial procedural issues  
9 within the scope of this proceeding. This separation of functions also applies to the  
10 supervisors of each team." (BBID Exh. 302 at p. 3.)

### 11 III. ARGUMENT

#### 12 A. The Guarantee of Due Process Mandates a Fair Hearing

13 The right to an unbiased adjudicator is a fundamental component of the  
14 guarantee of due process. (*Morongo Band of Mission Indians v. State Water Resources*  
15 *Control Bd.* (2009) 45 Cal.4th 731, 737 (*Morongo*) ["the constitutional guarantee of due  
16 process of law requires a fair tribunal" in administrative adjudications].) "A fair tribunal is  
17 one in which the judge or other decision maker is free of bias for or against a party."  
18 (*Ibid.*) Thus, "the presiding officer" and any "other person or body to which power to hear  
19 or decide in the [administrative] proceeding is delegated" are "subject to disqualification  
20 for bias, prejudice or interest in the proceeding." (Gov. Code, § 11425.40.)

21 As one safeguard against biased decision-makers, an agency must separate the  
22 adjudicative function from the investigative, prosecutorial, and advocacy functions within  
23 the agency when it conducts an adjudication. (Gov. Code, § 11425.10(4).) This  
24 mandatory separation of functions is "[o]ne of the basic tenets of the APA [because it]  
25 promotes both the appearance of fairness and the absence of even a probability of  
26 outside influence on administrative hearings." (*Nightlife Partners, Ltd. v. City of Beverly*  
27 *Hills* (2003) 108 Cal.App.4th 81, 91 (*Nightlife*)). Thus, administrative adjudications  
28 protect due process rights in two ways: (1) persons who are biased or who have

1 prejudged a matter may not act as adjudicators; and (2) an agency must separate the  
2 prosecuting and adjudicating functions. The test is an objective one. (*People v.*  
3 *Freeman* (2010) 47 Cal.4th 993, 1001.)

4 B. The Pertinent Test is Whether the Totality-Of-The-Circumstances Shows the  
5 Probability of Actual Bias is Too High to be Constitutionally Tolerable

6 Generally, “[i]n water rights adjudicative proceedings, [the] Board member serves  
7 as the hearing officer, and the agency’s practice is to separate the prosecutorial and  
8 advisory functions on the staff level, with some employees assigned to an enforcement  
9 team and others to a hearing team.” (*Morongo, supra*, 45 Cal.4th at p. 735.) To  
10 guarantee due process in such adjudications, “an employee engaged in prosecuting  
11 functions for an agency in a case may not, in the same or a factually related case,  
12 *participate* or *advise* in either the decision, or the [review] of that decision.” (*Nightlife,*  
13 *supra*, 108 Cal.App.4th at p. 92, original italics.)

14 BBID need not show actual bias or prejudice to support its motion for  
15 disqualification; it need only show that this is a situation “in which experience teaches  
16 that the probability of actual bias on the part of the judge or decisionmaker is too high to  
17 be constitutionally tolerable.’ [Citation.]” (*Morongo, supra*, 45 Cal.4th at p. 737.) The  
18 due process evaluation is a totality-of-the-circumstances analysis. (*Quintero v. City of*  
19 *Santa Ana* (2003) 114 Cal.App.4th 810, 817 (*Quintero*), disapproved on other grounds in  
20 *Morongo* at p. 740, fn. 2.)<sup>2</sup> Accordingly, while the trust and collegiality between a  
21 hearing officer and prosecution team members is not, in-and-of-itself, sufficient to  
22 support a hearing officer’s disqualification in an adjudication, such a relationship coupled  
23 with other evidence that the lines between advocate and adviser have become blurred  
24 can rise to the level of a due process violation. (*Morongo* at pp. 741-742 [approving the  
25 totality-of-the-circumstances test outlined in *Quintero*].) Here, the facts delineate a  
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27 <sup>2</sup> *Quintero* remains good law. The Supreme Court only disapproved of language in *Quintero* “suggesting  
28 the existence of a *per se* rule barring agency attorneys from simultaneously exercising advisory and  
prosecutorial functions, even in unrelated proceedings.” (*Morongo* at p. 740, fn. 2, italics added.)

1 pattern of failure to separate the prosecuting and adjudicating functions regarding issues  
2 directly related to and critical to fair adjudication in ENF01951.

3 C. The SWRCB Has Not Observed the Separation of Functions as Required By  
4 Statute, Case Law, and the Hearing Notice

5 BBID and the SWRCB agree that water availability is the predicate issue in this  
6 proceeding. (Exh. G at p. 2.) Thus, the repeated and detailed interactions between the  
7 Prosecution Team, SWRCB executive management, and Board Members regarding  
8 water availability and curtailments for at least two years prior to June 2015 makes the  
9 separation of functions illusory at best. At various Board meetings, Mr. O'Hagan and  
10 Ms. Mrowka, both members of the Prosecution Team, provided numerous updates and  
11 presentations to the Board Members regarding water supply availability and  
12 curtailments. (See, e.g., Board Meetings: BBID Exh. 306 at p. 3; BBID Exh. 308 at  
13 pp. 5, 7; BBID Exh. 310 at pp. 3, 5, 7; BBID Exh. 312 at pp. 4-7, 9; BBID Exh. 316 at  
14 pp. 3-9, 11-12 [discussing plans to issue curtailments, predictions for curtailing senior  
15 water right holders, and in what increment curtailments will be issued]; BBID Exh. 318 at  
16 pp. 3-4, 7-10; BBID Exh. 322 at pp. 9-11; BBID Exh. 324 at pp. 4-5; BBID Exh. 328 at  
17 pp. 4-9; BBID Exh. 330 at pp. 5-6.) Ms. Mrowka and Mr. O'Hagan further advised and  
18 updated the Board Members on water availability, curtailment, and enforcement actions  
19 after issuing the ACL Complaint. (Board Meetings: BBID Exh. 332 at pp. 3-4; BBID  
20 Exh. 334 at pp. 20-21 ["At this time, the demand in the watersheds are going slightly  
21 down after July is the peak month for water demand in our analysis. But the supply is  
22 not getting any better."].)

23 Even outside of formal Board meetings, Mr. O'Hagan, Ms. Mrowka, and Board  
24 Members directly discussed water availability and curtailment issues with each other.  
25 (Emails: F. Spivy-Weber cc'ing J. O'Hagan, BBID Exh. 280 [approving curtailment letter  
26 and confirming to inform governor's office]; J. O'Hagan to D. D'Adamo et al., cc'ing  
27 K. Mrowka et al., BBID Exh. 281 [discussing water availability as related to curtailments];  
28 K. Mrowka to D. D'Adamo and J. O'Hagan et al., BBID Exh. 282 [sending water

1 availability graphs created in response to stakeholder requests]; K. Mrowka to  
2 G. Kostyrko, Exh. B ["John just returned from briefing Felicia. He said Thursday for  
3 curtailment."]; from K. Mrowka to F. Marcus et al., BBID Exh. 283 [noting curtailment  
4 notice recipients must cease diversion and there is no exemption for health and safety  
5 needs]; C. Trgovcich to D. D'Adamo, cc'ing J. O'Hagan et al., BBID Exh. 284 [discussing  
6 curtailment and enforcement process, litigation, and messaging]; C. Trgovcich to T.  
7 Doduc et al., BBID Exh. 285 [informing ACL Complaint is scheduled to be issued]; F.  
8 Marcus cc'ing J. O'Hagan, BBID Exh. 286 [inquiring about curtailment lifts and  
9 recommending messaging].) Thus, Mr. O'Hagan and Ms. Mrowka have acted as  
10 principal advisers to Board Members on water availability, curtailment, and the drought.

11 Mr. Tauriainen, also a Prosecution Team member, likewise advised Board  
12 Members regarding curtailment and enforcement issues. (See, e.g., Board Meeting,  
13 BBID Exh. 314 at pp. 3, 14-18, 25-27.) Mr. George, the Delta Watermaster who  
14 identifies himself as a Prosecution Team member, also had numerous conversations  
15 with Board Members, including the Hearing Officer, regarding water availability in the  
16 Delta. (Exh. A at pp. 79:10-80:3.) Indeed, at a public workshop, Board Members  
17 discussed with SWRCB management and enforcement staff the desire to develop a  
18 strategy "to tee up the issues" for enforcement and get "a clearer sense of the timing[.]"  
19 and their statements indicate that discussions of these critical issues occurred outside of  
20 the eyes of the public. (Board Meeting: BBID Exh. 323 at pp. 6-7, 15-17; BBID Exh. 324  
21 at pp. 20-21.) Similarly, Mr. Howard, who signed the Curtailment Notice, had numerous  
22 substantive discussions with Board Members regarding curtailment methodology and  
23 water availability. (Exh. D at pp. 98-100; Exh. E at p. 149.)

24 The due process concerns do not extend only to the members of the Prosecution  
25 Team. Mr. Mona, a member of the Hearing Team, is an engineer for the Hearings Unit  
26 of the Division of Water Rights. (BBID Exh. 296.) He will be assisting the Hearing  
27 Officer "by providing legal and technical advice." (BBID Exh. 302 at p. 3.) However, he  
28 is supervised by Diane Riddle (Manager of the Bay Delta and Hearings Section) and

1 Les Grober (Assistant Deputy Director of the Hearings and Special Programs Branch),  
2 both of whom have been extensively included in water availability and curtailment  
3 discussions and decisions with the Prosecution Team. (Emails: BBID Exhs. 346-378;  
4 e.g., J. Kassel to J. O'Hagan et al., cc'ing L. Grober, BBID Exh. 347 [asking L. Grober if  
5 J. O'Hagan should treat the Sacramento and San Joaquin Watersheds as a single  
6 watershed]; R. Satkowski to J. O'Hagan, L. Grober, K. Mrowka, and D. Riddle, BBID  
7 Exh. 357 [summarizing meeting where L. Grober, D. Riddle, J. O'Hagan, and K. Mrowka  
8 decided how to develop a water rights and use dataset and discussed drought water  
9 allocation models]; B. Evoy to J. O'Hagan, K. Mrowka, and L. Grober, BBID Exh. 364  
10 [initiating weekly meetings to discuss curtailments before J. O'Hagan tackled curtailment  
11 issues]; B. Evoy to J. O'Hagan, D. Riddle, and L. Grober, BBID Exh. 375 [update on  
12 status of, expectations for, and evaluation of water right curtailments and water  
13 availability].)

14 Additionally, Mr. Grober advised the Board on water availability determinations  
15 made by staff in connection with curtailments and the decision to bring ENF01951.  
16 (Board Meetings: BBID Exh. 330 [L. Grober and K. Mrowka updating Board on  
17 curtailments and certification form response rate]; BBID Exh. 334 [L. Grober and J.  
18 O'Hagan presenting drought report to Board].) This is problematic because the  
19 separation between the Prosecution and Hearing Teams extends to supervisors of the  
20 team members. (BBID Exh. 302 at p. 3.) Mr. Mona's supervisors have advised the  
21 Board on the predicate issue in this adjudication (i.e., the water availability analysis) for  
22 over two years, agreeing with the Prosecution Team's position; whereas Mr. Mona must  
23 now provide neutral advice to the Hearing Officer as part of the Hearing Team.

24 For the foregoing reasons, instituting a separation of functions now is  
25 meaningless. When the totality of the circumstances described herein are viewed  
26 objectively, it is clear that the Prosecution Team members have participated in and  
27 advised the Board Members regarding the predicate issue of water availability pertinent  
28 to this proceeding as warned against in *Nightlife*, and has created the appearance of

1 bias and unfairness that *Quintero* found unacceptable. (*Nightlife, supra*, 108  
2 Cal.App.4th at pp. 92-93, 98 [violation of due process when assistant city attorney who  
3 made initial decision to deny business permit application subsequently acted as legal  
4 adviser to hearing officer reviewing that denial]; *Quintero, supra*, 14 Cal.App.4th at pp.  
5 814-817 [legal adviser's role in various matters serving in dual capacity as prosecutor  
6 and adviser to the board regarding the matter at issue "[gave] the appearance of bias  
7 and unfairness and suggest[ed] the probability of his influence on the [b]oard"]; *compare*  
8 *Morongo, supra*, 45 Cal.4th at 734 [due process not violated when an agency attorney  
9 prosecuting the matter before the SWRCB simultaneously served as an adviser to that  
10 board on an unrelated matter]; *compare also Today's Fresh Start, Inc. v. Los Angeles*  
11 *County Office of Ed.* (2013) 57 Cal.4th 197, 222 [superintendent's recommended  
12 revocation of charter not due process violation because she had no role other than as a  
13 witness in public proceedings and she was not in a position of defending her own actions  
14 or decisions before the adjudicatory decision maker].)

15       Additionally, SWRCB staff and management are unclear as to what roles each  
16 other play in ENF01951. It is not possible to maintain "separation" if one does not  
17 know whom he/she can talk to. In his deposition, Mr. George, who believes he is a  
18 member of the Prosecution Team, stated he did not know whether specific individuals  
19 were part of the prosecution team. (BBID Ex. A at pp. 49:11-25.) Similarly, during his  
20 deposition in this proceeding, Mr. Howard stated that he did not know whether  
21 Mr. Grober and Ms. Riddle are participating on either the Hearing Team or the  
22 Prosecution Team. (BBID Ex. E at p. 154:13-15.) If individuals within the SWRCB are  
23 unaware of the roles and participation of members on the prosecution and hearing  
24 teams, they are unable to maintain the required "separation of functions" sufficient to  
25 ensure due process in this proceeding.

26       Based on the above, the probability of actual bias due to the lack of separation of  
27 functions created by the cited communications is too high to be constitutionally tolerable.  
28 (*Morongo, supra*, 45 Cal.4th at p. 737.) Thus, the Hearing Officer and the Hearing Team

1 cannot reasonably provide BBID with a fair hearing.

2 D. The Board Members Have Been Inundated with Staff's Messaging and the  
3 Predicate Issue Has Already Been Prejudged

4 The SWRCB curtailed BBID's water right based on its staff's determination that  
5 water was unavailable for diversion. Throughout 2014 and 2015, however, the SWRCB  
6 staff's understanding of water availability was disseminated to the Board Members at  
7 Board meetings and workshops, in notices, and in public statements by the SWRCB.  
8 (Board Meetings cited on p. 5, *ante*; BBID Exhs. 337-345.) The staff's messaging is  
9 clear: There is no water available for diversion in this historic drought.

10 Though the SWRCB may try through subsequent communications to dispel the  
11 importance of the Curtailment Notice, it is clear that the substance of these issues have  
12 been discussed at length with the Board Members. Due to the frequent exposure and  
13 emphasis of the "unavailability of water" message, the Board Members will not be able to  
14 "unring the bell" for purposes of this proceeding. (*People v. Burgener* (1990) 223  
15 Cal.App.3d 427, 432.) A Board Member who has heard her staff repeatedly emphasize  
16 the lack of water availability and the need for curtailments, and who knows the SWRCB  
17 has made many decisions based upon those determinations, cannot now be told "[y]ou  
18 didn't hear any bell," because we all know "they heard the bell." (*Ibid.*)

19 The SWRCB staff's messaging has already impacted this proceeding because the  
20 predicate issue has been predetermined. This point is demonstrated by Mr. O'Hagan's  
21 sworn testimony in a coordinated civil action (*Banta-Carbona Irrigation Dist. v. State*  
22 *Water Resources Control Bd.*, Case No. 39-2015-00326421), in which he stated that the  
23 "State Water Board has determined" there was insufficient water based on a  
24 supply/demand graph to satisfy water right holders with 1903 and later priority dates.  
25 (BBID Exh. 299 at ¶¶ 5, 6, 8, 16.) The Sacramento Superior Court, relying on  
26 Mr. O'Hagan's declaration, explained that the Curtailment Notice "declare[d] and  
27 determine[d] that the recipient is not entitled to divert water because that water is  
28 necessary to meet senior water rights holders, thus making a determination of the

1 recipient's water rights priority." (BBID Exh. 301 at p. 3.) The court further explained  
2 that such curtailment notices "represent that the Board has already adjudicated that the  
3 recipients are no longer entitled to divert water and that any future diversions would be  
4 improper and a trespass . . . ." (*Id.* at p. 4.) The issue of water availability is at the heart  
5 of this enforcement proceeding and, as recognized by the Sacramento Superior Court,  
6 the SWRCB has already adjudicated the issue. Accordingly, the probability of actual  
7 bias is too high to be constitutionally tolerable. (*Morongo, supra*, 45 Cal.4th at p. 737.)

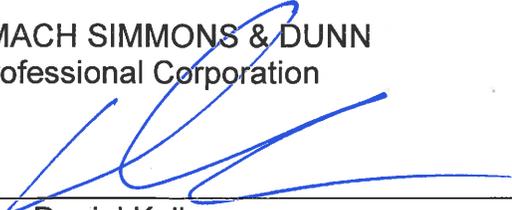
8 IV. CONCLUSION

9 For the foregoing reasons, BBID requests disqualification of State Water Board  
10 Member Tam Doduc as the current Hearing Officer and appointment of a neutral officer  
11 to preside over the proceeding.

12 Respectfully submitted,

13 SOMACH SIMMONS & DUNN  
14 A Professional Corporation

15 Dated: January 25, 2016

16 By:   
17 Daniel Kelly

18 Attorneys for Petitioner/Plaintiff  
19 Byron-Bethany Irrigation District  
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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 January 25, 2016, I served the following document(s):

**MOTION TO DISQUALIFY HEARING OFFICER**

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 January 25, 2016 at Sacramento, California.

  
\_\_\_\_\_  
Yolanda De La Cruz

**SERVICE LIST OF PARTICIPANTS  
BYRON-BETHANY IRRIGATION DISTRICT  
ADMINISTRATIVE CIVIL LIABILITY HEARING  
(Revised 9/2/15; Revised: 9/11/15)**

**SOMACH SIMMONS & DUNN**  
A Professional Corporation

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**SERVICE LIST  
WEST SIDE IRRIGATION DISTRICT  
CEASE AND DESIST ORDER HEARING**

**SOMACH SIMMONS & DUNN**  
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7

8  
9 BEFORE THE  
10 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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

SWRCB Enforcement Action  
ENF01951 and ENF01949

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

MOTION TO DISMISS  
ADMINISTRATIVE CIVIL  
LIABILITY PROCEEDING IN  
ENF01951 STATE WATER  
RESOURCES CONTROL  
BOARD'S METHOD OF  
DETERMINING WATER  
AVAILABILITY IS AN UNLAWFUL  
UNDERGROUND REGULATION

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1 I. INTRODUCTION

2 The administrative civil liability complaint (ACL Complaint)<sup>1</sup> that forms the basis of  
3 the State Water Resources Control Board's (SWRCB) enforcement proceeding against  
4 Byron-Bethany Irrigation District (BBID) in Enforcement Action ENF01951 (ENF01951) is  
5 based on a purported lack of availability of water sufficient to satisfy BBID's pre-1914  
6 appropriative water right. In its prosecution of ENF01951, the SWRCB's Prosecution  
7 Team relies solely on a water availability analysis developed by the SWRCB, and as set  
8 forth in the ACL Complaint. (See Declaration of Lauren Bernadett in Support of Motion to  
9 Dismiss Administrative Civil Liability Proceeding in ENF01951 SWRCB's Method of  
10 Determining Water Availability Is An Unlawful Underground Regulation (Bernadett Decl.),  
11 BBID Exh. 277 at ¶¶ 20-24.) However, the process for determining water availability has  
12 not undergone any review consistent with the California Administrative Procedures Act  
13 (APA), and the development and use of such a method is not exempt from the APA.  
14 Thus, the SWRCB's method of determining water availability as stated in the ACL  
15 Complaint, is an underground regulation, and cannot be used in ENF01951.

16 II. DISCUSSION

17 The SWRCB, or its staff, has developed a method of determining water availability,  
18 and has utilized that method to inform water right holders whether sufficient water exists  
19 to satisfy water rights with various priority dates. The SWRCB's method is identified on  
20 its Drought Year Action Watershed Analysis page:

21 [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/analysis/](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/analysis/). This  
22 method was employed to notify over 9,000 water right holders that water was unavailable  
23 for diversion under their priority of right, and that continued diversions were unlawful.  
24 (Bernadett Decl., BBID Exh. 293.) It was this analysis that led to the SWRCB's initial  
25 curtailment of BBID's pre-1914 appropriative water right based upon a finding of  
26 "unavailability" of water sufficient to satisfy BBID's water right. (Bernadett Decl., BBID

27 \_\_\_\_\_  
28 <sup>1</sup> For purposes of this motion, "ACL Complaint" refers to the complaint specific to BBID, and "ACL  
complaint" refers to ACL complaints in general for the purpose of discussing applicable law.

1 Exhs. 219, 279.)

2 A. The SWRCB's Water Availability Analysis Is A Regulation Subject to the  
3 California Administrative Procedures Act

4 A regulation is "every rule, regulation, order, or standard of general application or  
5 the amendment, supplement, or revision of any rule, regulation, order, or standard  
6 adopted by any state agency to implement, interpret, or make specific the law enforced or  
7 administered by it, or to govern its procedure." (Gov. Code, § 11342.600.) The APA  
8 provides the following:

9 [n]o state agency shall issue, utilize, enforce, or attempt to enforce any  
10 guideline, criterion, bulletin, manual, instruction, order, standard of general  
11 application, or other rule, which is a regulation as defined in Section  
12 11342.600, unless the guideline, criterion, bulletin, manual, instruction,  
order, standard of general application, or other rule has been adopted as a  
regulation and filed with the Secretary of State pursuant to this chapter.

13 (Gov. Code, § 11340.5, (a).) Thus, if a rule constitutes a "regulation" within the meaning  
14 of the APA, it may not be adopted except in conformity with basic minimum procedural  
15 requirements. (*Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 333  
16 (*Morning Star Co.*.)

17 As the California Supreme Court explained, "[o]ne purpose of the APA is to ensure  
18 that those persons or entities whom a regulation will affect have a voice in its creation, as  
19 well as notice of the law's requirements so that they can conform their conduct  
20 accordingly." (*Morning Star Co., supra*, 38 Cal.4th at p. 333, citing *Tidewater Marine*  
21 *Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, at 568-569 (*Tidewater*.)

22 Regulations have "two principal identifying characteristics:" (1) the agency must  
23 intend to rule to apply generally; and (2) the rule must implement, interpret, or make  
24 specific the law enforced or administered by the agency or govern the agency's  
25 procedure. (*Morning Star Co., supra*, 38 Cal.4th at pp. 333-334, citing *Tidewater, supra*,  
26 14 Cal.4th at p. 557, 571.)

27 The SWRCB's water availability analysis is a regulation within the meaning of the  
28 APA. The SWRCB's method of determining water availability for the purpose of issuing

1 curtailment notices is applied generally, as it formed the basis for the issuance of the  
2 curtailment notices to at least 9,329 water right holders. (Bernadett Decl., Exh. BBID  
3 293.) Thus, the first of the two “identifying characteristics” is met. The second  
4 characteristic is met as well, as the SWRCB purported to use the water availability  
5 analysis to implement the water right priority system. (Bernadette Decl., Exh. A at  
6 pp. 143:14-21, 145:7-12.) As the ACL Complaint states “[d]rought management of water  
7 rights is necessary to ensure that water to which senior water right holders are entitled is  
8 actually available to them . . . . The June 12 Unavailability Notice reflects the State  
9 Water Board’s determination that the existing water in the Sacramento-San Joaquin  
10 watersheds and Delta is insufficient to meet [] demands . . . .” (Bernadett Decl., BBID  
11 Exh. 277 at ¶ 18.) The ACL Complaint also explains that “[t]he State Water Board  
12 determines availability of water for water rights of varying priorities in any watershed by  
13 comparing the current and projected available water supply with the total water right  
14 diversion demand.” (Bernadett Decl., BBID Exh. 277 at ¶ 19.) Both the June 12  
15 Curtailment Notice and the July 15 Rescission and Clarification make similar statements,  
16 reinforcing the SWRCB’s determination of lack of water available based on this  
17 methodology. (Bernadett Decl., BBID Exhs. 219, 279.) The SWRCB purports to utilize  
18 this methodology to implement the water right priority system – the body of California law  
19 the SWRCB argues it was implementing through the curtailments.

20 While the APA also provides for a limited class of exceptions to the strict  
21 compliance mandate of the APA, the SWRCB’s water availability analysis and  
22 curtailments do not fit within any of those exceptions. The limited exceptions are  
23 contained in Government Code section 11340.9, which provides:

24 This chapter does not apply to any of the following:

- 25 (a) An agency in the judicial or legislative branch of the state government.  
26  
27 (b) A legal ruling of counsel issued by the Franchise Tax Board or State  
28 Board of Equalization.

- 1 (c) A form prescribed by a state agency or any instructions relating to the
- 2 use of the form, but this provision is not a limitation on any requirement
- 3 that a regulation be adopted pursuant to this chapter when one is
- 4 needed to implement the law under which the form is issued.
  
- 5 (d) A regulation that relates only to the internal management of the state
- 6 agency.
  
- 7 (e) A regulation that establishes criteria or guidelines to be used by the
- 8 staff of an agency in performing an audit, investigation, examination, or
- 9 inspection, settling a commercial dispute, negotiating a commercial
- 10 arrangement, or in the defense, prosecution, or settlement of a case, if
- 11 disclosure of the criteria or guidelines would do any of the following:
  - 12 (1) Enable a law violator to avoid detection.
  - 13 (2) Facilitate disregard of requirements imposed by law.
  - 14 (3) Give clearly improper advantage to a person who is in an
  - 15 adverse position to the state.
  
- 16 (f) A regulation that embodies the only legally tenable interpretation of a
- 17 provision of law.
  
- 18 (g) A regulation that establishes or fixes rates, prices, or tariffs.
  
- 19 (h) A regulation that relates to the use of public works, including streets
- 20 and highways, when the effect of the regulation is indicated to the public
- 21 by means of signs or signals or when the regulation determines uniform
- 22 standards and specifications for official traffic control devices pursuant to
- 23 Section 21400 of the Vehicle Code.
  
- 24 (i) A regulation that is directed to a specifically named person or to a group
- 25 of persons and does not apply generally throughout the state.
  
- 26 None of these exceptions apply. Subdivisions (a), (b), (g), and (h) are not applicable by
- 27 definition, and the plain language of the exception. Subdivision (c) does not apply
- 28 because the method of determining water availability is not “a form” or “instructions
- relating to the use of the form.” Subdivision (d) is inapplicable because the method of
- determining water availability does not relate “only to the internal management” of the
- SWRCB. (*Center for Biological Diversity v. Dept. of Fish and Wildlife* (2015) 134
- Cal.App.4th 214, 261 (*Center for Biological Diversity*)). Subdivision (e) does not apply
- because the method of determining water availability forms the basis for affecting the

1 availability of water under various water right priorities. Moreover, "disclosure" of the  
2 method of determining availability would not do any of the things referenced in  
3 Subdivisions (e)(1), (e)(2), or (e)(3). Subdivision (f) does not apply because the  
4 SWRCB's method of determining water availability is not the "only legal tenable  
5 interpretation" of water availability. Indeed, the fact that the parties dispute that  
6 methodology demonstrates that it is not applicable. As Tom Howard, the SWRCB's  
7 Executive Director confirmed, there were multiple methods that could have been used to  
8 determine available supply. (Bernadett Decl., Exh. B at p. 24:4-11.) When it came time  
9 to issue curtailment, Mr. Howard made the decision on which method to utilize. (*Id.* at  
10 pp. 24:15-18; 96:9-12.) Furthermore, this exception is narrow, and, to the extent the  
11 method of determining water availability is being used to implement the laws the SWRCB  
12 enforces, it does not fit within this exception. (Bernadett Decl., Exh. A at p. 194:3-9.)  
13 Only where the rule is a restatement of the statute or provides for applying the law in a  
14 rote or ministerial manner does it fall within this narrow exception. (*Center for Biological*  
15 *Diversity* at p. 263.) Subdivision (i) is not applicable because the method of determining  
16 water availability does not only apply to BBID. (See *Tidewater Marine Western, Inc. v.*  
17 *Bradshaw* (1996) 14 Cal.4th 557, 574-575 [policy that applies generally and not only in a  
18 single case is a regulation].) Instead, it applies to all water right holders in the entire  
19 Sacramento and San Joaquin River watersheds, and the Delta.

20 Because none of the exceptions apply, the SWRCB's method of determining  
21 water availability is a regulation subject to the APA.

22 B. The SWRCB Did Not Comply With the APA in Developing the Water Availability  
23 Analysis

24 As set forth in *Morning Star*:

25 If a rule constitutes a 'regulation' within the meaning of the APA (other  
26 than an 'emergency regulation,' which may not remain in effect more than  
27 120 days) it may not be adopted, amended, or repealed except in  
28 conformity with 'basic minimum procedural requirements' that are  
exacting. The agency must give the public notice of its proposed  
regulatory action; issue a complete text of the proposed regulation with a

1 statement of the reasons for it; give interested parties an opportunity to  
2 comment on the proposed regulation; respond in writing to public  
3 comments; and forward a file of all materials on which the agency relied in  
4 the regulatory process to the Office of Administrative Law, which reviews  
5 the regulation for consistency with the law, clarity, and necessity.

6 (*Morning Star Co.*, *supra*, 38 Cal.4th at p. 333, internal quotations, citations omitted.) Any  
7 regulation that substantially fails to comply with these requirements is invalid. (*Ibid.*; Gov.  
8 Code, § 11350.) It is indisputable that the SWRCB did not comply with the mandates of  
9 the APA for the water availability analysis used by the SWRCB to allege violation of  
10 Water Code section 1052.

11 On April 25, 2014, the Governor issued a proclamation providing that, among  
12 other things, the SWRCB “will adopt and implement emergency regulations pursuant to  
13 Water Code section 1058.5, as it deems necessary . . . to require curtailment of  
14 diversions when water is not available under the diverter’s priority of right.” (Bernadett  
15 Decl., Ex. C at ¶ 7.) The SWRCB adopted an emergency regulation at title 23, section  
16 875 of the California Code of Regulations, authorizing the Deputy Director of the Division  
17 of Water Rights to “issue curtailment orders to *post-1914* appropriative water right  
18 holders . . . .” (Cal. Code Regs., tit. 23, § 875 (b); emphasis added.) Importantly, the  
19 SWRCB *never* adopted regulations, emergency or otherwise, providing for the  
20 curtailment of *pre-1914* appropriative water rights. Regulations adopted under Water  
21 Code section 1058.5 expire automatically in 270 days unless renewed by the SWRCB.  
22 (Wat. Code, § 875, (c).) Section 875 became effective on July 16, 2014 and expired on  
23 April 14, 2015. (Bernadett Decl., Ex. E.) The SWRCB’s website regarding emergency  
24 regulations does not contain information indicating that section 875 was renewed or  
25 otherwise extended.

26 The Governor’s April 25, 2014 Proclamation was continued by Executive Order  
27 B 9-15, issued on April 1, 2015. (Bernadett Decl., Ex. D at ¶ 1.) There is no indication  
28 that the SWRCB adopted any emergency regulations regarding the curtailment of pre- or

1 post-1914 appropriative water rights, or the method of determining water availability used  
2 by the SWRCB in issuing curtailments in 2015.

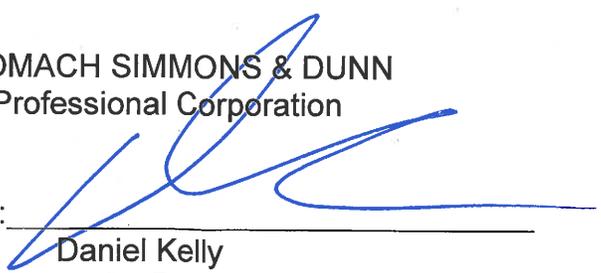
3 Because the SWRCB did not comply with the APA's procedures for adopting  
4 regulations or emergency regulations with respect to the SWRCB's method of determining  
5 water availability or issuing curtailments of pre-1914 water rights in 2015, the SWRCB's  
6 method of determining availability and issuing curtailments is an unlawful underground  
7 regulation. Because the method used by the SWRCB for determining water availability is  
8 invalid and cannot be used as a basis of enforcement in ENF01951, ENF01951 must be  
9 dismissed. (Office of Admin. Law, www.oal.ca.gov/underground\_regs.htm ["If a state  
10 agency issues, enforces, or attempts to enforce a rule without following the APA when it is  
11 required to, the rule is called a 'underground regulation.' State agencies are prohibited  
12 from enforcing underground regulations."])

13 III. CONCLUSION

14 The SWRCB's method of determining water availability, supporting water right  
15 curtailments and forming the basis of ENF01951, is an underground regulation that may  
16 not be used in ENF01951. As such, the SWRCB must strike the ACL Complaint and  
17 dismiss this proceeding.

18  
19 SOMACH SIMMONS & DUNN  
A Professional Corporation

20  
21 Dated: January 25, 2016

22 By:   
23 Daniel Kelly  
Attorneys for Petitioner/Plaintiff  
Byron-Bethany Irrigation District

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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.

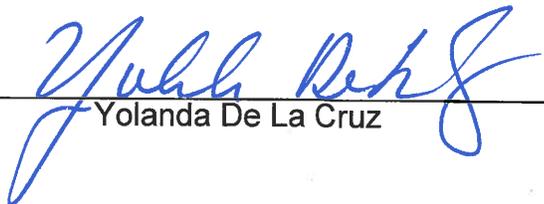
On January 25, 2016, I served the following document(s):

**MOTION TO DISMISS ADMINISTRATIVE CIVIL LIABILITY PROCEEDING IN ENF01951 STATE WATER RESOURCES CONTROL BOARD'S METHOD OF DETERMING WATER AVAILABILITY IS AN UNLAWFUL UNDERGROUND REGULATION**

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 January 25, 2016 at Sacramento, California.

  
\_\_\_\_\_  
Yolanda De La Cruz

**SERVICE LIST OF PARTICIPANTS  
BYRON-BETHANY IRRIGATION DISTRICT  
ADMINISTRATIVE CIVIL LIABILITY HEARING  
(Revised 9/2/15; Revised: 9/11/15)**

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**SERVICE LIST  
WEST SIDE IRRIGATION DISTRICT  
CEASE AND DESIST ORDER HEARING**

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8  
9 BEFORE THE  
10 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

11 ENFORCEMENT ACTION ENF01949  
12 DRAFT CEASE AND DESIST ORDER  
REGARDING UNAUTHORIZED  
13 DIVERSIONS OR THREATENED  
UNAUTHORIZED DIVERSIONS OF WATER  
14 FROM OLD RIVER IN SAN JOAQUIN  
COUNTY

SWRCB Enforcement Action  
ENF01951 and ENF01949

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

MOTION TO DISMISS  
ADMINISTRATIVE CIVIL  
LIABILITY PROCEEDING IN  
ENF01951 FOR LACK OF  
STATUTORY AUTHORITY  
UNDER WATER CODE SECTION  
1052

I. INTRODUCTION

Through Enforcement Action ENF01951 (ENF01951), the State Water Resources Control Board's (SWRCB) Prosecution Team accuses the Byron-Bethany Irrigation District (BBID) of violating subdivision (a) of Water Code section 1052 (Section 1052(a)). Section 1052(a) provides, in its entirety, that: "[t]he diversion and use of water *subject to this division* other than as authorized in this division is a trespass." (Wat. Code, § 1052 (a), italics added.) However, nothing alleged in the Administrative Civil Liability complaint (ACL Complaint)<sup>1</sup> forming the basis of ENF01951 states that the water diverted by BBID is "subject to" division 2 of the Water Code. To the extent anything in the ACL Complaint can be construed to encompass water subject to division 2, that water is subject to a contract between BBID and the Department of Water Resources (DWR), and resolution of any issue over that contract involves the interpretation of the terms of that contract, which is beyond the SWRCB's authority and jurisdiction. As such, ENF01951 must be dismissed.

II. BACKGROUND AND SUMMARY OF ARGUMENT

The *only* wrongful conduct alleged against BBID in the ACL Contract is a violation of Section 1052(a). (See Declaration of Lauren Bernadett in Support of Motion to Dismiss Administrative Civil Liability Complaint Proceeding In ENF01951 for Lack of Statutory Authority Under Water Code Section 1052 (Bernadett Decl.), BBID Exh. 277 at ¶ 1.) The ACL Complaint does not allege that BBID lacks a valid pre-1914 appropriative water right, nor does it allege that BBID was diverting water in excess of that right. Instead, the ACL Complaint alleges that BBID was diverting water needed to satisfy the needs of *more senior* pre-1914 appropriative and/or riparian water right holders. However, water is required to satisfy pre-1914 appropriative and riparian water rights is not subject to "this division" as that phrase is used in Section 1052(a), and therefore, as

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<sup>1</sup> For purposes of this motion, "ACL Complaint" refers to the complaint specific to BBID, and "ACL complaint" refers to ACL complaints in general for the purpose of discussing applicable law.

1 alleged in the ACL Complaint, BBID could not have committed a trespass within the  
2 meaning of the statute.<sup>2</sup>

3 Section 1052(a) provides, in its entirety, that: “[t]he diversion and use of water  
4 *subject to this division* other than as authorized in *this division* is a trespass.” (Wat.  
5 Code, § 1052(a), italics added.) Section 1052 is part of Division 2 of the Water Code.  
6 As such, “this division” as used in Section 1052 refers to Division 2 of the Water Code  
7 (Division 2). The ACL Complaint does not allege that the water BBID allegedly diverted  
8 is subject to Division 2, nor does it allege that BBID failed to comply with any particular  
9 provision in Division 2.

10 Instead, the ACL Complaint alleges only that BBID diverted water needed for  
11 senior water right holders “downstream” of BBID’s point of diversion. (Bernadett Decl.,  
12 Exh. 277 at ¶¶ 18, 24.) Katherine Mrowka, Manager of the SWRCB’s Division of Water  
13 Rights Enforcement Program, and the main Prosecution Team witness, confirmed the  
14 limited allegation against BBID stating as follows:

15 Question by Mr. Kelly: So whose water supply was affected by BBID’s  
16 diversions? Is it pre-1903 and riparian water right holders or someone  
17 else?

18 Answer by Ms. Mrowka: For BBID, because they have a 1914 priority, it  
19 could be anybody who is more senior to that 1914 priority, not necessarily  
20 limited to 1903.

21 Mr. Kelly: Okay. So let me phrase it this way. BBID’s seniority date is  
22 May the 18th -- I think the claim is May 18th. Does that ring a bell? I  
23 thought it was in here. So if we assume that BBID’s claimed date of  
24 priority was May 18th, 1914, is the ACL based on the fact that BBID took  
25 water that was needed by those with a priority May of May 17th, 1914, and  
26 senior and riparians?  
27

28  

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29 <sup>2</sup> The SWRCB consistently recognizes that disputes between senior water right holders (pre-1914 and  
30 riparians) are matters for the courts to resolve because those senior rights fall outside the SWRCB’s  
31 jurisdiction. In its *Statutory Water Rights Law* publication dated January 2015 (updated April 28, 2015),  
32 the SWRCB states: “Generally the superior courts continue to be the forum of first instance for resolution  
33 of conflicts involving pre-1914 and riparian rights, although some administrative procedures established  
34 under the Water Code apply to pre-1914 (See California Water Code Sec. 275, 1707).”  
35 ([www.swrcb.ca.gov/laws\\_regulations/docs/wrlaws.pdf](http://www.swrcb.ca.gov/laws_regulations/docs/wrlaws.pdf) at p. viii.) Neither section 275 nor 1707 are at issue  
36 in ENF01951.

1 Ms. Mrowka: Yes.

2 Mr. Kelly: Anybody else?

3 Ms. Mrowka: No.

4 (Bernadett Decl., Exh. A at pp. 172:24-173:16.)

5 Furthermore, John O'Hagan, the SWRCB's Division of Water Rights Assistant  
6 Deputy Director confirmed Katherine Mrowka's sworn testimony. (Bernadett Decl., Exh.  
7 B at p. 168:7-9.) [the curtailment analysis that forms the basis of the ACL Complaint was  
8 "to protect senior rights and their priorities"].)

9 Because BBID is accused of taking water needed solely to satisfy more senior  
10 pre-1914 appropriative and/or riparian water rights, BBID could has not committed a  
11 trespass in violation of Section 1052(a). Thus, this enforcement proceeding should be  
12 dismissed.

13 III. BBID COULD NOT HAVE VIOLATED SECTION 1052 BASED ON THE  
14 ALLEGATIONS RAISED IN THE ACL COMPLAINT

15 As discussed above, the ACL Complaint alleges that BBID committed a trespass in  
16 violation of Section 1052(a). That claim is based on the further allegation, as confirmed by  
17 the sworn testimony of the Manager of the SWRCB's Division of Water Rights Enforcement  
18 Program, that BBID diverted water needed by more senior pre-1914 appropriative and  
19 riparian water right holders. No other allegations of misconduct by BBID are contained in  
20 the ACL Complaint.

21 1. Principles of Statutory Interpretation

22 The task in statutory interpretation is "to determine afresh the intent of the  
23 Legislature by construing in context the language of the statute." (*Harris v. Capital*  
24 *Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159.) In determining such intent, one  
25 must begin "with the language of the statute itself." (*Rojo v. Kliger* (1990) 52 Cal.3d 65,  
26 73.) "If there is no ambiguity in the language of the statute, 'then the Legislature is  
27 presumed to have meant what it said, and the plain meaning of the language governs.'  
28

1 [Citation.]” (*Lennane v. Franchise Tax Bd.* (1994) 9 Cal.4th 263, 268.) Further, the rule  
2 against surplusage prescribes that a court should “strive to give meaning to every word  
3 in a statute and to avoid constructions that render words, phrases, or clauses  
4 superfluous.” (*In re C.H.* (2011) 53 Cal.4th 94, 103.) Section 1052(a) is unambiguous: it  
5 provides that the diversion of water subject to division 2 of the Water Code, other than  
6 as authorized in division 2 of the Water Code, is a trespass. Thus, to be guilty of a  
7 trespass under Section 1052(a), the plain language of Section 1052(a) requires that the  
8 water diverted is *subject to Division 2 of the Water Code*.<sup>3</sup>

9 2. The SWRCB’s Regulatory Authority is Limited to Post-1914 Appropriative  
10 Water Rights

11 The SWRCB derives its jurisdiction from the Water Commission Act (Act) (Stats.  
12 1913, Ch. 586), which was enacted in 1913. The Act established a comprehensive  
13 permit system and provides that all new appropriative uses (both for diversion and  
14 storage) subsequent to its effective date are subject to the authority of what is now the  
15 SWRCB. Specifically, the SWRCB has authority to regulate the diversion and use of  
16 water when the appropriative use commenced after December 19, 1914. Such “[p]ost-  
17 1914 appropriators may possess water rights only through a permit or license issued by  
18 the SWRCB, and their rights are circumscribed by the terms of the permit or license.”  
19 (*Millview County Water Dist. v. State Water Resources Control Bd.* (2013) 229  
20 Cal.App.4th 879, 889 (*Millview*.) In contrast, the SWRCB “has no permitting or licensing  
21 authority over riparian or pueblo rights, or over appropriative rights acquired before  
22 1914.” (*California Farm Bureau Federation v. State Water Resources Control Bd.* (2011)  
23 51 Cal.4th 421, 429.) Thus, “[r]iparian users and pre-1914 appropriators need neither a

24  
25 <sup>3</sup> Notably, even if the SWRCB argues that Section 1052(a) is somehow ambiguous, which it is not, this  
26 proceeding should nonetheless be dismissed. A statute or regulation that prohibits or requires particular  
27 conduct violates due process, and is therefore void, if its terms are so vague that it fails to give proper  
28 notice of the targeted conduct - i.e., when people of “common intelligence must necessarily guess at its  
meaning and differ as to its application.” (*FCC v. Fox Television Stations, Inc.* (2012) 132 S.Ct. 2307,  
2317-2320, internal quotations omitted; *Cranston v. City of Richmond* (1985) 40 Cal.3d 755, 763.)

1 permit nor other governmental authorization to exercise their water rights.” (*Millview* at  
2 p. 889.)

3 3. Section 1052(a) is Limited to Water Subject to the SWRCB’s Regulatory  
4 Jurisdiction Under Division 2

5 The SWRCB’s authority to pursue administrative civil liability relating to trespass  
6 was codified in section 38 under the 1913 Act, and was later recodified as Section 1052  
7 in 1943 (Stats. 1943, Ch. 368). Section 38, as initially enacted, provided that “any  
8 unauthorized diversion of water *subject to the provisions of the act* is declared to be a  
9 trespass.” (*Meridian, Ltd. v. San Francisco* (1939) 13 Cal.2d 424, 450, italics added;  
10 Stats. 1913, ch. 586, § 38, p. 1032.) This limitation on the statute’s application, as  
11 initially set forth in the Act, remains in the current version of Section 1052(a), limiting  
12 Section 1052(a) to water subject to Division 2.

13 Water appropriated prior to the effective date of the Act, and water needed for  
14 useful and beneficial purposes on riparian lands, is expressly excluded from the  
15 SWRCB’s regulatory authority provided for in Division 2 of the Water Code. (Wat. Code,  
16 § 1201.) This means that water appropriated “prior to December 19, 1914, the effective  
17 date of the statute,” is specifically excluded (see *People v. Skirokow* (1980) 26 Cal.3d  
18 301, 309) such that “[a] pre-1914 appropriative right is not subject to the 1913 statutory  
19 scheme for purposes of acquisition and supervision of use.” (*Nicoll v. Rudnick* (2008)  
20 160 Cal.App.4th 550, 557, citing *People v. Murrison* (2002) 101 Cal.App.4th 349, 359,  
21 fn. 6).

22 4. The Water at Issue in this Proceeding is Not Subject to Division 2

23 As discussed above, the ACL Complaint alleges that BBID violated Section  
24 1052(a) by diverting water needed to satisfy more senior water rights. However, a  
25 violation of Section 1052(a) requires the diversion of water subject to Division 2. (Wat.  
26 Code, § 1052(a).) Water needed by pre-1914 and riparian water right holders is not  
27 subject to Division 2. (*Ibid.*)  
28

1           Whether a diversion of water is subject to Section 1052(a) “turns on [the]  
2 interpretation of the phrase “water subject to [] this division.” (*People v. Shirokow*,  
3 *supra*, 26 Cal.3d at p. 306.)

4 As the *Shirokow* court explained:

5           Part 2 of the division provides a comprehensive scheme for the appropriation  
6 of water. It defines water subject to appropriation ...; declares compliance  
7 with the provisions of division 2 to be the exclusive means of acquiring the  
8 right to appropriate or use water subject to appropriation ...; authorizes the  
9 board to act upon all applications for permits to appropriate water, to grant  
10 permits to take and use water subject to the terms and conditions of the  
11 permit, and to collect fees ...; and provides for the issuance of licenses  
12 confirming the right to appropriate such amount of water as has been  
13 beneficially used by the permittees .... Thus it is clear that if the water  
14 diverted by defendant is water subject to appropriation, then it is water subject  
15 to the provisions of division 2 and any use thereof is conditioned upon  
16 compliance with the statutory procedure.

17           (*Ibid.*)

18           The *Shirokow* court then turned to the statutory provisions defining the water  
19 subject to appropriation. The court explained that Water Code section 1201 defines  
20 water “subject to appropriation,” and therefore defines what water is subject to Division  
21 2. Water Code section 1201 states:

22           All water flowing in any natural channel, *excepting so far as it has been or is*  
23 *being applied to useful and beneficial purposes upon, or in so far as it is or*  
24 *may be reasonably needed for useful and beneficial purposes upon lands*  
25 *riparian thereto, or otherwise appropriated, is hereby declared to be public*  
26 *water of the State and subject to appropriation in accordance with the*  
27 *provisions of this code. (Italics added.)*

28           The *Shirokow* court further confirmed that “[t]he rights not subject to the statutory  
appropriation procedures are narrowly circumscribed by the exception clause of []  
[Section 1201] and include only riparian rights and those which have been otherwise  
appropriated prior to December 19, 1914, the effective date of the statute.” (*Id.* at  
p. 309.) Thus, water appropriated pursuant to pre-1914 and riparian water rights do not  
fall within Section 1052(a).

1 The courts addressed the nature and scope of the SWRCB's authority over pre-  
2 1914 and riparian water rights under Water Code sections 1831 and 1052 in *Young v.*  
3 *State Water Resources Control Bd.* (2013) 219 Cal.App.4th 397 (*Young*), and *Millview,*  
4 *supra*, 229 Cal.App.4th at p. 889.

5 In *Young*, various landowners argued the SWRCB lacked jurisdiction to  
6 adjudicate the validity, extent, or forfeiture of riparian or pre-1914 appropriative water  
7 rights. (*Young, supra*, 219 Cal.App.4th at p. 404.) The *Young* court made clear that  
8 there was no dispute regarding the SWRCB's lack of jurisdiction to regulate riparian and  
9 pre-1914 appropriative rights. (*Ibid.*, citing *California Farm Bureau Federation v. State*  
10 *Water Resources Control Bd.*, *supra*, 51 Cal.4th 421, 429.) The court did confirm,  
11 however, that the SWRCB's jurisdiction under Division 2 extended to all water not  
12 otherwise properly diverted and used under a riparian or pre-1914 right. As the *Young*  
13 court explained, that included "water that has never been appropriated, water subject to  
14 a pre-1914 right but that was not perfected by putting the water to beneficial use with  
15 due diligence, and water for which a right has been perfected by putting the water to  
16 beneficial use under a pre-1914 right but where the use later ceased." (*Young* at p. 404,  
17 internal citations omitted.)<sup>4</sup>

18 In *Millview*, the court considered the SWRCB's authority to issue a cease and  
19 desist order under Water Code section 1831 (Section 1831) where the diversion of water  
20 was pursuant to a claimed pre-1914 appropriative right. Because the authority to issue a  
21 cease and desist order under Section 1831 incorporates Section 1052, the court  
22

23 <sup>4</sup> The SWRCB agreed with these limitations on its enforcement authority in its briefing to the *Young* court.  
24 Specifically, in its Appellate Opening Brief in *Young*, (2012 CA.App.Crt., Briefs Lexis 3929) (*Young* AOB),  
25 the SWRCB explained: (1) its authority under section 1052 extends only to determining the "validity of a  
26 diverter's claim to be exempt from the permitting system" because that is the extent of its jurisdiction; and  
27 (2) "[u]nder th[e] definition of unappropriated water, only the water claimed under a pre-1914 right that  
28 exceeds the actual right constitutes unappropriated water subject to the State Water Board's regulation."  
(Bernadett Decl., Exh. C at pp. \*27, \*33.) The SWRCB also agreed that *Phelps v. State Water Resources*  
*Control Bd.* (2007) 157 Cal.App.4th 89 "lends further support to the conclusion that the State Water Board  
has authority to take enforcement against a diverter who claims to hold a riparian or pre-1914  
appropriative right if the Board determines that the claim is invalid." (*Ibid.*)

1 considered the scope of Section 1052 to interpret the scope of the SWRCB's authority  
2 under Section 1831. The *Millview* court explained the Division 2 limiting language in  
3 section 1831 (the same as Section 1052) as follows:

4 [It] allows the Board to issue an order preventing the unauthorized  
5 diversion of water. Unauthorized diversion includes not merely the  
6 diversion of water under a claimed but invalid pre-1914 right, but also  
7 diversion beyond the proper scope of a valid pre-1914 right, whether  
8 because the diversion exceeds the maximum perfected amount of water  
under the right or because an intervening forfeiture has reduced the  
proper scope. (*Millview, supra*, 229 Cal.App.4th at p. 895.)

9 The *Millview* court agreed with and adopted the reasoning in *Young*, finding that  
10 "water diverted under a *valid* pre-1914 water right is protected from [the SWRCB's]  
11 regulation," and that "a permit is required to divert water appropriated pursuant to a  
12 claimed pre-1914 water right that was never perfected, or has been forfeited, or is  
13 otherwise invalid." (*Millview, supra*, 229 Cal.App.4th at p. 894, original italics, citing  
14 *Young, supra*, 219 Cal.App.4th at p. 404.)

15 *Shirokow, Young, and Millview* make clear that water subject to a valid pre-1914  
16 or riparian water right is not subject to Division 2, or to the SWRCB's jurisdiction, and  
17 only unappropriated water (as of December 19, 1914), or water previously appropriated  
18 under a pre-1914 water right but abandoned is subject to the SWRCB's jurisdiction and  
19 within the purview of Section 1052(a).

20 In ENF01951, there is no dispute that BBID has a valid pre-1914 water right.  
21 There is no allegation in the ACL Complaint regarding the validity of the claimed right.  
22 There is also no allegation in the ACL Complaint that BBID diverted water in excess of  
23 its claimed pre-1914 water right. Moreover, the SWRCB does not allege that any of the  
24 water BBID diverted in June of 2015 is subject to Division 2. In fact, the allegation is the  
25 ACL Complaint, and the actions of the SWRCB, plainly demonstrate that there was no  
26 "unappropriated" water in the vicinity of BBID's point of diversion, because the SWRCB  
27 previously determined that there was *no water* available to satisfy any post-1914 water  
28

1 rights as of May 1, 2015. If true, the only water available for BBID to divert during the  
2 relevant period was water *not subject* to Division 2, and therefore not subject to a  
3 trespass under Section 1052(a). Again, this fact is confirmed by the sworn testimony of  
4 Katherine Mrowka. (Bernadett Decl., Exh. A.)

5 IV. THE WATER BBID DIVERTED IN JUNE 2015 IS THE SUBJECT OF A  
6 CONTRACT WITH THE DEPARTMENT OF WATER RESOURCES

7 BBID's diversion facility was relocated from Italian Slough to its current location  
8 on the intake channel of the State Water Project in the early 1960s, when the State of  
9 California began construction of the facilities at Clifton Court, including Clifton Court  
10 Forebay, the Harvey O. Banks Pumping Plant, and the intake channel connecting Clifton  
11 Court Forebay to the Harvey O. Banks Pumping Plant. BBID's pumping facilities were  
12 constructed on the intake channel under an agreement with DWR executed in 1964.  
13 (Bernadett Decl., BBID Exh. 206.) The 1964 Agreement provides for, among other  
14 things, the relocation of BBID's pumping plants and points of diversion to the SWP  
15 intake channel. (*Id.* at ¶ 4.) Through the 1964 Agreement, the State of California also  
16 consented to the "permanent and perpetual use by [BBID], without cost, of State's  
17 facilities and of that portion of its right of way required for the construction, operation,  
18 and maintenance of [BBID's] permanent facilities . . . ." (*Id.* at ¶ 7.) Under the 1964  
19 Agreement, BBID relocated its pumping facilities to their current location, and has  
20 operated those facilities since that time. (Bernadett Decl., BBID Exh. 336.)

21 In 2003, DWR and BBID entered into another Agreement (2003 Agreement) to  
22 resolve outstanding issues between DWR and BBID and to recognize the changing uses  
23 of water within BBID. (Bernadett Decl., BBID Exh. 208.) Through the 2003 Agreement,  
24 DWR and BBID agree that BBID has the right to divert up to 50,000 acre-feet of water in  
25 each year, which could be diverted year-round, for agricultural, municipal, and industrial  
26 purposes. (*Id.* at ¶ 9.) The 2003 Agreement provides for the continued diversion of  
27 water by BBID, up to 50,000 acre-feet, year round. (*Ibid.*) Through the 2003 Agreement,  
28 DWR agrees not to challenge BBID's year-round use of up to 50,000 acre-feet of water

1 for agricultural, municipal, and industrial uses. (*Id.* at ¶ 8.) In fact, in a letter dated  
2 September 23, 2014 from DWR to the SWRCB, DWR characterizes the 2003 Agreement  
3 as a “settlement” under which “DWR provides BBID up to 50,000 acre-feet annually for  
4 use in its service area.” (Bernadett Decl., BBID Exh. 217.) As DWR states to the  
5 SWRCB in this letter, BBID has a unique relationship with DWR due to the location of  
6 BBID’s facilities within the Clifton Court complex, on the intake channel to the State  
7 Water Project. The 1964 Agreement, providing for the diversion by BBID of water  
8 present in the intake channel without cost, and the provisions in the 2003 Agreement  
9 providing for the year-round diversion of up to 50,000 acre-feet of water by BBID, makes  
10 any dispute regarding BBID’s diversion of water from the intake channel strictly a  
11 contract dispute between BBID and DWR – a dispute beyond the authority and  
12 jurisdiction of the SWRCB.

13 V. CONCLUSION

14 A pre-1914 appropriator diverting under a valid water right cannot commit a  
15 trespass under Section 1052(a). There is no allegation in the ACL Complaint that the  
16 water BBID diverted during June 2015 was subject to Division 2, and BBID therefore  
17 could not have committed a trespass. Moreover, any Division 2 water that could have  
18 allegedly been diverted is subject to the terms of the various agreements between BBID  
19 and DWR, and any dispute regarding BBID’s diversion of such water is one of contract  
20 interpretation. If DWR believes BBID violated the terms of the 1964 Agreement or the  
21 2003 Agreement, DWR can bring an action against BBID for breach of either contract.  
22 Any such dispute, however, does not support prosecution under Section 1052(a).

23 SOMACH SIMMONS & DUNN  
24 A Professional Corporation

25 Dated: January 25, 2016

26 By: \_\_\_\_\_

27 Daniel Kelly

28 Attorneys for Byron-Bethany Irrigation District

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

**MOTION TO DISMISS ADMINISTRATIVE CIVIL LIABILITY PROCEEDING IN ENF01951 FOR LACK OF STATUTORY AUTHORITY UNDER WATER CODE SECTION 1052**

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 January 25, 2016 at Sacramento, California.

  
\_\_\_\_\_  
Yolanda De La Cruz

**SERVICE LIST OF PARTICIPANTS  
BYRON-BETHANY IRRIGATION DISTRICT  
ADMINISTRATIVE CIVIL LIABILITY HEARING  
(Revised 9/2/15; Revised: 9/11/15)**

SOMACH SIMMONS & DUNN  
A Professional Corporation

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<u>VIA ELECTRONIC MAIL</u>	<u>VIA ELECTRONIC MAIL</u>
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**SERVICE LIST  
WEST SIDE IRRIGATION DISTRICT  
CEASE AND DESIST ORDER HEARING**

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6 Attorneys for Petitioner/Plaintiff BYRON-  
BETHANY IRRIGATION DISTRICT  
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8  
9 BEFORE THE  
10 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

11 ENFORCEMENT ACTION ENF01949  
12 DRAFT CEASE AND DESIST ORDER  
REGARDING UNAUTHORIZED  
13 DIVERSIONS OR THREATENED  
UNAUTHORIZED DIVERSIONS OF WATER  
14 FROM OLD RIVER IN SAN JOAQUIN  
COUNTY

SWRCB Enforcement Action  
ENF01951 and ENF01949

NOTICE OF POSITION REGARDING  
THE STATE WATER RESOURCES  
CONTROL BOARD AUTHORITY TO  
ISSUE CURTAILMENTS

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

1 At one point in time, the State Water Resources Control Board (SWRCB) saw one  
2 of the major issues associated with this matter to be its authority to “curtail” pre-1914  
3 appropriative water rights. SWRCB Board members, in discussing issues related to this  
4 matter with the SWRCB’s Executive Director, its General Counsel, and the Prosecution  
5 Team, articulated a strategy to reach legal resolution over issues like whether the  
6 SWRCB has the authority to curtail pre-1914 appropriative water rights. (Declaration of  
7 Lauren Bernadett in Support of Notice of Position Regarding the State Water Resources  
8 Control Board’s Authority to Issue Curtailments (Bernadett Decl.), BBID Exh. 323 at  
9 pp. 5-7, 15-17; BBID Exh. 324 at pp. 20-21.)

10 To this end, and in implementing this strategy, the SWRCB’s Enforcement  
11 Section targeted Byron-Bethany Irrigation District (BBID), as a test case, because of its  
12 status as a pre-1914 appropriative water right holder in the Delta. The Enforcement  
13 Section viewed BBID as an easy target. (Bernadett Decl., BBID Exh. 228 at p. 2.)

14 In pursuit of this objective, the Hearing Team now requests briefing on whether  
15 “*the State Water Resources Control Board [has] the authority to curtail.*” (Bernadett  
16 Decl., Exh. B at p. 2); accord (Bernadett Decl., Exh. C.)

17 The problem with this request, however, is that it ignores much of what has  
18 happened since the strategy outlined above was developed. While the SWRCB’s June  
19 12, 2015 Curtailment Notice purports to curtail<sup>1</sup> the lawful exercise of BBID’s pre-1914  
20 appropriative water right, when the SWRCB was faced with legal challenges to the  
21 process by which those curtailments issued, the SWRCB *rescinded* the curtailment  
22 portion of the June 12, 2015 Notice. Responding to a Temporary Restraining Order  
23 issued by the Sacramento Superior Court on July 15, 2015, the SWRCB issued its  
24 “Partial Rescission of April, May, and June 2015 Curtailment Notices and Clarification of  
25 State Water Board Position Re: Notices of Unavailability of Water For Those Diverting  
26 Water In The Sacramento River Watershed, San Joaquin River Watershed and Delta,

27 \_\_\_\_\_  
28 <sup>1</sup> Curtail means “To cut off the end or any part of; hence to shorten, abridge, diminish, lessen, or reduce;  
and term has no such meaning as to abolish.” (Black’s Law Dictionary, Sixth Ed., p. 383.)

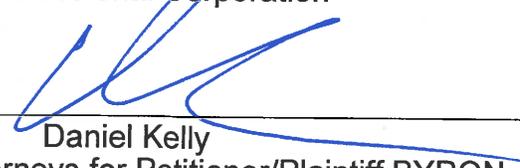
1 and Scott River.” (Bernadett Decl., BBID Exh. 279.) The Rescission and Clarification  
2 provides, among other things, that the express purpose of the Rescission and  
3 Clarification “is to rescind the ‘curtailment’ portions of the unavailability notices” issued  
4 by the SWRCB to water right holders. (Bernadett Decl. BBID Exh. 279 at p. 1 [“The  
5 purpose of this notice is rescind the ‘curtailment’ portions of the unavailability notices you  
6 received.”].)

7 Furthermore, in its recent filing with the Court of Appeal of the State of California,  
8 Sixth Appellate District, the SWRCB represents that the “curtailment” portion of the June  
9 12, 2015 notice was rescinded. (Bernadett Decl., Exh. A at p. 3.) The Administrative  
10 Civil Liability Complaint in ENF01951 recognizes as much. (Bernadett Decl., BBID Exh.  
11 277 at ¶ 29.)

12 Based upon the foregoing, the SWRCB’s authority to curtail pre-1914 water rights  
13 is not at issue in this proceeding.

14 Dated: January 25, 2016

SOMACH SIMMONS & DUNN  
A Professional Corporation

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17 By:   
18 Daniel Kelly  
19 Attorneys for Petitioner/Plaintiff BYRON-  
20 BETHANY IRRIGATION DISTRICT  
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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 January 25, 2016, I served the following document(s):

**NOTICE OF POSITION REGARDING THE STATE WATER RESOURCES CONTROL BOARD AUTHORITY TO ISSUE CURTAILMENTS**

(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 January 25, 2016 at Sacramento, California.

  
\_\_\_\_\_  
Yolanda De La Cruz

**SERVICE LIST OF PARTICIPANTS  
BYRON-BETHANY IRRIGATION DISTRICT  
ADMINISTRATIVE CIVIL LIABILITY HEARING  
(Revised 9/2/15; Revised: 9/11/15)**

SOMACH SIMMONS & DUNN  
A Professional Corporation

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<p>Patterson Irrigation District Banta-Carbona Irrigation District The West Side Irrigation District Jeanne M. Zolezzi Herum\Crabtree\Suntag 5757 Pacific Avenue, Suite 222 Stockton, CA 95207 <a href="mailto:jzolezzi@herumcrabtree.com">jzolezzi@herumcrabtree.com</a></p>	<p>City and County of San Francisco Jonathan Knapp Office of the City Attorney 1390 Market Street, Suite 418 San Francisco, CA 94102 <a href="mailto:jonathan.knapp@sfgov.org">jonathan.knapp@sfgov.org</a></p>
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**SERVICE LIST  
WEST SIDE IRRIGATION DISTRICT  
CEASE AND DESIST ORDER HEARING**

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6 Attorneys for Petitioner/Plaintiff BYRON-  
BETHANY IRRIGATION DISTRICT

7  
8  
9 BEFORE THE  
10 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

11 ENFORCEMENT ACTION ENF01949  
12 DRAFT CEASE AND DESIST ORDER  
REGARDING UNAUTHORIZED  
13 DIVERSIONS OR THREATENED  
UNAUTHORIZED DIVERSIONS OF WATER  
14 FROM OLD RIVER IN SAN JOAQUIN  
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16 In the Matter of ENFORCEMENT ACTION  
ENF01951 – ADMINISTRATIVE CIVIL  
LIABILITY COMPLAINT REGARDING  
17 UNAUTHORIZED DIVERSION OF WATER  
FROM THE INTAKE CHANNEL TO THE  
18 BANKS PUMPING PLANT (FORMERLY  
ITALIAN SLOUGH) IN CONTRA COSTA  
19 COUNTY

SWRCB Enforcement Action  
ENF01951 and ENF01949

DECLARATION OF LAUREN D.  
BERNADETT IN SUPPORT OF  
MOTION TO DISMISS  
ADMINISTRATIVE CIVIL  
LIABILITY COMPLAINT IN  
ENF01951 FOR VIOLATION OF  
DUE PROCESS

20  
21 I, Lauren D. Bernadett, declare:

22 1. I am an attorney at law licensed to practice before the courts of the State of  
23 California. I am an associate with Somach Simmons & Dunn. The following matters are  
24 within my personal knowledge and, if called as a witness, I can competently testify  
25 thereto.

26 2. Attached hereto as BBID Exhibit 202 is a true and correct copy of Byron-  
27 Bethany Irrigation Company's Notice of Appropriation of Water, dated May 18, 1914.

28 3. Attached hereto as BBID Exhibit 219 is a true and correct copy of the State

1 Water Resources Control Board's Notice of Unavailability of Water and Need for  
2 Immediate Curtailment for those Diverting Water in the Sacramento-San Joaquin  
3 Watersheds and Delta with a Pre-1914 Appropriative Claim Commencing During or After  
4 1903, dated June 12, 2015.

5 4. Attached hereto as BBID Exhibit 276 is a true and correct copy of the  
6 Reporter's Transcript of Proceedings of the *West Side Irrigation District et al. v. State*  
7 *Water Resources Control Board*, Case No. 34-2015-80002121, Sacramento County  
8 Superior Court, dated July 8, 2015.

9 5. Attached hereto as BBID Exhibit 277 is a true and correct copy of the State  
10 Water Resources Control Board's Administrative Civil Liability Complaint in the Matter of  
11 Unauthorized Diversion by Byron-Bethany Irrigation District (including cover letter from  
12 John O'Hagan, Assistant Deputy Director of the Division of Water Rights, to Rick  
13 Gilmore and Daniel Kelly regarding Enforcement Action ENF01951), dated July 20,  
14 2015.

15 6. Attached hereto as BBID Exhibit 279 is a true and correct copy of the State  
16 Water Resources Control Board's Partial Rescission of April, May and June 2015  
17 Curtailment Notices and Clarification of State Water Board Position Re: Notices of  
18 Unavailability of Water for Those Diverting Water in the Sacramento River Watershed,  
19 San Joaquin River Watershed and Delta, and Scott River, dated July 15, 2015.

20 7. Attached hereto as BBID Exhibit 299 is a true and correct copy of the  
21 Declaration of John O'Hagan in Opposition to Petitioner/Plaintiff's Application for Stay  
22 and/or in the Alternative Temporary Restraining Order and/or Preliminary Injunction,  
23 *Banta-Carbona Irrigation District v. State Water Resources Control Board*, Case No. 39-  
24 2015-00326421, San Joaquin County Superior Court, dated June 22, 2015.

25 8. Attached hereto as BBID Exhibit 379 is a true and correct copy of the  
26 Order Partially Granting Petitioners' Ex Parte Application for Temporary Restraining  
27 Order and Issuing an Order to Show Cause as to Why a Preliminary Injunction Should  
28 Not Be Granted, *West Side Irrigation District et al. v. State Water Resources Control*

1 Board, Case No. 34-2015-80002121, Sacramento County Superior Court, dated July 23,  
2 2015.

3 9. Attached hereto as Exhibit A is a true and correct copy of the Order After  
4 Hearing on Ex Parte Application for Temporary Stay Re: Enforcement of Curtailment  
5 Notice or In the Alternative Temporary Restraining Order and/or for Order to Show  
6 Cause Re: Preliminary Injunction, *West Side Irrigation District et al. v. State Water*  
7 *Resources Control Board*, Case No. 34-2015-80002121, Sacramento County Superior  
8 Court, dated July 10, 2015.

9 10. Attached hereto as Exhibit B is a true and correct copy of excerpts from the  
10 Reporter's Transcript of Proceedings in California Water Curtailment Cases, Case No. 1-  
11 15-CV-285182, Santa Clara County Superior Court, dated September 22, 2015.

12 11. Attached hereto as Exhibit C is a true and correct copy of excerpts from the  
13 Reporter's Transcript of Proceedings, *West Side Irrigation District et al. v. State Water*  
14 *Resources Control Board*, Case No. 34-2015-80002121, Sacramento County Superior  
15 Court, dated July 30, 2015.

16  
17 I declare under penalty of perjury under the laws of the State of California that the  
18 facts recited above are true and correct. Executed this 25th day of January 2016 at  
19 Sacramento, California.

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21 

22 Lauren D. Bernadett

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**BBID**  
**EXHIBIT 202**

NOTICE OF APPROPRIATION OF WATER.

NOTICE IS HEREBY GIVEN, that BYRON-BETHANY IRRIGATION COMPANY, a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in Contra Costa County, State aforesaid, does hereby claim the water flowing in Old River, at the point where the West bank of said Old River intersects the South bank of the branch or channel making South from said Old River and designated as "ITALIAN SLOUGH", and which said point is near to the center of Section Seven (7), Township One (1) South, Range Four (4) East Mount Diablo Base and Meridian in said Contra Costa County.

That said corporation claims and intends to use the water there flowing to the extent of 40,000 inches measured under a four-inch pressure.

That the purpose for which said corporation claims said water is to furnish water to its shareholders for irrigation and domestic purposes, and the place where it is intended to use said water is upon the lands lying in the Easterly portions of Contra Costa and Alameda Counties and the Southwesterly portion of San Joaquin County.

That the means by which it is intended to divert said water and the size of the diverting agency is as follows:

FIRST, through and along Italian Slough Southerly for about two miles to a point on the Southerly Section line of Section 13, in Township One South, Range Three East Mount Diablo Base and Meridian, and distant thereon 1450 feet Westerly from the Southeast corner of said Section 13, and which said Italian Slough is about 200 feet wide and 8 feet deep at its confluence with said Old River.

Thence Westerly through and along an artificial channel 200 feet wide and 8 feet deep, now existing, 3350 feet to a point 480 feet East of the Southwest corner of said Section 13.

SECOND; thence Southeasterly 3600 feet through and along an artificial canal or channel now existing, to the point of intersection of said canal with a creek known as Bruns Creek and the Segregation line, and which said point is in the Southwest quarter of Section 24, Township One South, Range Three East Mount Diablo Base and Meridian, said artificial channel or canal which is about 25 feet wide and 8 feet deep to be enlarged to 46 feet wide at the top, 30 feet wide at the bottom and 8 feet deep.

THIRD; thence through and by a canal or channel 50 feet wide at the top, 30 feet wide at the bottom and about 10 feet deep to be cut, and following Southwesterly up and along said Bruns Creek 2600 feet to a point near the Southwest corner of the Southwest quarter of said Section 24, and at such last named point by pumps and other apparatus and appliance to lift the water into several ditches or flumes or other conveyors for distribution to the main and other laterals for use on adjacent lands.

IN WITNESS WHEREOF, said corporation has caused its corporate name to be hereunto subscribed by its President, and its corporate seal to be hereunto affixed by its Secretary, the 18th day of May, 1914.

BYRON-BETHANY IRRIGATION COMPANY

By Volney Taylor President

By R. P. Houston Secretary.

NOTICE OF APPROPRIATION OF WATER.

NOTICE IS HEREBY GIVEN, that BYRON-BETHANY IRRIGATION COMPANY, a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in Contra Costa County, State aforesaid, does hereby claim the water flowing in Old River, at the point where the West bank of said Old River intersects the South bank of the branch or channel making South from said Old River and designated as "ITALIAN SLOUGH", and which said point is near to the center of Section Seven (?), Township One (1) South, Range Four (4) East Mount Diablo Base and Meridian in said Contra Costa County.

That said corporation claims and intends to use the water there flowing to the extent of 40,000 inches measured under a four-inch pressure.

That the purpose for which said corporation claims said water is to furnish water to its shareholders for irrigation and domestic purposes, and the place where it is intended to use said water is upon the lands lying in the Easterly portions of Contra Costa and Alameda Counties and the Southwesterly portion of San Joaquin County.

That the means by which it is intended to divert said water and the size of the diverting agency is as follows:

FIRST, through and along Italian Slough Southerly for about two miles to a point on the Southerly Section line of Section 13, in Township One South, Range Three East Mount Diablo Base and Meridian, and distant thereon 1450 feet Westerly from the Southeast corner of said Section 13, and which said Italian Slough is about 200 feet wide and 8 feet deep at its confluence with said Old River. Thence Westerly through and along an artificial channel 200 feet wide and 8 feet deep, now existing, 3350 feet to a point 480 feet East of the Southwest corner of said Section 13.

SECOND; thence Southeasterly 3600 feet through and along an artificial canal or channel now existing, to the point of intersection of said canal with a creek known as Bruns Creek and the Segregation line, and which said point is in the Southwest quarter of Section 24, Township One South, Range Three East Mount Diablo Base and Meridian, said artificial channel or canal which is about 25 feet wide and 6 feet deep to be enlarged to 46 feet wide at the top, 30 feet wide at the bottom and 8 feet deep.

State of California,  
County of Contra Costa

On this 19th day of May in the year one thousand, nine hundred and Fourteen A. D.

before me Alfred L. Boyd, a Notary Public in and for said County, personally appeared

Volney Taylor known to me to be the

President, and R.R. Houston known to me to be the

Secretary of the Corporation that executed the within instrument, known to me to be the persons who executed the within instrument on behalf of the corporation within named, and acknowledged to me that such Corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in said County, the day and year in this certificate first expressed.



Notary Public in and for the County of Contra Costa State of California

AFFIDAVIT OF POSTING OF NOTICE OF APPROPRIATION OF WATER.

STATE OF CALIFORNIA, )  
COUNTY OF CONTRA COSTA. ) ss:

R. R. Houston

being duly sworn, deposes and says:

That on May 18th, 1914 he posted a full, true and correct copy of the attached "NOTICE OF APPROPRIATION OF WATER" at the point where the West bank of Old River intersects the South bank of the branch or channel making South from said Old River, and designated as "Italian Slough", and which said point where said notice was posted is near to the center of Section 7, Township One South, Range 4 East Mount Diablo Base and Meridian, in Contra Costa County, State of California, by then and there affixing and fastening such copy of said "Notice of Appropriation of Water" to and upon a board firmly fixed in the ground at said above designated point;

That on May 18th, 1914, he posted a full, true and correct copy of the attached "NOTICE OF APPROPRIATION OF WATER" at the point of intersection of the East bank of "Italian Slough" at its terminus with the Eastern extremity of the South embankment of an artificial canal or channel 200 feet wide extending Westerly on the Southerly section line of Section 13 in Township One South, Range 3 East Mount Diablo Base and Meridian, in Contra Costa County, State of California, and which point is distant on such section line 1450 feet Westerly thereon from the Southeast corner of said Section 13, by then and there affixing and fastening such copy of said "Notice of Appropriation of Water" to and upon a board firmly fixed in the ground at said last above designated point;

That on May 18th, 1914, he posted a full, true and correct copy of the attached "NOTICE OF APPROPRIATION OF WATER" at the point of intersection of the South bank of the canal or channel 200 feet wide running East and West on the Southerly section line of Section 13, Township One South, Range 3 East, Mount Diablo Base and Meridian, in Contra Costa County, State of California, with the East bank of the canal or channel 25 feet wide extending Southeasterly, to the said point of intersection being 480 feet East of the Southwest corner of said Section 13, by then and there affixing and fastening such copy of said "Notice of Appropriation of Water" to and upon a board firmly fixed in the ground at said last above designated point.

R. R. Houston

Subscribed and sworn to before me,

23<sup>rd</sup> day of May, 1914  
[Signature]

Notary Public in and for the County of Contra Costa, State of California.

My Commission Expires Sept. 16, 1915





# **EXHIBIT 219**



State Water Resources Control Board

Byron-Bethany  
Irrigation District

June 12, 2015

BYRON-BETHANY IRRIGATION DISTRICT  
C/O RICK GILMORE, GENERAL MANAGER  
7995 BRUNS ROAD  
BYRON, CA 94514

In Regards to Claim of Right(s) [ID (password)]: S021256 (407769)

**NOTICE OF UNAVAILABILITY OF WATER AND NEED FOR IMMEDIATE CURTAILMENT FOR THOSE DIVERTING WATER IN THE SACRAMENTO-SAN JOAQUIN WATERSHEDS AND DELTA WITH A PRE-1914 APPROPRIATIVE CLAIM COMMENCING DURING OR AFTER 1903**

On January 23, 2015 and again on April 2, 2015, the State Water Resources Control Board (State Water Board) issued a Notice of Surface Water Shortage and Potential for Curtailment due to dry conditions throughout the State. On April 1, 2015, the Governor issued an executive order, order B-29-15, continuing the state of emergency, initially enacted on January 17, 2014, due to drinking water shortages, diminished water for agriculture production, degraded habitat for fish and wildlife, increased wildfire risk and the threat of saltwater contamination to fresh water supplies in the Sacramento-San Joaquin Delta (Delta).

On April 23, 2015 and May 1, 2015, the State Water Board issued curtailment notices to all post-1914 appropriative water rights in the Sacramento and San Joaquin River watersheds, inclusive of the Delta, due to insufficient projected water supplies. Based on updated water supply projections provided by the Department of Water Resources in early May, the State Water Board is now notifying pre-1914 claims of right, with a priority date of 1903 and later for the Sacramento-San Joaquin watersheds and the Delta, that, due to ongoing drought conditions, there is insufficient water in the system to service their claims of right.

**Curtailment of Certain Pre-1914 Claims of Right Commenced During or After 1903:**

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. With this notice, the State Water Board is notifying pre-1914 appropriative claims of right with a priority date of 1903 and later within the Sacramento-San Joaquin watersheds and Delta of the need to immediately stop diverting water with the exceptions discussed below. This condition of curtailment will continue until water conditions improve. Even if there is water physically available at your point of diversion, that water is necessary to meet more senior water right holders' needs or the water may be released previously stored water which must continue instream to serve its intended beneficial use. If precipitation occurs in the following weeks or months, you should not commence diversion before being notified by the State Water Board that water is legally available for diversion under your priority of right. Evaluations for additional curtailments of more senior rights will be made every two weeks through September.

FRANZ MARCUS, CHIEF | THOMAS HIGGINS, EXECUTIVE DIRECTOR

1901 I Street, Sacramento, CA 95811 | 1100 N. A Street, P.O. Box 103, Sacramento, CA 95832-0103 | www.waterboards.ca.gov

To Water Right Users in the  
Sacramento-San Joaquin Delta,  
Sacramento & San Joaquin River Watersheds

-3-

June 12, 2016

[http://www.dtac.ca.gov/database/CalEPA\\_Complaint/index.cfm](http://www.dtac.ca.gov/database/CalEPA_Complaint/index.cfm)

We recognize the burden the drought creates, and want to assure that others do not illegally benefit from your curtailments.

Sincerely,



Thomas Howard  
Executive Director

# **EXHIBIT 276**

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
2 IN AND FOR THE COUNTY OF SACRAMENTO  
3 HON. JUDGE SHELLEYANNE W. L. CHANG, DEPARTMENT 24

4 --oOo--

5 THE WEST SIDE IRRIGATION DISTRICT;  
6 CENTRAL DELTA WATER AGENCY; SOUTH DELTA  
7 WATER AGENCY; WOODS IRRIGATION COMPANY,  
8 Petitioners and Plaintiffs,  
9 VERSUS  
10 CALIFORNIA STATE WATER RESOURCES CONTROL  
11 BOARD; et al.,  
12 Respondents and Defendants.

CASE NO.  
34-2015-80002121

13 --oOo--

COPY

14 REPORTER'S TRANSCRIPT OF  
15 PROCEEDINGS

16 --oOo--

17 --oOo--

18 WEDNESDAY, JULY 8, 2015

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APPEARANCES

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FOR PETITIONER AND PLAINTIFFS:

WEST SIDE IRRIGATION DISTRICT

BY: STEVE HERUM, Attorney at Law

FOR PETITIONER AND PLAINTIFFS:

CENTRAL DELTA WATER AGENCY

BY: JENNIFER SPALETTA, Attorney at Law

FOR PETITIONER AND PLAINTIFFS:

WOODS IRRIGATION COMPANY AND

SOUTH DELTA WATER AGENCY

BY: DEAN RUIZ, Attorney at Law

FOR RESPONDENTS AND DEFENDANTS:

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

BY: CLIFFORD T. LEE, DEPUTY ATTORNEY GENERAL

BY: MATTHEW G. BULLOCK, DEPUTY ATTORNEY GENERAL

--oOo--

WEDNESDAY, JULY 8, 2015

--oOo--

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2  
3           The matter of the West Side Irrigation District;  
4 Central Delta Water Agency; South Delta Water Agency; Woods  
5 Irrigation Company, Petitioners and Plaintiffs, versus  
6 California State Water Resources Control Board; Thomas  
7 Howard, Executive Director of California State Water  
8 Resources Control Board and DOES 1 Through 100, inclusive,  
9 Respondents and Defendants, Case Number 34-2015-80002121,  
10 came on for hearing this day in the Superior Court, for the  
11 County of Sacramento, State of California, before Honorable  
12 Shelleyanne W. L. Chang, Judge, Department No. 24.

--oOo--

13  
14           Petitioners and Plaintiffs: West Side Irrigation  
15 District, et al., were represented by Steve Herum, Attorney  
16 at Law.

17           Petitioners and Plaintiffs: Central Delta Water  
18 Agency, was represented by Jennifer Spaletta, Attorney at  
19 Law.

20           Petitioners and Plaintiffs: Woods Irrigation Company  
21 and South Delta Water Agency, was represented by Dean Ruiz,  
22 Attorney at Law.

23           Respondents and Defendants: California State Water  
24 Resources Control Board, was represented by Clifford T. Lee  
25 and Matthew G. Bullock, Deputy Attorney Generals.

The following proceedings were then had:

--oOo--

THE COURT: Good morning. We're on the record in

1 the matter of the West Side Irrigation District versus the  
2 State Water Resources Control Board.

3 May I have the appearances of counsel, please,  
4 starting from the left.

5 MS. SPALETTA: Jennifer Spaletta, appearing on  
6 behalf of Central Delta Water Agency today.

7 MR. HERUM: If it please the court, Steve Herum,  
8 representing the West Side Irrigation District.

9 MR. RUIZ: Your Honor, Dean Ruiz for Woods  
10 Irrigation Company and South Delta Water Agency.

11 MR. LEE: Your Honor, Deputy Attorney General  
12 Clifford Lee here on behalf of the State Water Resources  
13 Control Board.

14 MR. BULLOCK: Mathew Bullock, Deputy Attorney  
15 General, also on behalf of the California State Water  
16 Resources Control Board.

17 --oOo--

18 THE COURT: Good morning, counsel. Let me first  
19 start by thanking you all for accommodating the court's  
20 schedule. I know the court was required to reschedule this  
21 hearing several times, and so I do appreciate counsels'  
22 courtesies and accommodation.

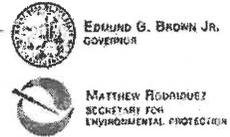
23 The other thing that I did want to bring to  
24 counsels' attention is the fact that court noticed on  
25 the -- counsel for the Water Resources Control Board's  
26 letterhead that one of the counsel is Deborah Barnes, and I  
27 believe that I worked with Miss Barnes approximately 15  
28 years ago, when I was the Chief Deputy Legal Affairs

# **EXHIBIT 277**



RECEIVED

JUL 22 2015



State Water Resources Control Board

Byron-Bethany  
Irrigation District

JUL 20 2015

Byron-Bethany Irrigation District  
Attn: Rick Gilmore, General Manager  
7995 Bruns Road  
Byron, CA 94514

CERTIFIED MAIL NO. 7003 1680 0000 2965 9480

Daniel Kelley  
General Counsel, Byron-Bethany Irrigation District  
Somach Simmons & Dunn  
500 Capital Mall, Suite 1000  
Sacramento, CA 95814

CERTIFIED MAIL NO. 7003 1680 0000 2965 9473

Dear Messrs. Gilmore and Kelley:

**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**

Enclosed is an Administrative Civil Liability (ACL) Complaint relating to your diversions from the intake channel to the Banks Pumping Plant (formerly Italian Slough) after June 12, 2015. This letter serves as notice to Byron-Bethany Irrigation District (BBID) that the State Water Resources Control Board (State Water Board), Division of Water Rights (Division), intends to impose the proposed Administrative Civil Liability.

**You have 20 days from receipt of this notice to act or face additional enforcement without further notice. Therefore, this matter requires your immediate attention.**

**VIOLATION DESCRIPTION**

BBID is alleged to have diverted a total of approximately two thousand sixty-seven (2,067) acre-feet over the course of thirteen days, from June 13 through June 25, 2015, during which water was unavailable to serve BBID's water right. The violation is further described in the enclosed ACL Complaint.

**ADMINISTRATIVE CIVIL LIABILITY**

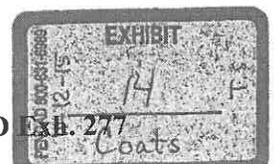
California Water Code, section 1052, prohibits the unauthorized diversion of water. Water Code section 1052 authorizes the State Water Board to administratively impose civil liability for unauthorized diversions of water during periods of drought emergency in an amount not to exceed \$1,000 per day of violation plus \$2,500 per acre-foot diverted without authorization.

FELIX A. MENDOZA, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

1001 I Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 160, Sacramento, CA 95812-0160 | www.waterboards.ca.gov

100% recycled paper

BBID



JUL 20 2015

I am hereby issuing the enclosed ACL Complaint proposing that a liability of \$1,553,250 be imposed for your diversion of water during periods when water supplies were insufficient to fulfill your claimed right. The ACL Complaint provides for a potentially reduced penalty upon showing that water pumped during the time considered under this action was used for health and safety needs, or for critical power generation. **If you fail to respond to the ACL Complaint in one of the manners below within 20 days of receiving this notice, then the State Water Board will issue an ACL Order and seek recovery of this proposed liability amount as authorized by California Water Code section 1055.4.**

If you disagree with the facts or allegations set forth in the ACL Complaint, you may request a hearing before the State Water Board. **Your request for a hearing must be in writing, signed by you or on your behalf, and mailed or hand-delivered to ensure receipt by the State Water Board within 20 days from the date you receive this notice.** You may mail your written hearing request to: State Water Resources Control Board, Division of Water Rights, Attn: Enforcement Section, P.O. Box 2000, Sacramento, CA 95812-2000.

You may hand-deliver your written hearing request to: State Water Resources Control Board, Division of Water Rights, Records Unit, 1001 I Street, 2nd Floor, Sacramento, CA 95814.

If you request a hearing, a hearing will be scheduled before the State Water Board or a designated hearing officer. Prior to the hearing, you will be required to submit any written testimony and other evidence you would like the State Water Board to consider. You will be notified of the hearing date and the submittal deadlines as soon as they are scheduled.

If you fail to come into compliance or request a hearing within 20 days of the date you receive this notice, the State Water Board will adopt the ACL.

#### SUMMARY OF OPTIONS

1. Submit a written request for hearing within 20 days of receiving the enclosed ACL Complaint; or
2. Do nothing, and receive a final ACL Order.

If you have any questions regarding the ACL Complaint, or if you have information that you want to provide in response to this complaint, or information that you believe the State Water Board staff should otherwise consider, please contact Kathy Mrowka, Manager, Enforcement Section at (916) 341-5363 or [Kathy.Mrowka@waterboards.ca.gov](mailto:Kathy.Mrowka@waterboards.ca.gov); or Andrew Tauriainen, Attorney III, Office of Enforcement, at (916) 341-5445 or [Andrew.Tauriainen@waterboards.ca.gov](mailto:Andrew.Tauriainen@waterboards.ca.gov), or send the information directly to them via email.

Sincerely,



John O'Hagan, Assistant Deputy Director  
Division of Water Rights

Enclosures: 1) Administrative Civil Liability Complaint

STATE OF CALIFORNIA  
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY  
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

**ADMINISTRATIVE CIVIL LIABILITY COMPLAINT**

---

In the Matter of Unauthorized Diversion by

**BYRON-BETHANY IRRIGATION DISTRICT**

---

SOURCE: Intake Channel to the Banks Pumping Plant (formerly Italian Slough)

COUNTY: Contra Costa

---

**YOU ARE HEREBY GIVEN NOTICE THAT:**

1. Byron-Bethany Irrigation District (BBID or District) is alleged to have diverted and used water in violation of California Water Code section 1052, subdivision (a), which provides that the diversion or use of water subject to Division 2 of the Water Code other than as authorized in Division 2 is a trespass.
2. Water Code section 1052, subdivision (c), provides that any person or entity committing a trespass during a period for which the Governor has issued a proclamation of a state of drought emergency may be liable in an amount not to exceed the sum of one thousand dollars (\$1,000) for each day the trespass occurs plus two thousand five hundred dollars (\$2,500) for each acre-foot of water diverted or used in excess of that diverter's rights. Water Code section 1052, subdivision (d)(2), provides that civil liability may be imposed administratively by the State Water Resources Control Board (State Water Board or Board) pursuant to Water Code section 1055.
3. Water Code section 1055, subdivision (a), provides that the Executive Director of the State Water Board may issue a complaint to any person or entity on whom Administrative Civil Liability (ACL) may be imposed. On June 5, 2012, the Executive Director delegated this authority to the Deputy Director for Water Rights. State Water Board Resolution 2012-0029 authorizes the Deputy Director for Water Rights to issue an order imposing an ACL when a complaint has been issued and no hearing has been requested within 20 days of receipt of the complaint. The Deputy Director for Water Rights has redelegated this authority to the Assistant Deputy Director for Water Rights pursuant to State Water Board Resolution 2012-0029.

**ALLEGATIONS**

4. On June 30, 2010, BBID submitted an Initial Statement of Water Diversion and Use (Statement), which the State Water Board, Division of Water Rights (Division) designated as Statement 021256 (S021256). Under S021256, BBID claims a pre-1914 appropriative water right to the Intake Channel to the Banks Pumping Plant, formerly Italian Slough, in Contra Costa County. The Statement also indicates that BBID diverted approximately 26,179 acre-feet (af) in 2009 for municipal and industrial and agricultural use within its boundaries.
5. On July 1, 2013, BBID submitted Supplemental Statements for S021256, for the years 2010, 2011 and 2012. BBID's Supplemental Statements each indicates that the District first put water to use in 1917, and that the purpose of use for the District's diversions is irrigation of 12,500 acres. The 2010 Supplement Statement indicates that BBID diverted 25,269 af and applied

approximately 22,302 af to beneficial use. The 2011 Supplemental Statement indicates that BBID diverted 22,344 af and applied 19,779 af to beneficial use. The 2012 Supplemental Statement indicates that BBID diverted 32,167 af and applied 28,345 af to beneficial use.

6. BBID does not hold or claim any other appropriative or riparian water rights on record with the State Water Board, although S021268 indicates that BBID holds Contract No. 14-06-200-785-LTR1 with the United States Bureau of Reclamation (Reclamation). In 2014 and 2015, Reclamation's agricultural contractors in the Delta were allocated zero percent of their contract quantity (available at <http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=49115> [last accessed June 30, 2015]). BBID confirmed in a public statement dated June 12, 2015, that it had received zero water supply from Reclamation in both 2014 and 2015 (available at <http://bbid.org/wp-content/uploads/2015/06/BBID-Curtailment-Response-FINAL.1.pdf> [last accessed June 30, 2015].)
7. On January 17, 2014, Governor Edmund G. Brown Jr. issued Proclamation No. 1-17-2014, declaring a State of Emergency to exist in California due to severe drought conditions.
8. Also on January 17, 2014, the State Water Board issued a "Notice of Surface Water Shortage and Potential Curtailment of Water Right Diversions" (2014 Shortage Notice). The 2014 Shortage Notice alerts water right holders in critically dry watersheds that water may become unavailable to satisfy beneficial uses at junior priorities.
9. On April 25, 2014, Governor Brown issued a Proclamation of a Continued State of Emergency due to drought conditions, to strengthen the state's ability to manage water and habitat effectively in drought conditions.
10. On May 27, 2014, the State Water Board issued a "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the Sacramento and San Joaquin River Watershed with a post-1914 Appropriative Right" (2014 Unavailability Notice), which notifies all holders of post-1914 appropriative water rights within the Sacramento and San Joaquin River watersheds of the lack of availability of water to serve their post-1914 water rights, with some minor exceptions for non-consumptive diversions. The 2014 Unavailability Notice did not apply to pre-1914 appropriative rights such as that claimed by BBID. The State Water Board notified the most senior right holders in stages as water became available to serve their rights, and by November 19, 2014, had notified all right holders of availability for all diversions in the Sacramento and San Joaquin River watersheds.
11. On January 23, 2015, the State Water Board issued a "Notice of Surface Water Shortage and Potential for Curtailment of Water Right Diversions for 2015" (2015 Shortage Notice). The 2015 Shortage Notice alerted water right holders in critically dry watersheds that water may become unavailable to satisfy beneficial uses at junior priorities.
12. On February 4, 2015, the State Water Board issued Order WR 2015-0002-DWR, requiring pre-1914 and riparian water right claimants representing the top 90 percent of such claimants by volume in the Sacramento and San Joaquin River watersheds and the Delta to submit information relating to their claimed water right, the monthly amounts of water diverted and the basis of right claimed for diversions in 2014, and monthly diversion information and anticipated monthly diversion information for each month starting with February, 2015, to be submitted by the 5<sup>th</sup> of each succeeding month until the drought ends.
13. BBID is subject to Order WR 2015-0002-DWR, and in response submitted information indicating that its predecessor, the Byron-Bethany Irrigation Company, recorded notice of an appropriation of water on or around May 16, 1914. Thus, BBID claims that its pre-1914 water right has a

priority date of May 18, 1914.<sup>1</sup>

14. BBID also submitted water diversion and use information for 2014, projected monthly diversions for 2015, and actual monthly diversions through May, 2015. BBID reports that it diverted 30,204 af in 2014 and projected diversions of 25,452 af in 2015. BBID's reported actual monthly diversion amounts for January through May, 2015, are generally similar to reported diversions for the same months in prior years where such information is available. BBID's reported projected diversions are similar to the reported actual diversions for the same months in prior years where such information is available. From August 1 to October 31, 2014, BBID reports it pumped 1,573 af of water under transfer that was approved by State Water Board Order dated August 27, 2014.
15. On April 1, 2015, Governor Brown issued Executive Order B-29-15 (Executive Order) to strengthen the state's ability to manage water and habitat effectively in drought conditions and called on all Californians to redouble their efforts to conserve water. The Executive Order finds that the continuous severe drought conditions present urgent challenges across the state including water shortages for municipal water use and for agricultural production, increased wildfire activity, degraded habitat for fish and wildlife, threat of saltwater contamination, and additional water scarcity if drought conditions continue. The Executive Order confirms that the orders and provisions in the Governor's previous drought proclamations and orders, the January 17, 2014, Proclamation, April 25, 2015, Proclamation, and Executive Orders B-26-14 and B-28-14, remain in full force and effect. On April 2, 2015, the State Water Board issued another notice warning that notices of unavailability of water were likely to be issued soon.
16. On April 23, 2015, the State Water Board issued a "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the San Joaquin River Watershed with a Post-1914 Appropriative Right" (April 23 Unavailability Notice), which notifies all holders of post-1914 appropriative water rights within the San Joaquin River watershed of the lack of availability of water to serve their post-1914 water rights, with some minor exceptions for non-consumptive diversions. The State Water Board issued a similar notice for post-1914 appropriative water rights within the Sacramento River watershed on May 1, 2015 (May 1 Unavailability Notice). The April 23 and May 1 Unavailability Notices do not apply to pre-1914 appropriative rights such as that claimed by BBID.
17. On June 12, 2015, the State Water Board issued a "Notice of Unavailability of Water and Need for Immediate Curtailment for Those Diverting Water in the Sacramento-San Joaquin Watersheds and Delta with a Pre-1914 Appropriative Claim Commencing During or After 1903" (June 12 Unavailability Notice), which notifies all holders of pre-1914 appropriative water rights with a priority date of 1903 and later within the Sacramento and San Joaquin River watersheds of the lack of availability of water to serve their rights, with some minor exceptions for non-consumptive uses.
18. Drought management of water rights is necessary to ensure that water to which senior water right holders are entitled is actually available to them, which requires that some water remain in most streams to satisfy senior demands at the furthest downstream point of diversion of these senior water rights. The June 12 Unavailability Notice reflects the State Water Board's determination that the existing water available in the Sacramento-San Joaquin watersheds and the Delta is insufficient to meet the demands of diverters with claims of pre-1914 appropriative rights with a priority date of 1903 and later. Continued diversion when there is no water available under the priority of the right constitutes unauthorized water diversion and use. Unauthorized diversion is subject to enforcement. (Wat. Code § 1052.)

<sup>1</sup> The term "pre-1914" appropriative water right means those appropriative rights commenced prior to December 19, 1914, the effective date of the Water Commission Act. Therefore, it is possible to have a "pre-1914" appropriative water right with a priority date in 1914.

## Byron-Bethany Irrigation District

19. The State Water Board determines the availability of water for water rights of varying priorities in any watershed by comparing the current and projected available water supply with the total water right diversion demand.
20. To determine water availability, the Board relies upon the full natural flows of watersheds calculated by the Department of Water Resources (DWR) for certain watersheds in its Bulletin 120 and in subsequent monthly updates. "Full natural flow," or "unimpaired runoff," represents the natural water production of a river basin, unaltered by upstream diversions, storage, storage releases, or by export or import of water to or from other watersheds. The full natural flow amount is different than the measured stream flows at the given measurement points because the measured flows may be higher or lower due to upstream operations. Forecasted flow data is uncertain, so DWR provides the data in the form of "levels of exceedance" or simply "exceedance" to show the statistical probability that the forecasted supply will occur. The exceedance is simply the percent of the time that the actual flow is expected to exceed the projected flow. The 90 percent exceedance hydrology assumes inflows from rainfall and snowmelt at levels that are likely to be met or exceeded by actual flows with a 90 percent probability, or in other words, there is a ten percent or less chance of actual conditions turning out to be this dry or drier. In April and early May, the State Water Board uses the 90% and 99% exceedance amounts for its analyses due to low flow conditions. DWR's daily natural flow calculations are also used in the analysis.
21. To determine water demand, the State Water Board relies on information supplied by water right holders on annual or triennial reports of water diversion and use required to be true and accurate to the best of the knowledge of the diverters. The Board also incorporates 2014 diversion data submitted pursuant to Order WR 2015-0002. All reported monthly water diversion data is compiled by watershed, type of right and priority dates. The Board performs quality control checks and removes obvious errors, excess reporting, removes demand for direct diversion for power, and makes additional changes based on stakeholders' input. The corrected demand data includes the 2014 reported data for 90% of the watershed demand plus, for the remaining diverters, an averaged diversion amount for 2010 through 2013. These monthly diversion demands are grouped into water right types (riparian, pre-1914 and post-1914 rights).
22. The State Water Board consistently adjusts the water availability and demand analyses based on new information obtained from stakeholders, or adjustments to projected flows from the DWR. State Water Board staff reviews this information and provides revisions to its data set and graphs that are all shown on the Watershed Analysis website ([http://www.waterboards.ca.gov/waterights/water\\_issues/programs/drought/analysis/](http://www.waterboards.ca.gov/waterights/water_issues/programs/drought/analysis/)).
23. The State Water Board's Watershed Analysis website provides updated graphical summations and spreadsheets containing supporting analysis of the availability and demand analyses. The graphical summations show priorities with monthly demands for the total riparian demand at bottom, the pre-1914 demands added to riparian and depicted above the riparian demand. The monthly amounts are averaged into cubic feet per second for graphical purposes. See, for example, the combined Sacramento/San Joaquin River Basin Senior Supply/Demand Analysis ([http://www.waterboards.ca.gov/waterights/water\\_issues/programs/drought/analysis/docs/sacsjo\\_combined.pdf](http://www.waterboards.ca.gov/waterights/water_issues/programs/drought/analysis/docs/sacsjo_combined.pdf)). The Curtailment Analysis website also provides graphical summations of the San Joaquin River Basin Senior Supply/Demand Analysis with Proportional Delta Demand ([http://www.waterboards.ca.gov/waterights/water\\_issues/programs/drought/analysis/docs/sjprora\\_ted.pdf](http://www.waterboards.ca.gov/waterights/water_issues/programs/drought/analysis/docs/sjprora_ted.pdf)) and the Sacramento River Basin Senior Supply/Demand Analysis with Proportional Delta Demand ([http://www.waterboards.ca.gov/waterights/water\\_issues/programs/drought/analysis/docs/sacpro\\_rated.pdf](http://www.waterboards.ca.gov/waterights/water_issues/programs/drought/analysis/docs/sacpro_rated.pdf)).
24. This analysis shows that by June 12, 2015, available supply was insufficient to meet the demands of appropriative rights with priority dates of 1903 and later throughout the Sacramento and San Joaquin River watersheds and the Delta.

## Byron-Bethany Irrigation District

25. The June 12 Unavailability Notice applies to S021256 because BBID claims a priority date of May 18, 1914. BBID received an electronic copy of the June 12 Unavailability Notice on June 12, 2015, via the Board's "Drought Updates" Lyris email list system, because Rick Gilmore, BBID's General Manager is a subscriber to that system (via email address [r.gilmore@bbid.org](mailto:r.gilmore@bbid.org)). Moreover, BBID issued a public statement on June 12, 2015, in response to the June 12 Unavailability Notice (available at <http://bbid.org/wp-content/uploads/2015/06/BBID-Curtailment-Response-FINAL1.pdf> [last accessed June 25, 2015].) BBID received a paper copy of the June 12 Unavailability Notice no later than June 15, 2015.
26. BBID's diversions are recorded by DWR and posted to the California Data Exchange Center (CDEC) (<http://cdec.water.ca.gov/cgi-procs/queryDaily?BBID>) also available at <http://www.water.ca.gov/swp/operationscontrol/docs/delta/DeltaHydrology.pdf>). CDEC reports that BBID has diverted water each day since the June 12 Unavailability Notice:

Date	Avg Diversion Rate (cfs)	Amount Diverted (af)	Date	Avg Diversion Rate (cfs)	Amount Diverted (af)
06/13/2015	91	180	06/20/2015	96	190
06/14/2015	122	242	06/21/2015	99	196
06/15/2015	79	158	06/22/2015	62	123
06/16/2015	83	164	06/23/2015	81	121
06/17/2015	78	154	06/24/2015	67	132
06/18/2015	91	180	06/25/2015	36	71
06/19/2015	80	158	06/25/2015	0	0

27. The daily diversion rates through June 24 are comparable to the District's average daily diversion rates reported for June 2014 (4,842 af/30 days/1.9835=81.4 cfs), and those BBID reported as anticipated for June 2015. This daily rate is in excess of the basic minimum health and safety needs of Mountain House Community Service District. This indicates that BBID has continued its normal diversions following the June 12 Unavailability Notice.
28. BBID diverted a total of approximately two thousand sixty-seven (2,067) acre-feet over the course of thirteen days following the June 12 Unavailability Notice, specifically from June 13 through June 25, 2015.
29. On July 15, 2015, the State Water Board issued a Clarification to the Unavailability Notices indicating that, to the extent that any of the notices described above contain language that may be construed as an order requiring you to curtail diversions under your affected water right, that language has been rescinded. Similarly, any language requiring affected water right holders to submit curtailment certification forms has been rescinded.
30. Diversion or use of water by an appropriative water right holder when there is insufficient water supply available for that water right is an unauthorized diversion or use of water subject to Division 2 of the Water Code. Water Code section 1052, subdivision (a) provides that unauthorized diversion or use of water is a trespass.
31. This enforcement action is based on lack of available water supply under the priority of the right. The Unavailability Notices were issued for the purpose of advising the public and water diverters of the lack of available water under the priority of the rights identified in each notice; the notices are not the basis for this enforcement action.

## PROPOSED CIVIL LIABILITY

32. Water Code section 1052 provides that the maximum civil liability that can be imposed by the State Water Board in this matter for the unauthorized diversion and use of the water during a

drought period is \$1,000 for each day of trespass plus \$2,500 for each acre-foot of water diverted or used in excess of that diverter's water rights.

33. Evidence demonstrates that BBID's unauthorized diversions began on June 13, 2015, and continued until June 25, 2015, for a total of thirteen (13) days. Over that period, BBID diverted approximately two thousand sixty-seven (2,067) acre-feet of water in excess of that available to serve its claimed water right.
34. Therefore, the maximum civil liability for the alleged violations is \$5,180,500 [13 days at \$1,000 per day plus 2,067 acre-feet at \$2,500 per acre-foot].
35. In determining the amount of civil liability, California Water Code section 1055.3 requires that the State Water Board consider all relevant circumstances, including, but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, and any corrective action taken by the violator.
36. In this case, BBID has made unauthorized diversions of water from the Intake Channel to the Banks Pumping Plant (formerly Italian Slough) during the most extreme drought in decades, when there was insufficient water supply available for BBID's claimed water right. BBID was aware that the State Water Board had determined that there was insufficient water supply available for BBID's claimed water right. These unauthorized diversions have reduced or threatened to reduce the amount of water available for downstream water right holders during an extreme drought emergency. Moreover, BBID's diversions likely reduced the water available for instream resources and riparian habitat within the Delta during an extreme drought emergency.
37. BBID received an economic advantage over other legitimate water diverters in the area by foregoing the costs of buying replacement water during the violation period. During 2015, irrigation districts north of the Delta have paid at least \$250 per acre-foot of replacement water. Thus, by illegally diverting 2,067 acre-feet of water from June 13 through June 25, BBID avoided purchased water costs of at least \$516,750.
38. The Division estimates that its staff cost to investigate the unauthorized diversion issues and develop the enforcement documents to be \$3,000.
39. BBID is known to be serving water to Mountain House Community Service District and to power generation facilities that may be deemed critical energy suppliers. BBID and Mountain House Community Service District took corrective actions to secure water available via contract and transfer. Although these supplies were not provided during the violation period identified above, they are recognized as progressive correction actions to prevent unauthorized diversions. Also taken into consideration is the fact that BBID has stopped its diversions from June 26.
40. Having taken into consideration the factors described above, the Assistant Deputy Director for Water Rights recommends an ACL for the unauthorized diversion of water in the amount of \$1,553,250. The recommended penalty is based on the circumstances known to this time, BBID's continued diversions despite lack of availability of water to serve its right during extreme ongoing drought conditions, and to provide a strong disincentive for continued unauthorized diversions by BBID and any similarly-situated parties. The Prosecution Team will consider adjustment of the recommended penalty if BBID provides evidence of the amounts of water pumped that were for health and safety needs or critical power generation.
41. Should the matter go to hearing, the State Water Board may consider a different liability based on the evidence received, including additional staff costs incurred, up to the maximum amount provided by law. It is estimated that if this matter goes to hearing, additional staff costs incurred for the prosecution staff would be approximately \$10,000.

Byron-Bethany Irrigation District

**RIGHT TO HEARING**

- 42. BBID may request a hearing on this matter before the State Water Board. Any such request for hearing must be in writing and received or postmarked within 20 days of the date this notice is received. (California Water Code, § 1055, subd. (b).)
- 43. If BBID requests a hearing, BBID will have an opportunity to be heard and to contest the allegations in this Complaint and the imposition of an ACL by the State Water Board. If a hearing is requested, separate notice setting the time and place for the hearing will be mailed not less than 10 days before the hearing date.
- 44. If BBID requests a hearing, the State Water Board will consider at the hearing whether to impose the civil liability, and, if so, whether to adjust the proposed liability within the amount authorized by statute. Based on the evidence received at the hearing, the State Water Board may take any appropriate action in accordance with sections 100, 275, and 1050 et seq. of the California Water Code and its responsibilities under the public trust doctrine. Any State Water Board order imposing an ACL shall become final and effective upon issuance.
- 45. If BBID does not wish to request a hearing, please remit a cashier's check or money order within 20 days of the date of this Complaint for the amount of the ACL set forth above to:  
  
State Water Resources Control Board  
Division of Water Rights  
Enforcement Section  
P.O. Box 2000  
Sacramento, CA 95812-2000
- 46. If BBID does not request a hearing and does not remit the ACL amount, the State Water Board may seek recovery of the ACL amount as authorized by Water Code section 1055.4.

STATE WATER RESOURCES CONTROL BOARD



*John O'Hagan, Assistant Deputy Director  
Division of Water Rights*

Dated: JUL 20 2015

**BBID**  
**EXHIBIT 279**



State Water Resources Control Board

RECEIVED

JUL 18 2015

Byron-Bethany  
Irrigation District



July 15, 2015

BYRON-BETHANY IRRIGATION DISTRICT  
C/O RICK GILMORE, GENERAL MANAGER  
7995 BRUNS ROAD  
BYRON, CA 94514

**PARTIAL RESCISSION OF APRIL, MAY AND JUNE 2015 CURTAILMENT NOTICES AND CLARIFICATION OF STATE WATER BOARD POSITION RE: NOTICES OF UNAVAILABILITY OF WATER FOR THOSE DIVERTING WATER IN THE SACRAMENTO RIVER WATERSHED, SAN JOAQUIN RIVER WATERSHED AND DELTA, AND SCOTT RIVER**

The State Water Resources Control Board (State Water Board) issued two letters earlier this year (January 23, 2015 and April 2, 2015) advising persons of the drought and the resulting lack of surface water availability. These letters were issued to facilitate planning for diversions during critical water supply shortages.

In addition to the planning letters, the State Water Board staff has issued notices to specific water diverters alerting categories of users that information available to the State Water Board staff indicates there is insufficient water available to divert under the priority of their water rights. These notices were issued as follows:

**Sacramento River and Delta**

- o May 1, 2015: All post-1914 rights (concurrent with term 91 curtailment); and
- o June 12, 2015: All appropriative water rights with a priority date between 1903 and 1914.

**San Joaquin River**

- o April 23, 2015: All post-1914 appropriative rights; and
- o June 12, 2015: All appropriative water rights with a priority date between 1903 and 1914.

**Additional San Joaquin River Sub-watersheds**

- o June 26, 2015: Appropriative rights in the Upper San Joaquin watershed with a priority date senior to 1903;
- o June 26, 2015: Appropriative rights in the Merced watershed with a priority date between 1858 and 1902; and
- o June 26, 2015: Four appropriative rights in the Tuolumne River watershed.

**Scott River**

- o April 23, 2015: All Decreed Surplus Class Rights, Post-1914 rights, and Priority class 2 water rights in Schedule D4.

You received one of the above notices because information available to the State Water Board, of which you may not be aware, indicates there is insufficient water to divert under the priority of your right. The notice was provided to ensure that diverters: (a) are aware of the severity of the situation; (b) have reliable information regarding the amount of water available for their diversion; and (c) have information on whether water that may appear to be available instead is only available to serve senior rights (expressed in the notices as priority of rights).

The purpose of this notice is to rescind the "curtailment" portions of the unavailability notices you received. To the extent that any of the notices described above contain language that may be construed as an order requiring you to stop diversions under your affected water right, that language is hereby rescinded. Similarly, any language that may be construed as requiring affected water right holders to submit curtailment certification forms is hereby rescinded.



BBII

July 15, 2015

Please note that information available to the State Water Board continues to indicate that there is insufficient water available for the categories of junior water users identified in the State Water Board's prior correspondence, identified above. If you believe you received this notice in error, or have information that you want to provide in response to this notice, or have information you believe the State Water Board staff should otherwise consider, you may submit that information via email to: [SWRCB-Drought-Availability@waterboards.ca.gov](mailto:SWRCB-Drought-Availability@waterboards.ca.gov)

Diversion is always subject to water availability limitations, and diversions under your affected water right may be subject to enforcement should the State Water Board find such diversions are or were unauthorized. The State Water Board is continuing its drought-year inspections to determine whether diverters are using water to which they are not entitled.

**Diversion when there is no available water under the priority of your right is an unauthorized diversion and use and is subject to enforcement by the State Water Board.** Those who are found to be diverting water beyond what is legally available to them may be subject to administrative penalties, cease and desist orders, or prosecution in court. If the State Water Board finds following an adjudicative proceeding that a person or entity has diverted or used water unlawfully, the State Water Board may assess penalties of up to \$1,000 per day of violation and \$2,500 for each acre-foot diverted or used in excess of a valid water right. (See Water Code, §§ 1052, 1055.) Additionally, if the State Water Board issues a Cease and Desist Order against an unauthorized diversion, violation of any such order can result in penalties of up to \$10,000 per day. (See Water Code, §§ 1831, 1845.) Any State Water Board enforcement action will be based upon the availability of water and be consistent with the reasonable and beneficial use requirement contained in article X, section 2 of the California Constitution. This notice does not establish or impose any new compliance responsibilities. Non-compliance with this notice shall not constitute a basis for the State Water Board's initiation of any enforcement action.

Consistent with the partial rescission of the prior notices, you are not required to complete and file the Curtailment Certification Form (Form) attached to the prior notices. The prior notices stated that there are no exceptions to curtailment, but provided opportunity for persons to inform the State Water Board, through the Form, whether they were under directives issued by the Division of Drinking Water or local health or drinking water regulation to provide continued water service to meet minimum health and safety standards. Although you are not required to complete the Form, you can voluntarily advise the State Water Board of directives regarding your domestic water system operation to facilitate the State Water Board's response to the drought conditions.

The State Water Board also encourages water right holders to assist in the prevention of unlawful diversion of water and in discouraging any waste or unreasonable use of water. To assist the State Water Board, you may file a complaint at: [http://www.dtsc.ca.gov/database/CalEPA\\_Complaint/index.cfm](http://www.dtsc.ca.gov/database/CalEPA_Complaint/index.cfm).

We recognize the burden and loss that California's historic drought is causing, and want to assure that others do not illegally benefit from your compliance with the Water Code.

Sincerely,



Thomas Howard  
Executive Director

# **EXHIBIT 299**

1 KAMALA D. HARRIS  
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2 GAVIN G. MCCABE  
Supervising Deputy Attorney General  
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7 Attorneys for Respondent and Defendants State  
Water Resources Control Board, et al.

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF  
9 SAN JOAQUIN

11  
12 BANTA-CARBONA IRRIGATION  
DISTRICT,

13 Petitioner/Plaintiff

14 vs,

15 CALIFORNIA STATE WATER  
16 RESOURCES CONTROL BOARD;  
THOMAS HOWARD, EXECUTIVE  
17 DIRECTOR OF THE CALIFORNIA STATE  
WATER RESOURCES CONTROL BOARD

18 Respondents/Defendants  
19  
20  
21

Case No. 39-2015-00326421-CU-WM-WTK

Declaration of John O'Hagan in  
Opposition to Petitioner/Plaintiff's  
Application for Stay and/or in the  
Alternative Temporary Restraining Order  
and/or Preliminary Injunction

Hearing Date: June 23, 2015

Time: 9:15 a.m.

Dept: 41

Judge: The Honorable Carter P. Holly

Trial Date: TBA

Action Filed: June 18, 2015

By Fax

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23  
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1 I, John O'Hagan, declare:

2 1. I have been an employee of the State Water Resources Control Board (State Water  
3 Board) for the past 34 years, and I am currently employed by the Board. Since May 2003 I have  
4 overseen the Enforcement Section of the State Water Board's Division of Water Rights  
5 (Division). Since April 2014, I have been the Division's Assistant Deputy Director overseeing the  
6 Enforcement Section and the Permitting and Licensing Section. As Assistant Deputy Director, I  
7 supervise the State Water Board's analyses for determining if water supplies are sufficient to  
8 meet current water use demands in critical watersheds during the 2014 and 2015 drought. I am  
9 responsible to meet with stakeholders of the watershed and ensure our information is transparent  
10 and I provide monthly updates to the Board at its monthly Board Meetings. I have a 1980  
11 Bachelor of Science Degree in Civil Engineering from California State University at Sacramento,  
12 and I have been registered as a Professional Civil Engineer in California since 1984.

13  
14  
15 2. As part of my responsibility for overseeing the Enforcement Section, I am  
16 responsible for the work of the Enforcement Section that includes, but is not limited to, statewide  
17 compliance and complaint investigations of water diversion projects and initiating formal  
18 enforcement actions. Part of these activities is monitoring diversions to ensure compliance with  
19 the state's water rights priority system. These activities include monitoring for the purpose of  
20 determining whether any diversion and use of water is authorized under the Water Code.

21  
22 3. The State Water Board has been vested by the Legislature with the authority to  
23 prevent unauthorized diversions and supervise the water right priority system. (See, e.g. Wat.  
24 Code §§ 174, 186, 1050, 1051, 1051.5, 1052, 1825.)

25 4. The water right priority system provides the primary basis for determining which  
26 users may divert, and how much, when there is insufficient water in the stream for all users.

27 Riparian right holders generally have the most senior priority to natural flows in a stream, and

1 older, more senior appropriative water rights have priority over more junior appropriative water  
2 rights. Senior water right holders are more likely to receive water at times of shortage than more  
3 junior water right holders. However, once water is stored or imported from another watershed,  
4 the entity that stored or imported the water has the paramount right to that water. Other  
5 appropriative water rights holders may divert any abandoned return flows. Riparian water right  
6 holders are only entitled to divert natural flow, so are not entitled to divert releases, or the return  
7 flows from upstream releases of stored water.  
8

9 5. When the amount of water available in a surface water source is not sufficient to  
10 support the needs of existing water right holders, the more junior right holders must cease  
11 diversion in favor of more senior right holders. However, it is not always clear to a junior  
12 diverter whether there is sufficient flow in the system to support their diversion and at the same  
13 time support senior water uses downstream. It can also be difficult to determine whether releases  
14 of stored water are abandoned flows that may be diverted or whether those flows are not available  
15 for diversion because they are being released for downstream purposes. Similarly, it can be  
16 difficult for a riparian to know if water is natural flow, or stored or imported water and whether  
17 and when and to what extent correlative reductions in water use are needed due to the need to  
18 share limited supplies amongst riparians. In accordance with the State's water right priority  
19 system, the State Water Board notifies diverters of the need to curtail water diversions when  
20 sufficient flows in a watershed are not available for a water user's needs, based on their priority  
21 of right.  
22  
23

24 6. A curtailment notice is a notification to water right holders of a certain priority of  
25 right that, due to water shortage conditions, the State Water Board has determined water is not  
26 available under their priority of right. A notice of curtailment is not an enforceable decision or  
27 order of the State Water Board. The notice provides the affected water right holder with the State

1 Water Board's findings of the unavailability of water under their priority of right for a certain  
2 right and the need to cease diversion under that right, the exceptions to the notice for direct  
3 diversion of water for power, and for continued use of previously stored water, and the potential  
4 for future enforcement for unauthorized diversions. A curtailment notice does not consider any  
5 particular diverter's other senior water rights or other facts such as water supply contracts,  
6 agreements, transfers or groundwater supplies that may allow the diverter to continue to divert  
7 lawfully. The notice is therefore not a State Water Board determination that any individual  
8 diverter is taking water without authorization under the Water Code. A diverter who continues to  
9 divert after receiving a notice of curtailment is not subject to penalties for violation of the  
10 curtailment notice, but may be subject to enforcement for an unauthorized diversion if their  
11 diversions do not fall within the exceptions enunciated in the notice and are not entirely  
12 authorized by other, non-curtailed water rights.  
13  
14

15 7. I have reviewed the Notice of Unavailability of Water and Need for Immediate  
16 Curtailment dated June 12, 2016 and addressed to Patterson Irrigation District and attached as  
17 Exhibit A to the petitioner's petition for writ of mandate. This notice is the type of curtailment  
18 notice that I described in paragraph 6. This notice does not constitute a decision or order of the  
19 State Water Board or a determination that Patterson Irrigation District, petitioner, or any other  
20 individual diverter has engaged in an unauthorized diversion of water under the Water Code.  
21

22 8. Diversion of water when it is unavailable under a diverter's priority of right  
23 constitutes an unauthorized diversion and a trespass against the state. The State Water Board may  
24 subject such unauthorized diversions to an Administrative Civil Liability (ACL) of up to \$1,000  
25 per day and \$2,500 per acre-foot of water unlawfully diverted in a drought year, or refer a diverter  
26 to the Attorney General's office for enforcement. The State Water Board may also issue  
27 administrative cease and desist orders and request court injunctions to require that diversions  
28

1 stop.

2 9. Before issuing such an order, the State Water Board must have particularized  
3 information regarding an unlawful diversion or the potential of such a diversion: the Board may  
4 not issue an enforceable order requiring diversion to cease simply based on lack of water  
5 availability, absent information that there is a risk of or actual continued diversion. Additionally,  
6 before issuing a final enforcement order, the State Water Board must first issue a draft Cease and  
7 Desist Order or an ACL Complaint. If such enforcement action is proposed, a water right holder  
8 is entitled to, upon written request within 20 day of receipt of the draft enforcement action, an  
9 evidentiary hearing on all issues before the order takes effect.  
10

11 10. The general analysis for determining the necessity for curtailment of water rights  
12 in any watershed compares the current and projected available water supply with the total water  
13 right diversion demand. For the water availability determination of the curtailment analysis, the  
14 State Water Board relies upon the full natural flows of watersheds calculated by the Department  
15 of Water Resources (DWR) for certain watersheds in its Bulletin 120, and in subsequent monthly  
16 updates. "Unimpaired Runoff" or "Full Natural Flow" represents the natural water production of  
17 a river basin, unaltered by upstream diversions, storage, or by export or import of water to or  
18 from other watersheds. The full natural flow amount is different than the measured stream flows  
19 at the given measurement points because the gauged flows are increased or decreased to account  
20 for these upstream operations. Forecasted flow data is uncertain so DWR provides the data in the  
21 form of "levels of exceedance" or simply "exceedance" to show the statistical probability that the  
22 forecasted supply will occur. The exceedance is simply the percent of the time that the actual  
23 flow is expected to exceed the projected flow. The 90 percent exceedance hydrology assumes  
24 inflows from rainfall and snowmelt at levels that are likely to be met or exceeded by actual flows  
25 with a 90 percent probability, or in other words, there is a ten percent or less chance of actual  
26  
27  
28

1 conditions turning out to be this dry or drier. The 50 percent exceedance is the 50/50 forecast.

2 The State Water Board uses both exceedances for its analyses.

3 11. Specifically, for the San Joaquin River watershed, the State Water Board totaled  
4 DWR's full natural flows for the Stanislaus, Tuolumne, Merced, Upper San Joaquin, Cosumnes  
5 and Mokelumne rivers on a monthly basis as the monthly available water supply for the San  
6 Joaquin River watershed. State Water Board staff also increased these total full natural flow  
7 amounts by adding monthly quantities for smaller watersheds and estimated return flows based on  
8 the DWR's May, 2007 Report of Unimpaired Flow Data. Estimates in the report for 1977 were  
9 used for these adjustments. The monthly adjusted water supply is provided in acre-feet per month  
10 and the State Water Board converts these amount into average monthly cubic feet per second for  
11 graphic purposes (at two exceedance levels). The State Water Board also shows DWR's daily  
12 full natural flow calculations on the graph for consideration before any curtailment. DWR's daily  
13 full natural flow calculations are less accurate because they are based on less data than is  
14 available at the completion of each month. Due to the lag between the effect of upstream  
15 operations and downstream flow measurements, calculated daily FNF will fluctuate from day to  
16 day. State Water Board staff also checks available forecast information from the California-  
17 Nevada River Forecast Center, real time flow conditions from the DWR and United States  
18 Geological Survey. This real time information and forecasted precipitation events can delay the  
19 curtailment notice.  
20  
21

22  
23 12. For water right demands, the State Water Board relies on information supplied by  
24 water right holders on annual or triennial reports of water diversion and use required to be true  
25 and accurate to the best of the knowledge of the diverters. The State Water Board also received  
26 2014 diversions data from water right holders that represents 90 percent of the water diverted  
27 from April through September in the Delta, and 90 percent of the water diverted from the upper  
28

1 Sacramento and San Joaquin Rivers. This information was required pursuant to Order WR 2015-  
2 0002 dated February 4, 2015. All reported monthly water diversion data is compiled by  
3 watershed, type of right and priority dates. The State Water Board performs quality control  
4 checks and removes obvious errors, excess reporting, removes demand for direct diversion for  
5 power, and makes additional changes based on stakeholders comments. The corrected demand  
6 data includes the 2014 reported data for 90% of the watershed demand plus for the remaining  
7 diverters, an averaged diversion amount for 2010 through 2013. These monthly diversion  
8 demands are grouped into water right types (riparian, pre-1914 and post-1914 rights) and by  
9 priority dates for pre-1914 and post-1914 rights. For the Sacramento-San Joaquin River  
10 Watersheds, special consideration of the Delta diversions is made. To be most conservative for  
11 the San Joaquin River, the State Water Board performs a proportional analysis based on the  
12 inflows from the watersheds. For example, for the month of June, the proportional full natural  
13 flow of the San Joaquin River watershed based on 90% exceedance, was 17 percent. Therefore,  
14 the San Joaquin watershed Delta demand was 17 percent of the total Delta demand.  
15

16  
17 13. The State Water Board provides graphical summations of these priorities with  
18 monthly demands for the total riparian demand at bottom, the pre-1914 demands added to riparian  
19 and depicted above the riparian demand. The monthly amounts are averaged into cubic feet per  
20 second for graphical purposes.  
21

22 14. The State Water Board is consistently making adjustments to its analyses based on  
23 new information obtained from stakeholders, or adjustments to projected flows from the DWR.  
24 State Water Board staff reviews this information and provides revisions to its data set and graphs  
25 that are all shown on the Drought Website.

26 15. The goal of curtailments is principally to ensure that water to which senior water  
27 right holders are entitled is actually available to them. To ensure that this occurs generally  
28

1 requires that some water remain in most streams to satisfy senior demands at the furthest  
2 downstream point of diversion of these senior water rights.

3 16. Attached as Exhibit B is a water supply and demand chart prepared by the State  
4 Water Board and issued on June 11, 2015 entitled "2015 San Joaquin River Basin Senior  
5 Supply/Demand Analysis with Proportion Delta Demand." The bar graph data discloses in terms  
6 of cubic feet per second the anticipated demand for water by riparian and pre-1914 water users  
7 for the period of March through September, 2015. The variable solid blue line displays the daily  
8 full natural flow from March 1, 2015 through June 7, 2015 of the San Joaquin River basin. The  
9 declining dotted lines represent the forecasted full natural flow through September, 2015 for the  
10 adjusted 50% and 90% exceedance levels. Based upon the data and information from which  
11 Exhibit B was derived and other relevant data, the State Water Board concluded that there is  
12 insufficient water in the San Joaquin River basin to satisfy water right claimants with priorities of  
13 1903 or later.  
14  
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16 17. On January 17 and April 2, 2014, the State Water Board issued a Notice of Surface  
17 Water Shortage and Potential for Curtailment of Water Right Diversions. The notice advised that  
18 if dry weather conditions persist, the State Water Board will notify water right holders of the  
19 requirement to limit or stop diversions of water under their water rights, based on water right  
20 priority.  
21

22 18. In April, the State Water Board began issuing drought-related curtailment notices  
23 to water right holders in a number of water-short watersheds.

24 The following notices of curtailment have been mailed to water right holders:

25 April 3, 2015- Antelope Creek Fishery Protection Regulation

26 April 17, 2015- Deer Creek Fishery Protection Regulation

27 April 23, 2015- Post-1914 and Surplus Class Rights in Scott River

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April 23, 2015- All post-1914 rights in the San Joaquin River Watershed.

April 30, 2015- all Permits and Licenses subject to Term 91 in Sacramento-San Joaquin watersheds and Delta.

May 1, 2015- All post-1914 rights in Sacramento River Watershed and Delta

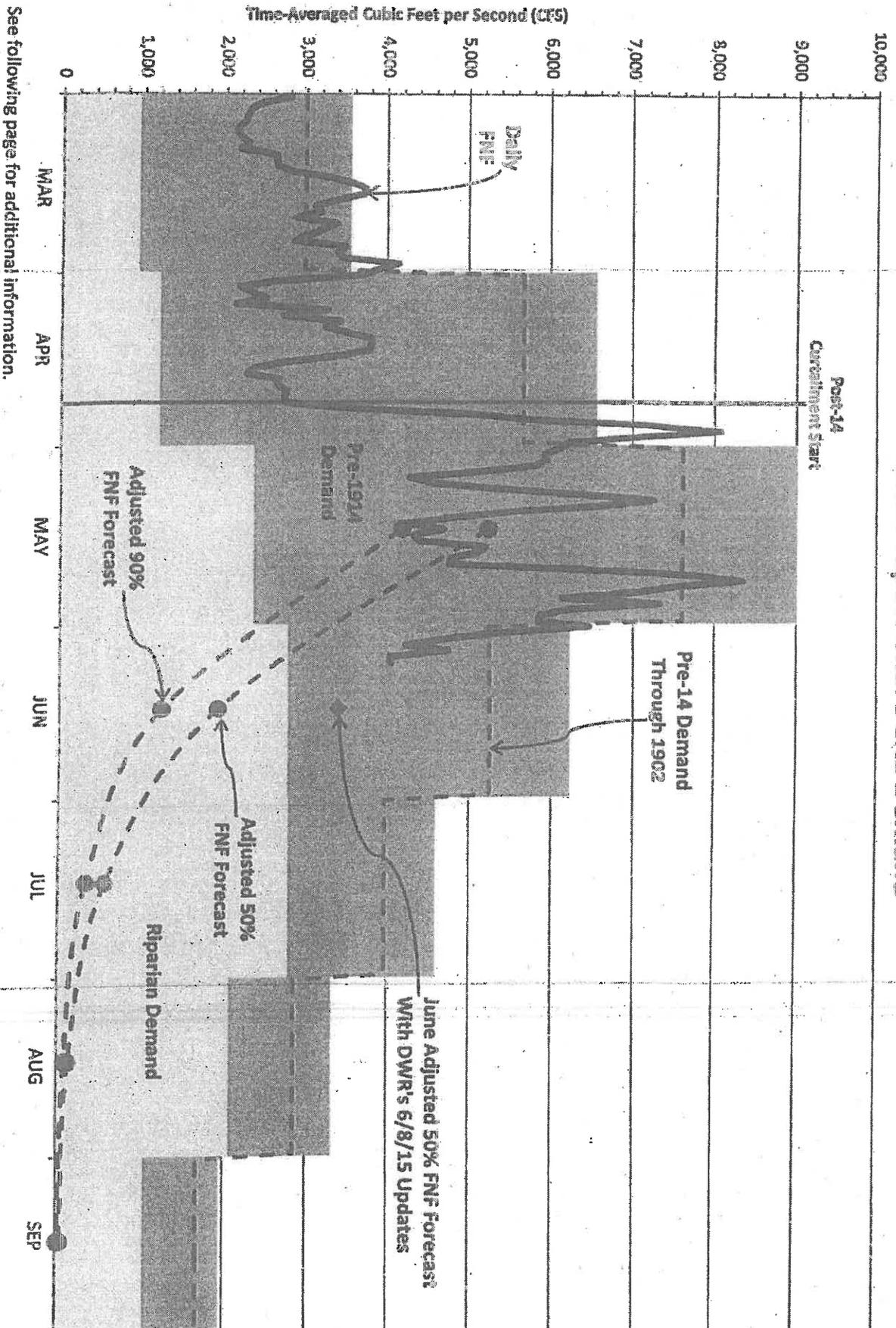
June 12, 2015- Pre-1914 rights with a priority dated of 2003 or later in the Sacramento-San Joaquin watershed and Delta.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge. Executed this 22 day of June, 2015 in Sacramento, California



JOHN O'HAGAN

# 2015 San Joaquin River Basin Senior Supply/Demand Analysis With Proportional Delta Demand



See following page for additional information.

# **EXHIBIT 379**

FILED / ENDORSED  
JUL 23 2015  
By E. Higginbotham, Deputy Clerk,

Exempt from Filing Fees  
Pursuant to Government  
Code Section 6103

1 STEVEN A. HERUM – SBN: 90462  
2 JEANNE M. ZOLEZZI – SBN: 121282  
3 KARNA E. HARRIGFELD – SBN: 162824  
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8 Telephone: (209) 472-7700

9 Attorneys for Petitioner  
10 THE WEST SIDE IRRIGATION DISTRICT

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12 IN AND FOR THE COUNTY OF SACRAMENTO

13 THE WEST SIDE IRRIGATION DISTRICT;  
14 CENTRAL DELTA WATER AGENCY;  
15 SOUTH DELTA WATER AGENCY; and  
16 WOODS IRRIGATION COMPANY,

17 Petitioners/Plaintiffs,

18 vs.

19 CALIFORNIA STATE WATER  
20 RESOURCES CONTROL BOARD;  
21 THOMAS HOWARD, EXECUTIVE  
22 DIRECTOR OF CALIFORNIA STATE  
23 WATER RESOURCES CONTROL BOARD;  
24 and DOES 1 THROUGH 100, INCLUSIVE.

25 Respondents/Defendants.

Case No.: 34-2015-80002121  
[PROPOSED] ORDER PARTIALLY  
GRANTING PETITIONERS' EX PARTE  
APPLICATION FOR TEMPORARY  
RESTRAINING ORDER AND ISSUING AN  
ORDER TO SHOW CAUSE AS TO WHY A  
PRELIMINARY INJUNCTION SHOULD  
NOT BE GRANTED

Petition Filed: June 29, 2015  
Hon. Shelleyanne W. L. Chang

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BY FAX

25 On July 8, 2015, Petitioners/Plaintiffs', The West Side Irrigation District, Central Delta  
26 Water Agency ("CDWA") and South Delta Water Agency ("SDWA") (collectively,  
27 "Petitioners"), Ex Parte Application Seeking a Stay or Temporary Restraining Order / Order to

HERUM\CRABTREE\SUNTAG  
476,945,93

1  
[PROPOSED] ORDER GRANTING PETITIONERS' EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND  
ISSUING AN ORDER TO SHOW CAUSE AS TO WHY A PRELIMINARY INJUNCTION SHOULD NOT BE GRANTED

1 Show Cause concerning the May 1, 2015 and June 12, 2015 Curtailment Letters<sup>1</sup> issued by  
2 Respondents/Defendants, the California State Water Resources Control Board and through its  
3 Executive Director, Thomas Howard (collectively, "Respondents"), came on for ex parte hearing  
4 in the above-referenced Court before the Honorable Judge Shelleyanne W. L. Chang, Judge  
5 Presiding.

6 Steven A. Herum, Jennifer L. Spaletta and Dean Ruiz appeared for Petitioners/Plaintiffs  
7 and Matthew Bullock and Clifford Lee appeared for Respondents/Defendants at the Ex Parte  
8 Hearing. The parties submitted moving and opposing papers on an ex parte basis shortly before  
9 the hearing. All parties had the opportunity to present oral arguments concerning the issues  
10 raised in the moving and opposing papers.

11 Having considered the moving and opposing papers and having considered the oral  
12 arguments presented by the parties regarding the ex parte application for stay or temporary  
13 restraining order, and good cause having been shown, the **COURT FINDS AS FOLLOWS:**

- 14 1. The Curtailment Letters are properly subject to a judicial determination of whether they  
15 violate the Petitioners' due process rights such that a temporary restraining order/order to  
16 show cause should issue.<sup>2</sup>
- 17 2. Although a petition for reconsideration filed by West Side Irrigation District is pending  
18 concerning the May Curtailment Letter, the Court finds this is a situation where the  
19 pursuit of the administrative remedy would result in irreparable harm absent a temporary  
20 restraining order. (See *People ex rel. DuFauchard v. U.S. Financial Management, Inc.*

21  
22 <sup>1</sup> The May 1, 2015 Curtailment Letter is titled "NOTICE OF UNAVAILABILITY OF WATER  
23 AND IMMEDIATE CURTAILMENT" (hereinafter "May Curtailment Letter"). The June 12,  
24 2015 Curtailment Letter is titled "NOTICE OF UNAVAILABILITY OF WATER AND NEED  
25 FOR IMMEDIATE CURTAILMENT" (hereinafter "June Curtailment Letter"). Collectively, the  
26 May 1, 2015 Curtailment Letter and the June 12, 2015 Curtailment Letter are entitled  
27 "Curtailment Letters."

28 <sup>2</sup> Petitioners have filed a petition for reconsideration pursuant to California Water Code section  
1126(b) which petition is still pending before the Water Resources Control Board and for which  
the 90-day period for reconsideration has not yet expired. (See Petition, ¶ 21; Wat. Code §1122.)  
The Court declines to interfere in these administrative proceedings, and consequently in no way  
stays the furtherance of that petition in accordance with the Water Code. The Court agrees that in  
light of the pending reconsideration petition, this matter is not subject to a Civil Code section  
1094.5, subdivision (g) stay.

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(2009) 169 Cal.App.4th 1502, 1512) (citing *Public Employment Relations Bd. v. Superior Court* (1993) 13 Cal.App.4th 1816, 1827). Petitioners' belief that they must stop diverting water, not because to do so would be a legal violation but merely a violation of the May Curtailment Letter, will result in irreparable harm to their crops while they await a decision on the petition for reconsideration. (Decl. of Jack Alvarez, ¶¶ 7, 8, 11.) Consequently, Petitioners will be irreparably harmed should they have to wait for final resolution of the administrative process before obtaining relief from the immediate mandate the May Curtailment Letter appears to impose outside of the statutory processes provided by the Water Code.

3. The Court further finds, for the reasons stated below, that the issuance of the Curtailment Letters violated Petitioners' Due Process rights. Every day the Letters remains in their current form constitutes a violation of those constitutional rights. Accordingly, it is proper for this Court to issue a temporary restraining order while the administrative process is ongoing.

4. With regard to the June Curtailment Letter, the Court liberally construes the allegations of the Petition For Writ of Administrative Mandate, as it must, and finds that for purposes of this *ex parte* application, Petitioners CDWA and SDWA have adequately pled that certain of their landowners exercise pre-1914 appropriative and/or permit licenses rights that are subject to the directives given in the June Letter. (Petition, ¶13, 14.) Consequently, Petitioners CDWA and SDWA have standing to bring the instant application concerning the June Curtailment Letter.

5. The Court finds the Curtailment Letters are coercive in nature and go beyond the "informational" purpose the Board claims prevents a stay. Consequently, Petitioners are likely to succeed on the merits. As in *Duarte Nursery, Inc. v. United States Corps of Engineers* (2014) 17 F.Supp.3d 1013 (*Duarte*), even though the Curtailment Letters are not enforceable on their own and there are no separate penalties for violating them, the language used in the Curtailment Letters results in a "comman[d] by the...[g]overnment to stop [water diverting] activities." (*Duarte*, 17 F.Supp.3d. at 1018.) It is not a

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suggestion for “voluntary cessation of activities,” but instead requires Petitioners to “immediately stop diverting water.” (*Id.* at 1019; Pet. exh. B.)

6. Respondents argue *Duarte* is distinguishable because it involved a single letter sent to a single rights-holder, and provided that the Army Corps of Engineers had already determined that a violation of the Clean Water Act had occurred. (*Duarte*, 17 F.Supp.3d at 1015.) Respondents contend the challenged Curtailment letters are form letters being sent to hundreds of appropriators, and are merely informational with no pre-determination that any individual rights-holder has violated the law.

7. While all parties acknowledge the Curtailment Letters were sent to more than one appropriator, the letters provided to the Court are addressed to an individual company, and identify a specific claim of rights at issue. The Curtailment Letters further declare and determine that the recipient is not entitled to divert water because that water is necessary to meet senior water rights holders, thus making a determination of the recipient’s water rights priority. (Pet., exh. B, ¶2.) By including this specific information, the Curtailment Letters appear not to be generalized notices, but instead a specific adjudication and command with respect to the particular rights holder.

8. Further, nothing in *Duarte* limits its holding to an instance involving only one notice. The *Duarte* court’s focus was on the fact that nothing in the letter notified “plaintiffs that the Corps could not take action based upon the CDO alone.” (*Duarte*, 17 F.Supp.3d at 1022.) The same is true in this situation, as the Curtailment Letters indicate the recipient must “immediately stop diverting water” and do not clearly state the letter is merely informational, without any legal force or effect.

9. The Curtailment Letters also require recipients to “document receipt of this notice by completing an online Curtailment Certification Form (Form) within seven days. The Form confirms your cessation of diversion under the specific pre-1914 claim of right. Completion of the Form is mandatory...” Nowhere in this language do the Curtailment Letters assert that Petitioners are free to ignore the directive to cease diverting water or

1 that this directive is merely a suggestion.<sup>3</sup> At the hearing on this matter, Respondents  
2 acknowledged that the Form requires diverters to sign under penalty of perjury that they  
3 are no longer diverting water.

4 10. Although the Curtailment Letters do not state that the Board has made a specific  
5 determination that the particular recipient has already engaged in illegal conduct, the  
6 letters plainly state that the recipient must “immediately stop diverting water” because  
7 there is insufficient water for the diverter to continue diverting and that the only action  
8 available is to sign the compliance certification that “confirms your cessation of diversion  
9 under the specific pre-1914 claim of right.” (Pet., exh. B.)<sup>4</sup> As in *Duarte*, this strong  
10 directive implicates a pre-determination as to the availability of water pursuant to the  
11 recipient’s appropriation rights. The Board, “did not ‘notify’ plaintiffs they were  
12 operating in violation of the law, it commanded plaintiffs to stop their activities.”  
13 (*Duarte*, 17 F.Supp.3d at 1023.)

14 11. At oral argument, Respondents argued that because the Curtailment Letters did not  
15 expand or alter Petitioners’ civil liability for water diversions and are merely  
16 “informational documents”, a temporary restraining order should not issue. Respondents’  
17 argument is not only misguided, it is also inaccurate.

18 12. The focus is not whether the Petitioners’ legal exposure remains unchanged or not, but  
19 rather whether the Curtailment Letters could be reasonably interpreted to be an order or  
20 command by the government, not merely a suggestion or request for voluntary cessation  
21 of activities. (*Duarte*, 17 F.Supp.3d at 1020.) Moreover, contrary to Respondents’  
22 assertions, the Curtailment Letters have altered Petitioners’ legal position. The  
23 Curtailment Letters state that even if there is available water for the water user, said water

24  
25 <sup>3</sup> This is similar to *Phelps v. State Water Resources Control Board* (2007) 157 Cal.App.4th 89,  
26 where the Court held plaintiffs were aggrieved by a curtailment notice within the meaning of  
27 section 1126(b) because it “required plaintiffs to immediately discontinue diversion of water  
under their licenses.” Although *Phelps* involved only one notice, the implication of the language  
of the letters is the same as in this case.

28 <sup>4</sup> In *Duarte* the Court noted that the assertion that a violation has already occurred, by itself, is  
insufficient to satisfy the ripeness requirement. A letter or notice must also threaten  
consequences for failure to take certain action, as it does here. (*Duarte*, 17 F.Supp.3d at 1025.)

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1 is dedicated for senior water rights' holders needs, conclude that the recipient no longer  
2 has any legal right to said water, and orders the recipient to "immediately stop diverting  
3 water..." Indeed, the Curtailment Letters appear to alter Petitioners' civil liability as the  
4 Board has apparently concluded without hearing or notice that Petitioners are no longer  
5 entitled to divert water for their needs.

6 13. As the court in *Duarte* stated, "If the [Letters] were simply a 'notification' to plaintiffs,  
7 then it should have said so, rather than clothing itself as an 'order' which carried with it  
8 the authority to 'prohibit' the plaintiffs from continuing their activities." (*Duarte*, 17  
9 F.Supp.3d at 1020.) The Court recognizes, and Respondents admit, that the Curtailment  
10 Letters do not subject Petitioners to any additional liability or penalties above that which  
11 they may already be subjected to due to the extreme drought conditions California is  
12 currently experiencing. However, the Curtailment Letters represent that the Board has  
13 already adjudicated that the recipients are no longer entitled to divert water and that any  
14 future diversions would be improper and a trespass ["This Form confirms your cessation  
15 of diversion under the specific post-1914 water right... Completion of the form is  
16 mandatory to avoid unnecessary enforcement proceedings"].

17 14. Respondents are free to provide truly informational notices to water diverters of the  
18 nature of the drought and the Board's right to initiate Water Code section 1831 or 1052  
19 proceedings. Respondents are also free to initiate inquiries with diverters as to whether  
20 they have alternate water sources and to otherwise exercise their statutory enforcement  
21 authority under the Water Code, including investigation and instituting any actions for  
22 trespass. To be clear, Respondents are free to exercise their statutory authority to enforce  
23 the Water Code as to any water user, including these Petitioners, if it deems them to be in  
24 violation of any provisions of the Water Code, so long as the bases for said action are not  
25 the Curtailment Letters.

26 15. However, the language of the Curtailment Letters goes beyond informational and is  
27 instead coercive such that a recipient is likely to believe they are no longer allowed to  
28 divert. This belief is not because such a diversion would be a trespass or other legal

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violation, but because the Board has already declared in the Curtailment Letters that it has made a determination that they are no longer entitled to divert under their appropriative water rights, without any sort of pre-deprivation hearing. Respondents do not challenge Petitioners' assertion that any cessation of water diversion done in response to the Curtailment Letters, not as a result of an unavailability of legally divertible water, would cause a serious hardship to Petitioners. This is an issue ripe for judicial intervention and the Court concludes that the Curtailment Letters as presently drafted constitute a violation of the due process rights of the Petitioners.<sup>5</sup>

16. The Curtailment Letters, including the requirement that recipients sign a compliance certification confirming cessation of diversion, result in a taking of Petitioners' property rights without a pre-deprivation hearing, in violation of Petitioners' Due Process Rights.

Based on the foregoing, the **COURT HEREBY ORDERS AS FOLLOWS:**

- (1) Petitioners' ex parte application for a temporary restraining order and an order to show cause as to why a preliminary injunction should not issue requiring the Board to issue a revised letter/notice that is informational in nature are **HEREBY GRANTED**.
- (2) A temporary restraining order shall issue staying or prohibiting Respondents/ Defendants State Water Resources Control Board and Thomas Howard from taking any action against the West Side Irrigation District and landowners of the other petitioner Districts on the basis of the 2015 Curtailment Letters sent by the Water Board's Executive Director, Thomas Howard, or on the basis of a failure to complete a Curtailment Certification Form.
- (3) This matter is set for an Order to Show Cause on **July 30, 2015 at 9:00 a.m. in Department 24**. Respondents shall file with the clerk of Department 24 and serve (via email or fax) any supplemental Opposition to the Order to Show Cause no later than

<sup>5</sup> There is no allegation that Petitioners have filed a petition for reconsideration with the Board concerning the June Curtailment Notice. Respondents made no argument that Petitioners were required to do so before bringing the instant petition and ex parte application. Consequently, the Court does not address whether such a reconsideration petition was required.

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**July 16, 2015.** Petitioners shall file with the clerk of Department 24 and serve (via email or fax) any Reply no later than **July 23, 2015.**

(4) Petitioners' application for a temporary stay pursuant to Code of Civil Procedure Section 1094.5(g) is **HEREBY DENIED.**

**IT IS SO ORDERED:**

Date: July 23, 2015

SHELLEYANNE W.L. CHANG  
Honorable Judge Shelleyanne W. L. Chang  
Superior Court of California, County of Sacramento

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PROOF OF SERVICE

I, LAURA CUMMINGS, certify and declare as follows:

I am over the age of 18 years, and not a party to this action. My business address is 5757 Pacific Avenue, Suite 222, Stockton, California 95207, which is located in the county where the mailing described below took place.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing. On July 10, 2015 at my place of business a copy of [PROPOSED] ORDER GRANTING PETITIONERS' EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ISSUING AN ORDER TO SHOW CAUSE AS TO WHY A PRELIMINARY INJUNCTION SHOULD NOT BE GRANTED was placed for deposit following ordinary course of business as follows:

BY U.S. MAIL with the United States Postal Service in a sealed envelope, with postage thereon fully prepaid.

OFFICE OF THE CALIFORNIA ATTORNEY GENERAL  
Deputy Attorney General Clifford Lee  
Deputy Attorney General Matthew Bullock  
455 Golden Gate Ave., Suite 11000  
San Francisco, CA 94102

*Attorneys for California State Water Resources Control Board*

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Dante John Nomellini, Jr.  
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*Attorneys for Central Delta Water Agency*

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Post Office Box 2660  
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*Attorney for Central Delta Water Agency*

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S. Dean Ruiz  
HARRIS, PERISHO & RUIZ  
3439 Brookside Road, Suite 210  
Stockton, CA 95219

*Attorney for Woods Irrigation Company*

BY ELECTRONIC MAIL (EMAIL) at \_\_\_\_\_ a.m. By sending the document(s) to the person(s) at the email address(es) listed below.

BY FEDERAL EXPRESS/OVERNIGHT MAIL in a sealed envelope, with postage thereon fully prepaid. [Code Civ. Proc., §§ 1013(c), 2015.5.]

BY PERSONAL SERVICE/HAND DELIVERY.

BY FACSIMILE at approximately 8:40 a.m. by use of facsimile machine telephone number (209) 472-7986. I caused the facsimile machine to print a transmission record of the transmission, a copy of which is attached to this declaration. The transmission was reported as complete and without error. [Cal. Rule of Court 2008 and 2003(3).]

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

Dated: July 20, 2015.

  
LAURA CUMMINGS

# **EXHIBIT A**

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SACRAMENTO

<b>DATE:</b>	July 10, 2015	<b>DEPT. NO.:</b>	24
<b>JUDGE:</b>	HON. SHELLEYANNE W. L. CHANG	<b>CLERK:</b>	E. HIGGINBOTHAM
<p><b>THE WEST SIDE IRRIGATION DISTRICT; CENTRAL DELTA WATER AGENCY; SOUTH DELTA WATER AGENCY; WOODS IRRIGATION COMPANY,</b></p> <p style="text-align: center;">Petitioners and Plaintiffs,</p> <p style="text-align: center;">v.</p> <p><b>CALIFORNIA STATE WATER RESOURCES CONTROL BOARD; THOMAS HOWARD, EXECUTIVE DIRECTOR OF CALIFORNIA STATE WATER RESOURCES CONTROL BOARD; and DOES 1 THROUGH 100, INCLUSIVE,</b></p> <p style="text-align: center;">Respondents and Defendants.</p>		<p>Case No.: 34-2015-80002121</p>	
<b>Nature of Proceedings:</b>		<p><b>ORDER AFTER HEARING ON EX PARTE APPLICATION FOR TEMPORARY STAY RE: ENFORCEMENT OF CURTAILMENT NOTICE OR IN THE ALTERNATIVE TEMPORARY RESTRAINING ORDER AND/OR FOR ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION</b></p>	

This matter came before the Court pursuant to an ex parte application by the West Side irrigation District, Central Delta Water Agency, and South Delta Water Agency. The ex parte application seeks a stay or a temporary restraining order/order to show cause concerning the May 1, 2015 and June 12, 2015, "NOTICE OF UNAVAILABILITY OF WATER AND NEED FOR IMMEDIATE CURTAILMENT..."<sup>1</sup> (hereinafter referred to as the "May Curtailment Letter" and the "June Curtailment Letter", jointly referred to as the "Curtailment Letters") issued by the State Water Resources Control Board through its Executive Director Thomas Howard.

Counsel for Petitioners/Plaintiffs appeared at the ex parte hearing, as well as counsel for Respondents/Defendants. All parties had the opportunity to present oral arguments concerning the issues raised in the moving and opposing papers.

<sup>1</sup> This language is from the heading of the June 1, 2015 letter. The May 1, 2015 letter is titled, "NOTICE OF UNAVAILABILITY OF WATER AND IMMEDIATE CURTAILMENT..."

The Court finds the May Curtailment Letter is properly subject to a judicial determination of whether it violates the Petitioners' due process rights such that a temporary restraining order/order to show cause should issue.<sup>2</sup> The Court finds there is no administrative process Petitioners must exhaust prior to this determination as to the May Curtailment Letter.<sup>3</sup>

Although a petition for reconsideration is still pending concerning the May Curtailment Letter, the Court finds that this is a situation where the pursuit of the administrative remedy would result in irreparable harm absent a temporary restraining order. (See *People ex rel. DuFauchard v. U.S. Financial Management, Inc.* (2009) 169 Cal.App.4th 1502, 1512)(citing *Public Employment Relations Bd. v. Superior Court* (1993) 13 Cal.App.4th 1816, 1827.) Petitioners' belief that they must stop diverting water, not because to do so would be a legal violation but merely a violation of the May Curtailment Letter, will result in irreparable harm to their crops while they await a decision on the petition for reconsideration. (Decl. of Jack Alvarez, ¶¶ 7, 8, 11.) Consequently, Petitioners will be irreparably harmed should they have to wait for final resolution of the administrative process before obtaining relief from the immediate mandate the May Curtailment Letter appears to impose outside of the statutory processes provided by the Water Code.

Moreover, for the reasons stated below, the Court finds that the issuance of the May Curtailment Letter violated Petitioners' Due Process rights. Every day the Letter remains in its current form constitutes a violation of those constitutional rights. Accordingly, it is proper for this Court to issue a temporary restraining order while the administrative process is ongoing.

With regard to the June Curtailment Letter, the Court liberally construes the allegations of the Petition For Writ of Administrative Mandate, as it must, and finds that for purposes of this ex parte application, Petitioners CDWA and SDWA have adequately pled that their landowners exercise pre-1914 appropriative and/or permit licenses rights that are subject to the directives given in the Letter. (Petition, ¶13, 14.) Consequently, Petitioners CDWA and SDWA have standing to bring the instant application concerning the June Curtailment Letter.

The Court finds the 2015 Curtailment Letters are coercive in nature and go beyond the "informational" purpose the Board claims prevents a stay. Consequently, Petitioners are likely to succeed on the merits. As in *Duarte*, even though the Curtailment Letters are not

---

<sup>2</sup> Petitioners have filed a petition for reconsideration pursuant to California Water Code section 1126(b) which petition is still pending before the Water Resources Control Board and for which the 90-day period for reconsideration has not yet expired. (See Petition, ¶ 21; Wat. Code § 1122.) The Court declines to interfere in these administrative proceedings, and consequently in no way stays the furtherance of that petition in accordance with the Water Code. The Court agrees that in light of the pending reconsideration petition, this matter is not subject to a Civil Code section 1094.5, subdivision (g) stay.

<sup>3</sup> Respondents have not argued Petitioners are required to exhaust their administrative remedies. Respondents have instead argued the petition with regard to the May Curtailment Letter is untimely pursuant to the 30-day deadline in section 1126. However, this deadline is extended while a petition for reconsideration is pending, as is the case here.

enforceable on their own and there are no separate penalties for violating them, the language used in the Curtailment Letters results in a “command by the...[g]overnment to stop [water diverting] activities.” (*Duarte Nursery, Inc. v. United States Army Corps of Engineers* (2014) 17 F.Supp.3d 1013, 1018.) It is not a suggestion for “voluntary cessation of activities,” but instead requires Petitioners to “immediately stop diverting water.” (*Id.* at 1019; Pet. exh. B.)

Respondents argue *Duarte* is distinguishable because it involved a single letter sent to a single rights-holder, and provided that the Army Corps of Engineers had already determined that a violation of the Clean Water Act had occurred. (*Duarte*, 17 F.Supp.3d at 1015.) Respondents contend here, the Curtailment letters are form letters being sent to hundreds of appropriators, and are merely informational with no pre-determination that any individual rights-holder has violated the law.

While all parties acknowledge the Curtailment Letters were sent to more than one appropriator, the letters provided to the Court are addressed to an individual company, and identify a specific claim of rights at issue. The Curtailment Letters further declare and determine that the recipient is not entitled to divert water because that water is necessary to meet senior water rights holders, thus making a determination of the recipient’s water rights priority. (Pet., exh. B, ¶2.) Through the inclusion of this specific information, the Curtailment Letters appear not to be generalized notices, but instead a specific adjudication and command with respect to the particular rights holder.

Further, nothing in *Duarte* limits its holding to an instance involving only one notice. The *Duarte* court’s focus was on the fact that nothing in the letter notified “plaintiffs that the Corps could not take action based upon the CDO alone.” (*Duarte*, 17 F.Supp.3d at 1022.) The same is true here, as the Curtailment Letters indicate the recipient must “immediately stop diverting water” and do not clearly state that the letter is merely informational, without any legal force or effect.

The Curtailment Letters also require recipients to “document receipt of this notice by completing an online Curtailment Certification Form (Form) within seven days. The Form confirms your cessation of diversion under the specific pre-1914 claim of right. Completion of the Form is mandatory...” Nowhere in this language do the Curtailment Letters assert that Petitioners are free to ignore the directive that they cease diverting water or that it is merely a suggestion.<sup>4</sup> At the hearing on this matter, Respondents acknowledged that the Form requires diverters to sign under penalty of perjury that they are no longer diverting water.

Although the Curtailment Letters do not state that the Board has made a specific determination that the particular recipient has already engaged in illegal conduct, the letters plainly state that the recipient must “immediately stop diverting water” and that

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<sup>4</sup> This is similar to *Phelps v. State Water Resources Control Board* (2007) 157 Cal.App.4th 89, where the Court held plaintiffs were aggrieved by a curtailment notice within the meaning of section 1126(b) because it “required plaintiffs to immediately discontinue diversion of water under their licenses.” Although *Phelps* involved only one notice, the implication of the language of the letters is the same as in this case.

the only action available is to sign the compliance certification that “confirms your cessation of diversion under the specific pre-1914 claim of right.” (Pet., exh. B.)<sup>5</sup> As in *Duarte*, this strong directive implicates a pre-determination as to the availability of water pursuant to the recipient’s appropriation rights. The Board, “did not ‘notify’ plaintiffs they were operating in violation of the law, it commanded plaintiffs to stop their activities.” (*Duarte*, 17 F.Supp.3d at 1023.)

At oral argument, Respondents argued that because the Curtailment Letters did not expand or alter Petitioners’ civil liability for water diversions and are merely “informational documents”, a temporary restraining order should not issue. Respondents’ argument is not only misguided, it is also inaccurate.

The focus is not whether the Petitioners’ legal exposure remains unchanged or not, but rather whether the Curtailment Letters could be reasonably interpreted to be an order or command by the government, not merely a suggestion or request for voluntary cessation of activities. (*Duarte*, 17 F.Supp.3d at 1020.) Moreover, contrary to Respondents’ assertions, the Curtailment Letters have altered Petitioners’ legal position. The Curtailment Letters state that even if there is available water for the water user, said water is dedicated for senior water rights’ holders needs, conclude that the recipient no longer has any legal right to said water, and orders the recipient to “immediately stop diverting water...” Indeed, the Curtailment Letters appear to alter Petitioners’ civil liability as the Board has apparently concluded without hearing or notice that Petitioners are no longer entitled to divert water for their needs.

As the Court in *Duarte* stated, “If the [Letters] were simply a ‘notification’ to plaintiffs, then it should have said so, rather than clothing itself as an ‘order’ which carried with it the authority to ‘prohibit’ the plaintiffs from continuing their activities.” (*Duarte*, 17 F.Supp.3d at 1020.) The Court recognizes, and Respondents admit, that the Curtailment Letters do not subject Petitioners to any additional liability or penalties above that which they may already be subjected to due to the extreme drought conditions California is currently experiencing. However, the Curtailment Letters represent that the Board has already adjudicated that the recipients are no longer entitled to divert water and that any future diversions would be improper and a trespass [“This Form confirms your cessation of diversion under the specific post-1914 water right... Completion of the form is mandatory to avoid unnecessary enforcement proceedings”].

Respondents are free to provide truly informational notices to water diverters of the nature of the drought and the Board’s right to initiate Water Code section 1831 or 1052 proceedings. Respondents are also free to initiate inquiries with diverters as to whether they have alternate water sources and to otherwise exercise their statutory enforcement authority under the Water Code, including investigation and instituting any actions for trespass. To be clear, Respondents are free to exercise their statutory authority to enforce the Water Code as to any water user, including these Petitioners, if it deems them to be in

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<sup>5</sup> In *Duarte* the Court noted that the assertion that a violation has already occurred, by itself, is insufficient to satisfy the ripeness requirement. A letter or notice must also threaten consequences for failure to take certain action, as it does here. (*Duarte*, 17 F.Supp.3d at 1025.)

violation of any provisions of the Water Code, so long as the bases for said action are not the Curtailment Letters.

However, the language of the Curtailment Letters goes beyond informational and is instead coercive such that a recipient is likely to believe they are no longer allowed to divert. This belief is not because such a diversion would be a trespass or other legal violation, but because the Board has already declared in the Curtailment Letters that it has made a determination that they are no longer entitled to divert under their appropriative water rights, without any sort of pre-deprivation hearing. Respondents do not challenge Petitioners' assertion that any cessation of water diversion done in response to the Curtailment Letters, not as a result of an unavailability of legally divertible water, would cause a serious hardship to Petitioners. This is an issue ripe for judicial intervention and the Court concludes that the Curtailment Letters as presently drafted constitute a violation of the due process rights of the Petitioners.<sup>6</sup>

The Curtailment Letters, including the requirement that recipients sign a compliance certification confirming cessation of diversion, result in a taking of Petitioners' property rights without a pre-deprivation hearing, in violation of Petitioners' Due Process Rights. The Court hereby **GRANTS** the ex parte application for a temporary restraining order/order to show cause as to why a preliminary injunction should not issue requiring the Board to issue a revised letter/notice that is informational in nature.

A temporary restraining order shall issue staying or prohibiting Defendants State Water Resources Control Board and Thomas Howard from taking any action against the West Side Irrigation District and landowners of the other petitioner Districts on the basis of the 2015 Curtailment Letters sent by the Water Board's Executive Director, Thomas Howard, or on the basis of a failure to complete a Curtailment Certification Form.

The matter is set for an order to show cause on July 30, 2015 at 9:00 a.m. in Department 24. Respondents shall file with the clerk of Department 24 and serve (via email or fax) any supplemental Opposition to the Order To Show Cause no later than July 16, 2015. Petitioners shall file with the clerk of Department 24 and serve (via email or fax) any Reply no later than July 23, 2015. The application for a temporary stay pursuant to CCP §1094.5(g) is **DENIED**.

Counsel for Petitioners to submit a formal order for the Court's signature pursuant to CRC 3.1312.

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<sup>6</sup> There is no allegation that Petitioners have filed a petition for reconsideration with the Board concerning the June Curtailment Notice. Respondents made no argument that Petitioners were required to do so before bringing the instant petition and ex parte application. Consequently, the Court does not address whether such a reconsideration petition was required.

**Declaration of Mailing**

I hereby certify that I am not a party to the within action and that I deposited a copy of this document in sealed envelopes with first class postage prepaid, addressed to each party or the attorney of record in the U.S. Mail at 720 Ninth Street, Sacramento, California.

Dated: July 10, 2015

E. Higginbotham, Deputy Clerk /s/ E. Higginbotham

A handwritten signature in black ink, appearing to be 'E. Higginbotham', written over a horizontal line that extends to the right.

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# **EXHIBIT B**

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SANTA CLARA  
BEFORE THE HONORABLE PETER H. KIRWAN, JUDGE  
DEPARTMENT 1

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CALIFORNIA WATER CURTAILMENT CASES. )  
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) NO. 1-15-CV-285182  
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REPORTER'S TRANSCRIPT OF PROCEEDINGS  
SEPTEMBER 22, 2015

---oOo---

A P P E A R A N C E S:  
FOR THE PLAINTIFF:           MICHAEL VERGARA  
                                  Attorney at Law  
  
                                  DANIEL KELLY  
                                  Attorney at Law  
  
                                  KARNA HARRIGFELD  
                                  Attorney at Law  
  
                                  STEVE HERUM  
                                  Attorney at Law  
  
                                  JENNIFER SPALETTA  
                                  Attorney at Law  
  
FOR THE DEFENDANT:           MATTHEW BULLOCK  
                                  Attorney at Law  
  
                                  CLIFFORD LEE  
                                  Attorney at Law  
  
OFFICIAL COURT REPORTER:    MELISSA CRAWFORD, CSR, RPR  
                                  CSR NO. 12288

1 felt it was incumbent on them to inform the Court that these  
2 factual issues we had disagreements with. And it was to that  
3 end that there was a Mr. O'Hagan declaration submitted.

4 THE COURT: Okay. So, what I'm hearing you tell me is  
5 that the proceedings will be an evidentiary hearing where each  
6 party will have an opportunity to present evidence to an  
7 impartial tribunal; is that correct?

8 MR. LEE: That is correct.

9 THE COURT: All right. And no decision will be made  
10 until both sides have an opportunity to present their evidence,  
11 correct?

12 MR. LEE: Correct, Your Honor.

13 THE COURT: All right. All right, let's talk -- let's  
14 switch gears here and talk a little bit about concurrent  
15 jurisdiction, all right? I read the *National Audubon* case. And  
16 it's factually distinguishable from this case. But that isn't  
17 the only reason why I'm not particularly persuaded by it. I  
18 think there are sound reasons that go beyond just different  
19 facts that cause me concern about the Court's reliance on that  
20 case in making any type of determination that there's concurrent  
21 jurisdiction here. In that case it was an environmental agency,  
22 as you know, suing Los Angeles. And, ultimately, the Court,  
23 towards the latter part of the conclusion, concluded that  
24 because the Court could, under certain sections of the Water  
25 Code, utilize its right to employ somebody from the State Water  
26 Agency as a referee. That there was concurrent jurisdiction.  
27 And there was enough body of law that said we're not going to  
28 take it out of the hands of the Court.

1 STATE OF CALIFORNIA )  
2 COUNTY OF SANTA CLARA ) ss.

3

4 I, MELISSA CRAWFORD, HEREBY CERTIFY:

5 That I was the duly appointed, qualified shorthand  
6 reporter of said court in the above-entitled action taken on the  
7 above-entitled date; that I reported the same in machine  
8 shorthand and thereafter had the same transcribed through  
9 computer-aided transcription as herein appears; and that the  
10 foregoing typewritten pages contain a true and correct  
11 transcript of the proceedings had in said matter at said time  
12 and place to the best of my ability.

13 I further certify that I have complied with CCP  
14 237(a)(2) in that all personal juror identifying information has  
15 been redacted, if applicable.

16

17 DATED: OCTOBER 8, 2015

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20

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MELISSA CRAWFORD, CSR, RPR  
CSR No. 12288

21

22

23

24 ATTENTION:  
25 CALIFORNIA GOVERNMENT CODE  
SECTION 69954(D) STATES:

26 "ANY COURT, PARTY, OR PERSON WHO HAS PURCHASED A TRANSCRIPT MAY,  
27 WITHOUT PAYING A FURTHER FEE TO THE REPORTER, REPRODUCE A COPY  
28 OR PORTION THEREOF AS AN EXHIBIT PURSUANT TO COURT ORDER OR  
RULE, OR FOR INTERNAL USE, BUT SHALL NOT OTHERWISE PROVIDE OR  
SELL A COPY OR COPIES TO ANY OTHER PARTY OR PERSON."

# **EXHIBIT C**

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

HON. SHELLEYANNE W.L. CHANG, JUDGE, DEPARTMENT 24

---o0o---

THE WEST SIDE IRRIGATION DISTRICT; )  
CENTRAL DELTA WATER AGENCY; SOUTH )  
DELTA WATER AGENCY and WOODS )  
IRRIGATION COMPANY, )  
Petitioners/Plaintiffs,)

vs.

) Case Number  
) 34-2015-80002121

CALIFORNIA STATE WATER RESOURCES )  
CONTROL BOARD; THOMAS HOWARD, )  
EXECUTIVE DIRECTOR OF CALIFORNIA )  
STATE WATER RESOURCES CONTROL BOARD )  
and DOES 1 through 100, inclusive, )  
Respondents/Defendants.)

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

---o0o---

THURSDAY, JULY 30, 2015

---o0o---

APPEARANCES:

For the Petitioner/Plaintiff WEST SIDE IRRIGATION DISTRICT:

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JEANNE M. ZOLEZZI, Esq.  
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5757 Pacific Avenue, Suite 222  
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(209) 472-7700

---o0o---

Lisa A. Busath, RPR, CSR No. 10751

Pursuant to Government Code section 69954(d): Any court, party, or person...shall not otherwise provide or sell a copy or copies to any other party or person.

1 MR. LEE: So, yes, the answer to your question is  
2 yes.

3 THE COURT: Okay. So just kind of following along  
4 with your criminal complaint analogy, to the extent --  
5 well, can the petitioners make an argument that the  
6 evidence upon which the CDOs were issued was tainted and  
7 that the CDOs are fruit of the poisonous tree, and that  
10:04:59 8 because they are fruit of the poisonous tree, the CDOs  
9 must be rescinded or declared void?

10 MR. LEE: Well, to the extent that that evidence  
11 is the only evidence that the agency relies upon, that the  
12 prosecuting team relies upon, then that certainly would be  
13 a factor that the Board could conclude.

14 THE COURT: So they could consider whether or not  
15 the evidence was received from an independent source?

16 MR. LEE: Yes. Your Honor, the Board has a  
10:05:31 17 technical staff. It does its own analysis separate and  
18 apart from the prosecution unit. The Board also listens  
19 to evidence and reviews evidence as provided by the  
20 parties that are before them. Not only the petitioners  
21 but any other party that wants to participate in that  
22 proceeding.

23 The independent evidence that the Board considers,  
24 the evidence of the parties, all are part of the  
10:05:58 25 administrative record. If there is an objection timely  
26 raised in the proceeding as to particular evidence, the  
27 Board will rule on that and make a determination of its  
28 consideration.

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CERTIFICATE OF CERTIFIED SHORTHAND REPORTER

STATE OF CALIFORNIA        )  
                                  )    ss.  
COUNTY OF SACRAMENTO    )

I, LISA A. BUSATH, hereby certify that I am an Official Certified Shorthand Reporter, and that at the times and places shown, I recorded verbatim in shorthand writing all the proceedings in the following described action completely and correctly, to the best of my ability:

- Court: Superior Court of California, County of Sacramento.
- Judge: HON. SHELLYANNE W.L. CHANG, Department Number 24.
- Case: THE WEST SIDE IRRIGATION DISTRICT, et al., Petitioners, vs. CALIFORNIA STATE WATER RESOURCES CONTROL BOARD, et al., Respondents, Case Number 34-2015-80002121.
- Date: THURSDAY, JULY 30, 2015.

I further certify that my said shorthand notes have been transcribed into typewriting, and that the foregoing pages 1 to 40, inclusive, constitute an accurate and complete transcript of all of my shorthand writing for the dates and matter specified.

I further certify that I have complied with CCP 237(a)(2) in that all personal juror identifying information have been redacted, if applicable.

Dated: August 9, 2015.

LISA A. BUSATH, RPR, CSR NO. 10751

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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.

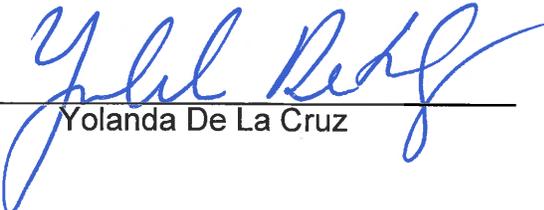
On January 25, 2016, I served the following document(s):

**DECLARATION OF LAUREN D. BERNADETT IN SUPPORT OF MOTION TO DISMISS ADMINISTRATIVE CIVIL LIABILITY COMPLAINT IN ENF01951 FOR VIOLATION OF DUE PROCESS**

(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 January 25, 2016, at Sacramento, California.

  
\_\_\_\_\_  
Yolanda De La Cruz

**SERVICE LIST OF PARTICIPANTS  
BYRON-BETHANY IRRIGATION DISTRICT  
ADMINISTRATIVE CIVIL LIABILITY HEARING  
(Revised 9/2/15; Revised: 9/11/15)**

**SOMACH SIMMONS & DUNN**  
A Professional Corporation

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**SERVICE LIST  
WEST SIDE IRRIGATION DISTRICT  
CEASE AND DESIST ORDER HEARING**

**SOMACH SIMMONS & DUNN**  
A Professional Corporation

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2 DANIEL KELLY, ESQ. (SBN 215051)  
MICHAEL E. VERGARA, ESQ. (SBN 137689)  
3 LAUREN D. BERNADETT, ESQ. (SBN 295251)  
500 Capitol Mall, Suite 1000  
4 Sacramento, California 95814-2403  
Telephone: (916) 446-7979  
5 Facsimile: (916) 446-8199

6 Attorneys for Petitioner/Plaintiff BYRON-  
BETHANY IRRIGATION DISTRICT  
7

8  
9 BEFORE THE  
10 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

11 ENFORCEMENT ACTION ENFO1949  
12 DRAFT CEASE AND DESIST ORDER  
REGARDING UNAUTHORIZED  
13 DIVERSIONS OR THREATENED  
UNAUTHORIZED DIVERSIONS OF WATER  
14 FROM OLD RIVER IN SAN JOAQUIN  
COUNTY  
15 In the Matter of ENFORCEMENT ACTION  
16 ENF01951 – ADMINISTRATIVE CIVIL  
LIABILITY COMPLAINT REGARDING  
17 UNAUTHORIZED DIVERSION OF WATER  
FROM THE INTAKE CHANNEL TO THE  
18 BANKS PUMPING PLANT (FORMERLY  
ITALIAN SLOUGH) IN CONTRA COSTA  
19 COUNTY

SWRCB Enforcement Action  
ENF01951 and ENF01949

DECLARATION OF LAUREN D.  
BERNADETT IN SUPPORT OF  
MOTION TO DISMISS  
ADMINISTRATIVE CIVIL  
LIABILITY PROCEEDING IN  
ENF01951 FOR LACK OF  
STATUTORY AUTHORITY  
UNDER WATER CODE  
SECTION 1052

20 I, Lauren D. Bernadett, declare:

21 1. I am an attorney at law licensed to practice before the courts of the State of  
22 California. I am an associate with Somach Simmons & Dunn. The following matters are  
23 within my personal knowledge and, if called as a witness, I can competently testify  
24 thereto.

25 2. Attached hereto as BBID Exhibit 206 is a true and correct copy of the  
26 Agreement Between Byron-Bethany Irrigation District and the State of California  
27 Department of Water Resources, dated May 4, 1964.

28 3. Attached hereto as BBID Exhibit 208 is a true and correct copy of the

1 Agreement Between the Department of Water Resources of the State of California and  
2 the Byron-Bethany Irrigation District Regarding the Diversion of Water from the Delta,  
3 dated May 28, 2003.

4 4. Attached hereto as BBID Exhibit 217 is a true and correct copy of the Email  
5 from Michelle Morrow, Assistant Chief Counsel at the Department of Water Resources,  
6 to Barbara Evoy, Deputy Director of the Division of Water Rights, dated September 23,  
7 2014.

8 5. Attached hereto as BBID Exhibit 277 is a true and correct copy of the State  
9 Water Resources Control Board's Administrative Civil Liability Complaint in the Matter of  
10 Unauthorized Diversion by Byron-Bethany Irrigation District (including cover letter from  
11 John O'Hagan, Assistant Deputy Director of the Division of Water Rights, to Rick  
12 Gilmore and Daniel Kelly regarding Enforcement Action ENF01951), dated July 20,  
13 2015.

14 6. Attached hereto as BBID Exhibit 336 is a true and correct copy of the  
15 Statement of William T. O'Leary Regarding Byron-Bethany Irrigation District's Use of  
16 Water in July and August of 1977, dated August 27, 1986.

17 7. Attached hereto as Exhibit A is a true and correct copy of excerpts from the  
18 Deposition of Katherine Mrowka, November 16, 2015.

19 8. Attached hereto as Exhibit B is a true and correct copy of excerpts from the  
20 Deposition of John O'Hagan, Volume II, November 20, 2015.

21 9. Attached hereto as Exhibit C is a true and correct copy of the State Water  
22 Resources Control Board's Opening Brief in *Young v. State Water Resources Control*  
23 *Board* (2013) 219 Cal.App.4th 397, dated September 26, 2012.

24 I declare under penalty of perjury under the laws of the State of California that the  
25 facts recited above are true and correct. Executed this 25th day of January 2016 at  
26 Sacramento, California.

27 

28 Lauren D. Bernadett

# **EXHIBIT 206**

ORIGINAL

AGREEMENT NUMBER 353311

AGREEMENT BETWEEN  
BYRON-BETHANY IRRIGATION DISTRICT  
AND THE  
STATE OF CALIFORNIA  
DEPARTMENT OF WATER RESOURCES

THIS AGREEMENT, made and entered into by and between the BYRON-BETHANY IRRIGATION DISTRICT, hereinafter referred to as the "District," and the STATE OF CALIFORNIA acting by and through its Department of Water Resources, hereinafter referred to as the "State;"

W I T N E S S E T H:

WHEREAS, the State proposes to construct, as a part of state water development operations an intake channel in the vicinity of Byron; and

WHEREAS, said intake channel will cross District's S45 lateral canal and destroy a portion of said canal; and

WHEREAS, the District desires to relocate its pumping facilities to said intake channel in lieu of accepting a flume which the State has proposed to construct, at no cost to the District, to replace the portion of said S45 lateral canal which will be destroyed by the intake channel;

NOW, THEREFORE, it is mutually agreed as follows:

1. In lieu of constructing a flume for District and in exchange for that portion of District's S45 canal which will be destroyed by State's intake channel, State will pay to the District the sum of \$120,000. Such payment to District shall be made as soon after execution of this agreement as State's fiscal procedure will permit and shall relieve State of any obligation to provide

any temporary or permanent facilities or permissions relating to District's S45 canal other than the permanent and perpetual easement required for District's pumping plants on the intake channel as provided for herein and permission for the construction and temporary use of a bypass canal and siphon facilities as hereinafter described.

2. Upon execution of this agreement, State grants to District permission to construct, operate and maintain a temporary bypass canal substantially as shown on State's Drawing No. 151-1-H-23, attached hereto, marked Exhibit "A" and by this reference made a part hereof. Said construction, operation and maintenance shall be performed by and at the expense of District and District agrees to terminate use of said temporary canal and make it available to State, at no cost to State, not later than November 1, 1965, so that State may complete excavation and construction of State's intake channel.

3. State will make District's temporary siphon and permanent pump sites, located as shown on Byron-Bethany Irrigation District Drawing No. W26.06-1 attached hereto, marked Exhibit "B" and by this reference made a part hereof, available to District, without cost to District and without any preparation required solely for District's purposes, as soon as reasonably possible, but in no event later than December 1, 1965. Upon the availability of such sites, District may proceed with the construction and operation of District's proposed temporary siphon system. All construction, operation and maintenance of such siphon system shall be performed by and at the expense of District. Additionally, District may proceed with the construction of its contemplated permanent pumping

facilities, such construction to be by and at the expense of District. District shall not, however, undertake any construction until it has submitted its plans and specifications to State and has obtained State's approval thereof. State shall not unreasonably withhold or delay such approval. District will, not later than November 1, 1966, complete any of its work which would interfere with the flow of water in the intake channel, but shall not divert water from said channel prior to March 1, 1968. District will, prior to September 1, 1968, remove its temporary siphon from State's intake channel, such removal to be at District's sole cost and expense.

4. The relocation of District's pumping plants and points of diversion to the location shown on Exhibit "B" is being made pursuant to Section 1706 of the Water Code of the State of California and State hereby consents to said change in points of diversion to said locations, but to no other. It is further understood that District's rights to quantity and quality of water may or may not be undetermined at the present time. Nothing contained in this agreement nor in State's consent to change in District's points of diversion shall either enlarge or restrict District's present water rights. No charge shall hereafter be made by State to District for water pumped by District solely by reason of District's pumping from State's intake channel, irrespective of the source of water in said channel.

5. State and District, their agents, contractors and suppliers, shall cooperate with and shall not unreasonably restrict or interfere with the operations of each other's contractors working in the general area.

6. District, in the performance of its work contemplated herein, is acting on its own behalf and not as the agent, employer or contractor of State. State assumes no liability other than that expressly provided for herein for the actions of District in the performance of such work.

7. State hereby consents to the permanent and perpetual use by District, without cost, of State's facilities and of that portion of its right of way required for the construction, operation and maintenance of District's permanent facilities as provided for herein and located as shown on Exhibit "B" attached hereto, together with the right to use State's operating roads for access purposes.

8. Within 30 days following payment to District by State as provided for in paragraph 1 of this agreement, District will convey to State all of District's right, title and interest in that portion of its present easement, lying within State's intake channel, which will no longer be occupied by District's S45 canal or District's permanent facilities.

9. District reserves the right, at District's sole cost, expense and responsibility and as long as it does not interfere with State's facilities or conflict with any of the provisions of this agreement, to revert back at any time to its original pumping site and points of diversion. Such reversion shall not reconstitute the District's right of way across State's intake channel.

10. The waiver of a breach of any of the provisions of this agreement shall not be deemed to be a waiver of any other provisions hereof, or of a subsequent breach of such provisions.

IN WITNESS WHEREOF, the parties hereto have executed  
this agreement as of the 4 day of May,  
1964.

BYRON-BETHANY IRRIGATION DISTRICT

FORM	POLICY	SUBJECT
Department of General Services		
APPROVED		
JUN 11 1964		
BY	<u>Robert M. [Signature]</u> Director	

By M. R. [Signature]  
President, Board of Directors

By [Signature]  
Secretary

Approved as to legal  
form and sufficiency:

STATE OF CALIFORNIA  
Department of Water Resources

[Signature]  
Chief Counsel for the  
Department of Water Resources

By [Signature]  
DEPUTY DIRECTOR ADMINISTRATION

APPROVED BY  
[Signature]  
For Department

RECEIVED  
MAY 11 1964  
DEPARTMENT OF WATER RESOURCES  
BBID Exh. 206

# **EXHIBIT 208**

STATE OF CALIFORNIA  
THE RESOURCES AGENCY  
DEPARTMENT OF WATER RESOURCES

AGREEMENT BETWEEN  
THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF CALIFORNIA  
AND THE BYRON BETHANY IRRIGATION DISTRICT  
REGARDING THE DIVERSION OF WATER  
FROM THE DELTA

THIS AGREEMENT is made May 28, 2003, between the  
DEPARTMENT OF WATER RESOURCES OF THE STATE OF CALIFORNIA  
(Department), and the BYRON BETHANY IRRIGATION DISTRICT (District) a  
governmental agency acting under and by virtue of Division 11 of the California Water  
Code.

RECITALS

- A. The District maintains a right to divert water for irrigation and domestic uses from the Delta at a point where the Italian Slough channel intersects Old River based on a pre-1914 appropriative right.
- B. The Department holds certain appropriative rights from the State Water Resources Control Board pursuant to which water is conveyed and distributed by agreements through what is commonly referred to as the State Water Project, which permits include certain rights to divert and redivert water from the Delta.
- C. Pursuant to "Agreement Between Byron-Bethany Irrigation District and the State of California Department of Water Resources," executed May 4, 1964, and which remains in effect, the Department was allowed to cross the District's S45 lateral, destroy a portion of the lateral, and pay the District a lump sum of money for the

Agreement for Diversion  
Of Water from the Delta

District to construct two pumping plants on the Harvey O. Banks Delta Pumping Plant intake channel. The Department consented to the permanent and perpetual use by the District, without cost, of the Department's facilities and of that portion of its right of way required for the construction, operation and maintenance of the District's pumping facilities. The District, pursuant to Section 1706 of the Water Code of the State of California, changed its point of diversion from Italian Slough at Old River to the Intake Channel.

- D. The District provides water for irrigation and municipal and industrial purposes in parts of Contra Costa, San Joaquin, and Alameda counties.
- E. Pursuant to "Agreement Between the Department of Water Resources of the State of California and Byron-Bethany Irrigation District for an Exchange of Water," executed September 17, 1993, the terms for an annual exchange of up to a maximum of 4,000 acre-feet of water between the District and the Department were defined. The District was to make water available to the Department during the period April 1 through October 31 for a like amount of water made available to the District during the period November 1 through March 31. This exchange provided the District with a reliable year-round source of water for the approved Mountain House Community development.
- F. The purpose of this Agreement is to describe the nature and extent of the District's rights as between the District and the Department for the diversion of water from the Delta for agricultural, municipal and industrial uses within the District.

AGREEMENT

The parties agree as follows:

1. DEFINITIONS.

- a. "Delta" shall mean the Sacramento-San Joaquin Delta as defined in Section 12220 of the California Water Code as of the date of the execution of this Agreement.
- b. "Department" shall mean the Department of Water Resources of the State of California.
- c. "District" shall mean the Byron-Bathany Irrigation District and shall include all of the lands within the jurisdiction of the Byron-Bathany Irrigation District at the time the Agreement is executed, or are within the boundaries of the Mountain House Community, and those lands which may hereafter be annexed to the District with the approval of the Department, which are within the area shown on Attachment A.
- d. "Intake Channel" shall mean the Harvey O. Banks Delta Pumping Plant Intake channel.
- e. "Mountain House Community" shall mean the development described in the Mountain House Community general plan amendment (GP-92-09 as approved by the San Joaquin County Board of Supervisors on February 25, 1993, by Resolution R-93-110, plus those incidental areas to be included within the Master Plan of the Mountain House Community, as shown on the map dated May 5, 1993 attached as Attachment B.

f. "SWP" shall mean the State Water Resources Development System as defined in Section 12931 of the Water Code of the State of California.

g. "Year" shall mean the period January 1 through December 31.

2. TERM OF AGREEMENT

This Agreement shall become effective upon the date stated in the first sentence of this Agreement, and shall remain in effect through December 31, 2035.

Within a reasonable time prior to the expiration of this Agreement, the parties shall enter into good faith negotiations to renew this Agreement on terms and conditions agreeable to both parties. This Agreement may be amended or terminated at any time by mutual agreement of the parties. In the event this Agreement terminates, the parties' water rights, as between the Department and the District, shall exist as if this Agreement had not been executed.

3. ENVIRONMENTAL DOCUMENTATION

As may be necessary, the District shall serve as lead agency and the Department as responsible agency under the California Environmental Quality Act with respect to this Agreement. The District shall submit to the Department any environmental document that has been prepared and shall file a notice of determination under CEQA.

4. REGULATORY RESTRICTIONS

Restrictions imposed by state or federal regulatory agencies for environmental, drought, or other purposes that affect the ability of the Department to make water

diversions from the Delta for SWP deliveries, shall only be applied to the District if they are imposed directly upon the District by law.

5. INABILITY TO MAKE WATER AVAILABLE

If a structural emergency occurs such as a levee failure or a failure of a SWP facility due to but not limited to, earthquake or flood damage which prevents diversion of water from the Intake Channel and the Delta facilities for agricultural, municipal and industrial purposes, the Department shall not be in breach of this Agreement if it makes reasonable efforts to maintain operations of the SWP. Neither the Department nor any of its officers, agents, or employees shall be liable for any damage, direct or indirect, arising from shortages in the amount of water to be made available for diversion by the District as a result of emergencies, disasters, catastrophic conditions, or activities beyond the control of the Department.

6. AREA SERVED

District water shall not be sold or otherwise disposed of by the District for use outside of the District as shown on Attachment A, without the prior written consent of the Department. Such consent shall not be arbitrarily or unreasonably withheld. All return flow water from water diverted by the District under this Agreement shall be returned to the Delta channels.

7. WATER QUALITY

Neither the Department, nor its officers, agents, or employees shall be liable for the quality of the water diverted by the District, including but not limited to:

property damage, personal injury, or death arising out of or in connection with the quality of the water delivered beyond the District's diversion point.

8. RIGHT TO DIVERT WATER

The District maintains that water diverted by the District under this Agreement shall be deemed diverted under the District's present water rights. This Agreement neither enlarges nor restricts the District's present water rights. This Agreement shall constitute the full and sole agreement between the Department and the District to divert water from the Delta for agricultural, municipal and industrial use. The uses shall not be disturbed or challenged by the Department and the District shall not claim any right against the Department in conflict with provisions in this Agreement so long as this Agreement remains in full force and effect.

9. DIVERSION AMOUNT

The District may divert up to 50,000 acre-feet of water annually from the District's point of diversion in the Intake Channel, mile post 1.83, for beneficial use within historic District boundaries, as shown on Attachment A, at a rate not to exceed 300 cubic feet per second. The District may furnish water under the provisions of this Agreement to the Tracy Hills portion of the District, as shown on Attachment A, to the extent that such deliveries could have been made under the water rights of BBID in the absence of this Agreement. Total diversions by BBID for delivery within all portions of the District shall not exceed 50,000 acre-feet.

The District may divert water during any month of the year for agricultural, municipal, and industrial purposes.

10. MEASUREMENT OF WATER DIVERTED

The District shall measure the quantity of water diverted from the Delta and shall keep and maintain accurate and complete records thereof. The measuring devices and equipment shall be examined regularly, tested and serviced as needed to insure their accuracy by the District at its sole cost. At its discretion, the Department may inspect such measuring devices and equipment and the records relating to the diversion. The District shall continue to provide records of daily diversions to the Delta Field Division Area Control Center. The District shall take reasonable steps to ensure that 50,000 acre-feet maximum annual diversion in Paragraph 9 is not exceeded.

11. INDEMNITY

The District shall defend and hold harmless the Department and its officers, agents, or employees, from any action, liability, damages, claims of damages, judgement, or settlement, including, but not limited to those nor shall be liable for property damage, personal injury, and death (1) arising out of the control, carriage, handling, use, disposal, water quality, or distribution of water after it has been diverted by the District after such water has passed its diversion points, (2) involving the District's legal authority to divert water from the Delta, or (3) relating to the District's compliance with CEQA under Paragraph 3 of this Agreement.

12. RESERVATION WITH RESPECT TO STATE LAWS.

Nothing in this Agreement shall be construed as estopping or otherwise preventing either party, or any person, firm, association, corporation, or public body claiming by, through, or under either party, from contesting by litigation or other lawful means, the validity, constitutionality, construction, or application of any law of the State of California.

13. OPINIONS AND DETERMINATIONS

Where the terms of this Agreement provide for the action to be based upon the opinion, judgement, approval, review, or determination of either party hereto, such terms are not intended to be and shall never be construed as permitting such opinion, judgement, approval, review, or determination to be arbitrary, capricious, or unreasonable.

14. ASSIGNMENT

No assignment of this Agreement in whole or in part shall be valid without the written approval of the Department. The Department may impose reasonable terms and conditions on any assignment which it approves.

15. WAIVER OF RIGHTS.

Any waiver at any time by either party of its rights with respect to a default, or any other matter arising in connection with this Agreement, shall not be deemed to be a waiver with respect to any other default or matter.

16. ASSURANCE RELATING TO VALIDITY OF AGREEMENT

After the execution and delivery of this Agreement, the District may file and pursue to a final decree, including any appeal therefrom to the highest court of the State of California, in a court of competent jurisdiction a special proceeding for the judicial examination, approval, and confirmation of the proceedings of the District's Board of Directors and of the District leading up to and including the making of this Agreement and the validity of the provisions thereof as a binding and enforceable obligation upon the Department and the District. If, in this proceeding or other proceeding before a court of competent jurisdiction, any portion of this Agreement should be determined to be constitutionally invalid, then the remaining portions of this Agreement shall remain in full force and effect.

17. NOTICES

All notices that are required either expressly or by implication to be given by one party to the other under this Agreement shall be deemed to have been given if delivered personally or if enclosed in a properly addressed envelope and deposited in the United States Post Office for delivery by registered or certified mail and sent by facsimile. Unless and until formally notified otherwise, all notices shall be addressed to the parties at their addresses as shown below:

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on  
the date first above written.

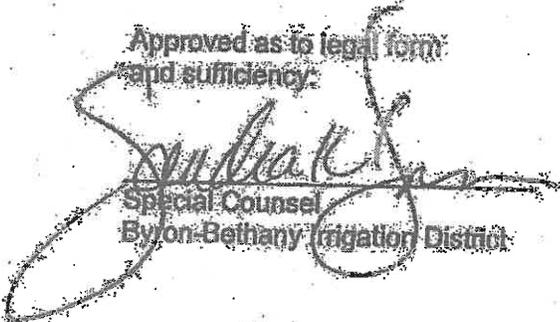
Approved as to legal form  
and sufficiency:

  
Chief Counsel  
Department of Water Resources

STATE OF CALIFORNIA  
DEPARTMENT OF WATER RESOURCES

  
Director

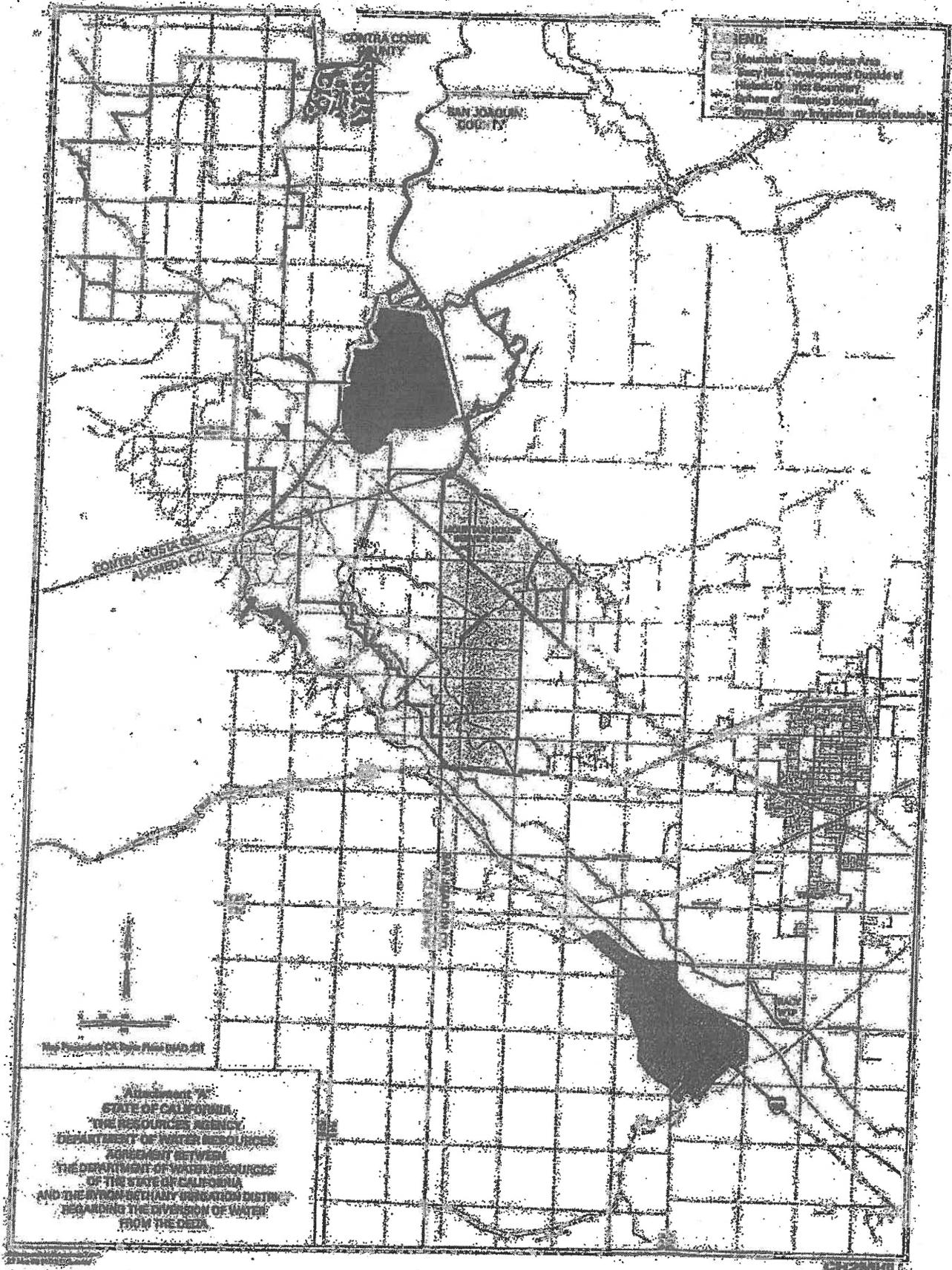
Approved as to legal form  
and sufficiency:

  
Special Counsel  
Byron-Bethany Irrigation District

BYRON-BETHANY IRRIGATION  
DISTRICT

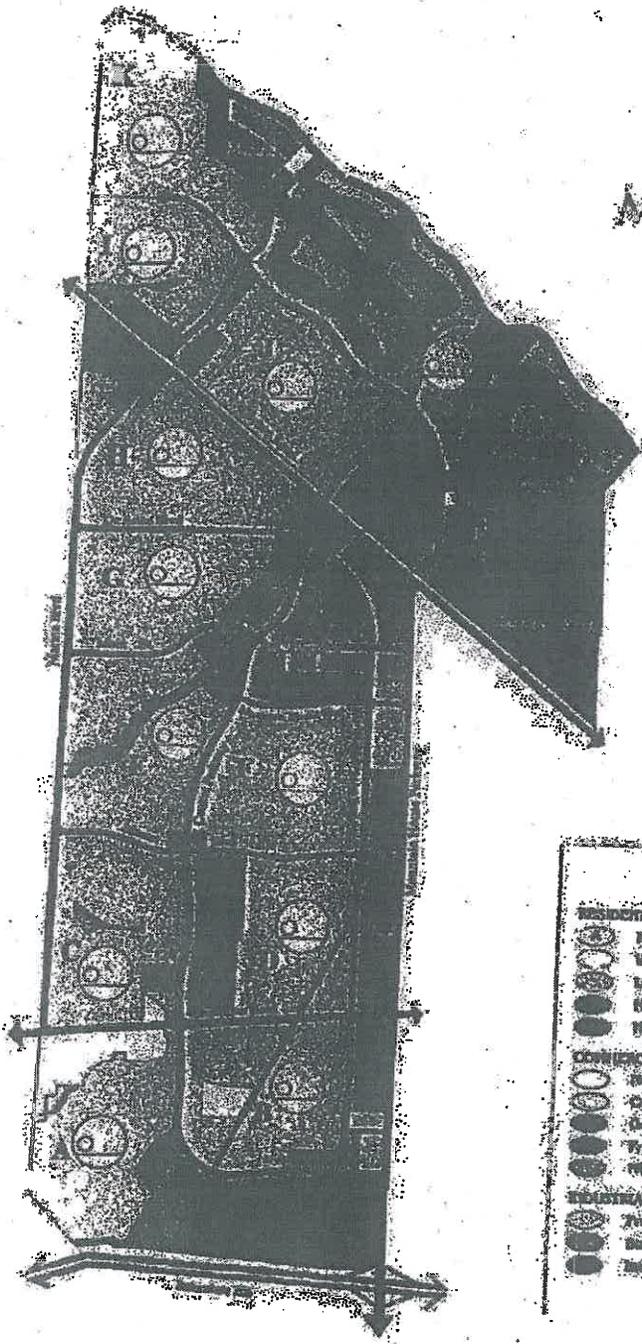
  
Signature

Attest:   
Secretary



Attachment 7  
**STATE OF CALIFORNIA**  
**THE RESOURCES AGENCY**  
**DEPARTMENT OF WATER RESOURCES**  
**AGREEMENT BETWEEN**  
**THE DEPARTMENT OF WATER RESOURCES**  
**OF THE STATE OF CALIFORNIA**  
**AND THE BROWN-SOUTH BAY IRRIGATION DISTRICT**  
**REGARDING THE DIVISION OF WATER**  
**FROM THE DELTA.**

**MH**  
**MOUNTAIN HOUSE**  
**MASTER PLAN**



1:26,000



**MASTER PLAN LEGEND**

<b>RESIDENTIAL</b>	<b>PARKS</b>
<ul style="list-style-type: none"> <li>Neighborhood Residential Center</li> <li>Very Low Density</li> <li>Low Density</li> <li>Medium Density</li> <li>High Density</li> </ul>	<ul style="list-style-type: none"> <li>Neighborhood Park</li> <li>Community Park</li> <li>Regional Park</li> </ul>
<b>COMMERCIAL</b>	<b>OFFICE</b>
<ul style="list-style-type: none"> <li>Neighborhood Commercial</li> <li>Community Commercial</li> <li>General Commercial</li> <li>Specialty Services Commercial</li> <li>Office Park</li> </ul>	<ul style="list-style-type: none"> <li>Open Space (PUD)</li> <li>Resource Conservation</li> <li>Water</li> </ul>
<b>EDUCATION</b>	<b>SCHOOLS</b>
<ul style="list-style-type: none"> <li>Regional Office</li> <li>Business Park</li> <li>Industry</li> </ul>	<ul style="list-style-type: none"> <li>Elementary School</li> <li>High School</li> </ul>
	<b>PUBLIC FACILITIES</b>
	<ul style="list-style-type: none"> <li>Public Facility</li> <li>Neighborhood Center</li> </ul>
	<b>ROADWAY</b>
	<ul style="list-style-type: none"> <li>Highway</li> </ul>

ATTACHMENT 2B

**RESOLUTION 2003-15**

**Authorize General Manager to Execute Agreement with Department of Water Resources**

WHEREAS, Byron-Bethany Irrigation District is a special district acting under and by virtue of Division 11 of the California Water Code;

WHEREAS, the Board of Directors is authorized to enter into any agreement necessary to carry out its purpose of ensuring sufficient water for beneficial use within the District;

WHEREAS, the Board of Directors has determined that the Agreement Between the Department of Water Resources and the Byron-Bethany Irrigation District ("Agreement") will clarify the respective water rights of the parties and will facilitate the planning and operations of the District;

WHEREAS, the Board of Directors has determined that the Agreement does not constitute a project under the California Environmental Quality Act;

NOW, THEREFORE, BE IT RESOLVED, that the General Manager is authorized to sign on behalf of Byron-Bethany Irrigation District the Agreement Between the Department of Water Resources and the Byron-Bethany Irrigation District Regarding the Diversion of Water from the Delta, which is attached hereto as Exhibit "A", provided the Agreement has been approved as to form by the District's legal counsel.

PASSED AND ADOPTED at a Regular Meeting of the Board of Directors of the Byron-Bethany Irrigation District this 28<sup>th</sup> day of May, 2003, by the following vote:

Ayes: Gilbert, Tennant, Maggiori, Franco, Spatafora Jr.

Noes:

Abstained:

Absent:

  
Mr. Charles Spatafora, Jr.  
President of the Board of Directors  
Byron-Bethany Irrigation District

Attest:

  
Betty Walker  
Secretary of the Board of Directors of  
Byron-Bethany Irrigation District

**Secretary's Certification**

I, Betty Walker, Secretary of the Board of Directors of the Byron-Bethany Irrigation District, do hereby certify that the foregoing resolution is a true and correct copy entered into the Minutes of the Regular Board Meeting of May 28<sup>th</sup>, 2003, at which time a quorum was present, and no motion to amend or rescind the above resolution was made.

  
Betty Walker  
Secretary of the Board of Directors of  
Byron-Bethany Irrigation District

5/28/03  
Date

# **EXHIBIT 217**

**DEPARTMENT OF WATER RESOURCES**

1416 NINTH STREET, P.O. BOX 942836  
SACRAMENTO, CA 94236-0001  
(916) 653-5791



September 23, 2014

Ms. Barbara L. Evoy, Deputy Director  
Division of Water Rights  
State Water Resources Control Board  
1001 I Street  
Sacramento, California 95814

SENT VIA EMAIL: [bevoy@waterboards.ca.gov](mailto:bevoy@waterboards.ca.gov)

Dear Ms. Evoy:

The Department of Water Resources ("DWR") has a contract with Byron-Bethany Irrigation District ("BBID") that settles water right issues and requires reporting to DWR the amount of water BBID diverts from the Delta under the contract. The DWR requests that because of the reporting requirements agreed to by BBID in this contract, the State Water Resources Control Board (SWRCB) not include BBID in any order responding to the DWR/Reclamation request for action under the emergency regulations filed with the SWRCB on July 23, 2014 and further explained in a letter on September 15, 2014.

In 2003, DWR and BBID executed a contract to settle between them an issue over the amount of any pre-1914 appropriative water right that BBID could divert from the Clifton Court Forebay, a diversion location which establishes a unique relationship between BBID and DWR. Pursuant to this settlement, DWR provides BBID up to 50,000 acre feet annually for use in its service area. The contract also provides that BBID shall accurately and completely measure the quantity of its diversions and report this information to the DWR Delta Field Division Area Control Center. BBID fulfills its reporting obligations by metering its diversions and providing those quantities to DWR.

The SWRCB emergency regulations and draft order attached to the September 24 Delta diversions workshop notice seek information on the basis of right and use of water by pre-1914 appropriators and riparian users in the Delta. The information currently gathered by BBID and reported to DWR allows for accurate adjustments to State Water Project (SWP) operations. Thus, including BBID in the draft order will not produce any additional information. Rather, if the SWRCB would benefit from this information, DWR can provide it upon request.

Ms. Barbara L. Evoy  
September 23, 2014  
Page 2

At the September 24 Delta diversions workshop, DWR can provide further information on the BBID contract if the SWRCB has any questions. Furthermore, at this time DWR is unaware of any other Delta diverter who holds a contract with DWR that provides for metering and reporting of diversions. Thus, this request that the SWRCB consider the unique circumstances where BBID currently satisfies information that is the subject of the Board draft order does not alter the general need for accurate information as requested by DWR and Reclamation.

Sincerely,



Michelle Morrow  
Assistant Chief Counsel

cc: Mr. Les Grober  
Chief Deputy Director  
Division of Water Rights  
State Water Resources Control Board  
1001 I Street  
Sacramento, California 95814

cc: Ms. Dianne Riddle  
Environmental Program Manager  
Division of Water Rights  
State Water Resources Control Board  
1001 I Street  
Sacramento, California 95814

cc: Mr. Rick Gilmore  
General Manager  
Byron Bethany Irrigation District  
7995 Bruns Road  
Byron, California 94514-1625

# **EXHIBIT 277**



RECEIVED

JUL 22 2015



EDMUND G. BROWN JR.  
GOVERNOR



MATTHEW RODRIGUEZ  
SECRETARY FOR  
ENVIRONMENTAL PROTECTION

State Water Resources Control Board

Byron-Bethany  
Irrigation District

JUL 20 2015

Byron-Bethany Irrigation District  
Attn: Rick Gilmore, General Manager  
7995 Bruns Road  
Byron, CA 94514

CERTIFIED MAIL NO. 7003 1680 0000 2965 9480

Daniel Kelley  
General Counsel, Byron-Bethany Irrigation District  
Somach Simmons & Dunn  
500 Capital Mall, Suite 1000  
Sacramento, CA 95814

CERTIFIED MAIL NO. 7003 1680 0000 2965 9473

Dear Messrs. Gilmore and Kelley:

**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**

Enclosed is an Administrative Civil Liability (ACL) Complaint relating to your diversions from the intake channel to the Banks Pumping Plant (formerly Italian Slough) after June 12, 2015. This letter serves as notice to Byron-Bethany Irrigation District (BBID) that the State Water Resources Control Board (State Water Board), Division of Water Rights (Division), intends to impose the proposed Administrative Civil Liability.

**You have 20 days from receipt of this notice to act or face additional enforcement without further notice. Therefore, this matter requires your immediate attention.**

**VIOLATION DESCRIPTION**

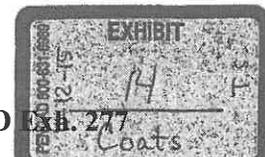
BBID is alleged to have diverted a total of approximately two thousand sixty-seven (2,067) acre-feet over the course of thirteen days, from June 13 through June 25, 2015, during which water was unavailable to serve BBID's water right. The violation is further described in the enclosed ACL Complaint.

**ADMINISTRATIVE CIVIL LIABILITY**

California Water Code, section 1052, prohibits the unauthorized diversion of water. Water Code section 1052 authorizes the State Water Board to administratively impose civil liability for unauthorized diversions of water during periods of drought emergency in an amount not to exceed \$1,000 per day of violation plus \$2,500 per acre-foot diverted without authorization.

FELIX A. MARQUEZ, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

1001 J Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 100, Sacramento, Ca 95812-0100 | www.waterboards.ca.gov



BBID

I am hereby issuing the enclosed ACL Complaint proposing that a liability of \$1,553,250 be imposed for your diversion of water during periods when water supplies were insufficient to fulfill your claimed right. The ACL Complaints provides for a potentially reduced penalty upon showing that water pumped during the time considered under this action was used for health and safety needs, or for critical power generation. **If you fail to respond to the ACL Complaint in one of the manners below within 20 days of receiving this notice, then the State Water Board will issue an ACL Order and seek recovery of this proposed liability amount as authorized by California Water Code section 1055.4.**

If you disagree with the facts or allegations set forth in the ACL Complaint, you may request a hearing before the State Water Board. **Your request for a hearing must be in writing, signed by you or on your behalf, and mailed or hand-delivered to ensure receipt by the State Water Board within 20 days from the date you receive this notice.** You may mail your written hearing request to: State Water Resources Control Board, Division of Water Rights, Attn: Enforcement Section, P.O. Box 2000, Sacramento, CA 95812-2000.

You may hand-deliver your written hearing request to: State Water Resources Control Board, Division of Water Rights, Records Unit, 1001 I Street, 2nd Floor, Sacramento, CA 95814.

If you request a hearing, a hearing will be scheduled before the State Water Board or a designated hearing officer. Prior to the hearing, you will be required to submit any written testimony and other evidence you would like the State Water Board to consider. You will be notified of the hearing date and the submittal deadlines as soon as they are scheduled.

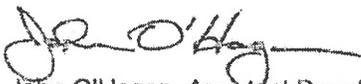
If you fail to come into compliance or request a hearing within 20 days of the date you receive this notice, the State Water Board will adopt the ACL.

#### SUMMARY OF OPTIONS

1. Submit a written request for hearing within 20 days of receiving the enclosed ACL Complaint; or
2. Do nothing, and receive a final ACL Order.

If you have any questions regarding the ACL Complaint, or if you have information that you want to provide in response to this complaint, or information that you believe the State Water Board staff should otherwise consider, please contact Kathy Mrowka, Manager, Enforcement Section at (916) 341-5363 or [Kathy.Mrowka@waterboards.ca.gov](mailto:Kathy.Mrowka@waterboards.ca.gov); or Andrew Tauriainen, Attorney III, Office of Enforcement, at (916) 341-5445 or [Andrew.Tauriainen@waterboards.ca.gov](mailto:Andrew.Tauriainen@waterboards.ca.gov), or send the information directly to them via email.

Sincerely,



John O'Hagan, Assistant Deputy Director  
Division of Water Rights

Enclosures: 1) Administrative Civil Liability Complaint

STATE OF CALIFORNIA  
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY  
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

**ADMINISTRATIVE CIVIL LIABILITY COMPLAINT**

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In the Matter of Unauthorized Diversion by

**BYRON-BETHANY IRRIGATION DISTRICT**

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SOURCE: Intake Channel to the Banks Pumping Plant (formerly Italian Slough)

COUNTY: Contra Costa

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**YOU ARE HEREBY GIVEN NOTICE THAT:**

1. Byron-Bethany Irrigation District (BBID or District) is alleged to have diverted and used water in violation of California Water Code section 1052, subdivision (a), which provides that the diversion or use of water subject to Division 2 of the Water Code other than as authorized in Division 2 is a trespass.
2. Water Code section 1052, subdivision (c), provides that any person or entity committing a trespass during a period for which the Governor has issued a proclamation of a state of drought emergency may be liable in an amount not to exceed the sum of one thousand dollars (\$1,000) for each day the trespass occurs plus two thousand five hundred dollars (\$2,500) for each acre-foot of water diverted or used in excess of that diverter's rights. Water Code section 1052, subdivision (d)(2), provides that civil liability may be imposed administratively by the State Water Resources Control Board (State Water Board or Board) pursuant to Water Code section 1055.
3. Water Code section 1055, subdivision (a), provides that the Executive Director of the State Water Board may issue a complaint to any person or entity on whom Administrative Civil Liability (ACL) may be imposed. On June 5, 2012, the Executive Director delegated this authority to the Deputy Director for Water Rights. State Water Board Resolution 2012-0029 authorizes the Deputy Director for Water Rights to issue an order imposing an ACL when a complaint has been issued and no hearing has been requested within 20 days of receipt of the complaint. The Deputy Director for Water Rights has redelegated this authority to the Assistant Deputy Director for Water Rights pursuant to State Water Board Resolution 2012-0029.

**ALLEGATIONS**

4. On June 30, 2010, BBID submitted an Initial Statement of Water Diversion and Use (Statement), which the State Water Board, Division of Water Rights (Division) designated as Statement 021256 (S021256). Under S021256, BBID claims a pre-1914 appropriative water right to the intake Channel to the Banks Pumping Plant, formerly Italian Slough, in Contra Costa County. The Statement also indicates that BBID diverted approximately 26,179 acre-feet (af) in 2009 for municipal and industrial and agricultural use within its boundaries.
5. On July 1, 2013, BBID submitted Supplemental Statements for S021256, for the years 2010, 2011 and 2012. BBID's Supplemental Statements each indicates that the District first put water to use in 1917, and that the purpose of use for the District's diversions is irrigation of 12,500 acres. The 2010 Supplement Statement indicates that BBID diverted 25,269 af and applied

approximately 22,302 af to beneficial use. The 2011 Supplemental Statement indicates that BBID diverted 22,344 af and applied 19,779 af to beneficial use. The 2012 Supplemental Statement indicates that BBID diverted 32,167 af and applied 28,345 af to beneficial use.

6. BBID does not hold or claim any other appropriative or riparian water rights on record with the State Water Board, although S021256 indicates that BBID holds Contract No. 14-06-200-785-LTR1 with the United States Bureau of Reclamation (Reclamation). In 2014 and 2015, Reclamation's agricultural contractors in the Delta were allocated zero percent of their contract quantity (available at <http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=49115> [last accessed June 30, 2015]). BBID confirmed in a public statement dated June 12, 2015, that it had received zero water supply from Reclamation in both 2014 and 2015 (available at [http://bbid.org/wp-content/uploads/2015/06/BBID-Curtailment-Response-FINAL\\_1.pdf](http://bbid.org/wp-content/uploads/2015/06/BBID-Curtailment-Response-FINAL_1.pdf) [last accessed June 30, 2015].)
7. On January 17, 2014, Governor Edmund G. Brown Jr. issued Proclamation No. 1-17-2014, declaring a State of Emergency to exist in California due to severe drought conditions.
8. Also on January 17, 2014, the State Water Board issued a "Notice of Surface Water Shortage and Potential Curtailment of Water Right Diversions" (2014 Shortage Notice). The 2014 Shortage Notice alerts water right holders in critically dry watersheds that water may become unavailable to satisfy beneficial uses at junior priorities.
9. On April 25, 2014, Governor Brown issued a Proclamation of a Continued State of Emergency due to drought conditions, to strengthen the state's ability to manage water and habitat effectively in drought conditions.
10. On May 27, 2014, the State Water Board issued a "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the Sacramento and San Joaquin River Watershed with a post-1914 Appropriative Right" (2014 Unavailability Notice), which notifies all holders of post-1914 appropriative water rights within the Sacramento and San Joaquin River watersheds of the lack of availability of water to serve their post-1914 water rights, with some minor exceptions for non-consumptive diversions. The 2014 Unavailability Notice did not apply to pre-1914 appropriative rights such as that claimed by BBID. The State Water Board notified the most senior right holders in stages as water became available to serve their rights, and by November 19, 2014, had notified all right holders of availability for all diversions in the Sacramento and San Joaquin River watersheds.
11. On January 23, 2015, the State Water Board issued a "Notice of Surface Water Shortage and Potential for Curtailment of Water Right Diversions for 2015" (2015 Shortage Notice). The 2015 Shortage Notice alerted water right holders in critically dry watersheds that water may become unavailable to satisfy beneficial uses at junior priorities.
12. On February 4, 2015, the State Water Board issued Order WR 2015-0002-DWR, requiring pre-1914 and riparian water right claimants representing the top 90 percent of such claimants by volume in the Sacramento and San Joaquin River watersheds and the Delta to submit information relating to their claimed water right, the monthly amounts of water diverted and the basis of right claimed for diversions in 2014, and monthly diversion information and anticipated monthly diversion information for each month starting with February, 2015, to be submitted by the 5<sup>th</sup> of each succeeding month until the drought ends.
13. BBID is subject to Order WR 2015-0002-DWR, and in response submitted information indicating that its predecessor, the Byron-Bethany Irrigation Company, recorded notice of an appropriation of water on or around May 18, 1914. Thus, BBID claims that its pre-1914 water right has a

priority date of May 16, 1914.<sup>1</sup>

14. BBID also submitted water diversion and use information for 2014, projected monthly diversions for 2015, and actual monthly diversions through May, 2015. BBID reports that it diverted 30,204 af in 2014 and projected diversions of 25,452 af in 2015. BBID's reported actual monthly diversion amounts for January through May, 2015, are generally similar to reported diversions for the same months in prior years where such information is available. BBID's reported projected diversions are similar to the reported actual diversions for the same months in prior years where such information is available. From August 1 to October 31, 2014, BBID reports it pumped 1,573 af of water under transfer that was approved by State Water Board Order dated August 27, 2014.
15. On April 1, 2015, Governor Brown issued Executive Order B-29-15 (Executive Order) to strengthen the state's ability to manage water and habitat effectively in drought conditions and called on all Californians to redouble their efforts to conserve water. The Executive Order finds that the continuous severe drought conditions present urgent challenges across the state including water shortages for municipal water use and for agricultural production, increased wildfire activity, degraded habitat for fish and wildlife, threat of saltwater contamination, and additional water scarcity if drought conditions continue. The Executive Order confirms that the orders and provisions in the Governor's previous drought proclamations and orders, the January 17, 2014, Proclamation, April 25, 2015, Proclamation, and Executive Orders B-26-14 and B-28-14, remain in full force and effect. On April 2, 2015, the State Water Board issued another notice warning that notices of unavailability of water were likely to be issued soon.
16. On April 23, 2015, the State Water Board issued a "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the San Joaquin River Watershed with a Post-1914 Appropriative Right" (April 23 Unavailability Notice), which notifies all holders of post-1914 appropriative water rights within the San Joaquin River watershed of the lack of availability of water to serve their post-1914 water rights, with some minor exceptions for non-consumptive diversions. The State Water Board issued a similar notice for post-1914 appropriative water rights within the Sacramento River watershed on May 1, 2015 (May 1 Unavailability Notice). The April 23 and May 1 Unavailability Notices do not apply to pre-1914 appropriative rights such as that claimed by BBID.
17. On June 12, 2015, the State Water Board issued a "Notice of Unavailability of Water and Need for Immediate Curtailment for Those Diverting Water in the Sacramento-San Joaquin Watersheds and Delta with a Pre-1914 Appropriative Claim Commencing During or After 1903" (June 12 Unavailability Notice), which notifies all holders of pre-1914 appropriative water rights with a priority date of 1903 and later within the Sacramento and San Joaquin River watersheds of the lack of availability of water to serve their rights, with some minor exceptions for non-consumptive uses.
18. Drought management of water rights is necessary to ensure that water to which senior water right holders are entitled is actually available to them, which requires that some water remain in most streams to satisfy senior demands at the furthest downstream point of diversion of these senior water rights. The June 12 Unavailability Notice reflects the State Water Board's determination that the existing water available in the Sacramento-San Joaquin watersheds and the Delta is insufficient to meet the demands of diverters with claims of pre-1914 appropriative rights with a priority date of 1903 and later. Continued diversion when there is no water available under the priority of the right constitutes unauthorized water diversion and use. Unauthorized diversion is subject to enforcement. (Wat. Code § 1052.)

<sup>1</sup> The term "pre-1914" appropriative water right means those appropriative rights commenced prior to December 19, 1914, the effective date of the Water Commission Act. Therefore, it is possible to have a "pre-1914" appropriative water right with a priority date in 1914.

19. The State Water Board determines the availability of water for water rights of varying priorities in any watershed by comparing the current and projected available water supply with the total water right diversion demand.
20. To determine water availability, the Board relies upon the full natural flows of watersheds calculated by the Department of Water Resources (DWR) for certain watersheds in its Bulletin 120 and in subsequent monthly updates. "Full natural flow," or "unimpaired runoff," represents the natural water production of a river basin, unaltered by upstream diversions, storage, storage releases, or by export or import of water to or from other watersheds. The full natural flow amount is different than the measured stream flows at the given measurement points because the measured flows may be higher or lower due to upstream operations. Forecasted flow data is uncertain, so DWR provides the data in the form of "levels of exceedance" or simply "exceedance" to show the statistical probability that the forecasted supply will occur. The exceedance is simply the percent of the time that the actual flow is expected to exceed the projected flow. The 90 percent exceedance hydrology assumes inflows from rainfall and snowmelt at levels that are likely to be met or exceeded by actual flows with a 90 percent probability, or in other words, there is a ten percent or less chance of actual conditions turning out to be this dry or drier. In April and early May, the State Water Board uses the 90% and 99% exceedance amounts for its analyses due to low flow conditions. DWR's daily natural flow calculations are also used in the analysis.
21. To determine water demand, the State Water Board relies on information supplied by water right holders on annual or triennial reports of water diversion and use required to be true and accurate to the best of the knowledge of the diverters. The Board also incorporates 2014 diversion data submitted pursuant to Order WR 2015-0002. All reported monthly water diversion data is compiled by watershed, type of right and priority dates. The Board performs quality control checks and removes obvious errors, excess reporting, removes demand for direct diversion for power, and makes additional changes based on stakeholders' input. The corrected demand data includes the 2014 reported data for 90% of the watershed demand plus, for the remaining diverters, an averaged diversion amount for 2010 through 2013. These monthly diversion demands are grouped into water right types (riparian, pre-1914 and post-1914 rights).
22. The State Water Board consistently adjusts the water availability and demand analyses based on new information obtained from stakeholders, or adjustments to projected flows from the DWR. State Water Board staff reviews this information and provides revisions to its data set and graphs that are all shown on the Watershed Analysis website ([http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/analysis/](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/analysis/)).
23. The State Water Board's Watershed Analysis website provides updated graphical summations and spreadsheets containing supporting analysis of the availability and demand analyses. The graphical summations show priorities with monthly demands for the total riparian demand at bottom, the pre-1914 demands added to riparian and depicted above the riparian demand. The monthly amounts are averaged into cubic feet per second for graphical purposes. See, for example, the combined Sacramento/San Joaquin River Basin Senior Supply/Demand Analysis ([http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/analysis/docs/sacsjc\\_combined.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/analysis/docs/sacsjc_combined.pdf)). The Curtailment Analysis website also provides graphical summations of the San Joaquin River Basin Senior Supply/Demand Analysis with Proportional Delta Demand ([http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/analysis/docs/sjorated.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/analysis/docs/sjorated.pdf)) and the Sacramento River Basin Senior Supply/Demand Analysis with Proportional Delta Demand ([http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/analysis/docs/sacpro rated.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/analysis/docs/sacpro rated.pdf)).
24. This analysis shows that by June 12, 2015, available supply was insufficient to meet the demands of appropriative rights with priority dates of 1903 and later throughout the Sacramento and San Joaquin River watersheds and the Delta.

25. The June 12 Unavailability Notice applies to SG21256 because BBID claims a priority date of May 16, 1914. BBID received an electronic copy of the June 12 Unavailability Notice on June 12, 2015, via the Board's "Drought Updates" Lyris email list system, because Rick Gilmore, BBID's General Manager is a subscriber to that system (via email address [r.gilmore@bbid.org](mailto:r.gilmore@bbid.org)). Moreover, BBID issued a public statement on June 12, 2015, in response to the June 12 Unavailability Notice (available at [http://bbid.org/wp-content/uploads/2015/06/BBID-Curtailment-Response-FINAL\\_1.pdf](http://bbid.org/wp-content/uploads/2015/06/BBID-Curtailment-Response-FINAL_1.pdf) [last accessed June 25, 2015].) BBID received a paper copy of the June 12 Unavailability Notice no later than June 15, 2015.
26. BBID's diversions are recorded by DWR and posted to the California Data Exchange Center (CDEC) (<http://cdec.water.ca.gov/cgi-progs/queryDaily?BBID> also available at <http://www.water.ca.gov/swp/operationscontrol/docs/delta/DeltaHydrology.pdf>). CDEC reports that BBID has diverted water each day since the June 12 Unavailability Notice:

Date	Avg Diversion Rate (cfs)	Amount Diverted (af)	Date	Avg Diversion Rate (cfs)	Amount Diverted (af)
06/13/2015	91	180	06/20/2015	96	190
06/14/2015	122	242	06/21/2015	99	196
06/15/2015	79	156	06/22/2015	62	123
06/16/2015	83	164	06/23/2015	51	121
06/17/2015	76	154	06/24/2015	67	132
06/18/2015	91	180	06/25/2015	36	71
06/19/2015	80	158	06/26/2015	0	0

27. The daily diversion rates through June 24 are comparable to the District's average daily diversion rates reported for June 2014 (4,842 af/30 days/1.9835=81.4 cfs), and those BBID reported as anticipated for June 2015. This daily rate is in excess of the basic minimum health and safety needs of Mountain House Community Service District. This indicates that BBID has continued its normal diversions following the June 12 Unavailability Notice.
28. BBID diverted a total of approximately two thousand sixty-seven (2,067) acre-feet over the course of thirteen days following the June 12 Unavailability Notice, specifically from June 13 through June 25, 2015.
29. On July 15, 2015, the State Water Board issued a Clarification to the Unavailability Notices indicating that, to the extent that any of the notices described above contain language that may be construed as an order requiring you to curtail diversions under your affected water right, that language has been rescinded. Similarly, any language requiring affected water right holders to submit curtailment certification forms has been rescinded.
30. Diversion or use of water by an appropriative water right holder when there is insufficient water supply available for that water right is an unauthorized diversion or use of water subject to Division 2 of the Water Code. Water Code section 1052, subdivision (a) provides that unauthorized diversion or use of water is a trespass.
31. This enforcement action is based on lack of available water supply under the priority of the right. The Unavailability Notices were issued for the purpose of advising the public and water diverters of the lack of available water under the priority of the rights identified in each notice; the notices are not the basis for this enforcement action.

#### PROPOSED CIVIL LIABILITY

32. Water Code section 1052 provides that the maximum civil liability that can be imposed by the State Water Board in this matter for the unauthorized diversion and use of the water during a

- drought period is \$1,000 for each day of trespass plus \$2,500 for each acre-foot of water diverted or used in excess of that diverter's water rights.
33. Evidence demonstrates that BBID's unauthorized diversions began on June 13, 2015, and continued until June 25, 2015, for a total of thirteen (13) days. Over that period, BBID diverted approximately two thousand sixty-seven (2,067) acre-feet of water in excess of that available to serve its claimed water right.
  34. Therefore, the maximum civil liability for the alleged violations is \$5,180,500 [13 days at \$1,000 per day plus 2,067 acre-feet at \$2,500 per acre-foot].
  35. In determining the amount of civil liability, California Water Code section 1055.3 requires that the State Water Board consider all relevant circumstances, including, but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, and any corrective action taken by the violator.
  36. In this case, BBID has made unauthorized diversions of water from the Intake Channel to the Banks Pumping Plant (formerly Italian Slough) during the most extreme drought in decades, when there was insufficient water supply available for BBID's claimed water right. BBID was aware that the State Water Board had determined that there was insufficient water supply available for BBID's claimed water right. These unauthorized diversions have reduced or threatened to reduce the amount of water available for downstream water right holders during an extreme drought emergency. Moreover, BBID's diversions likely reduced the water available for instream resources and riparian habitat within the Delta during an extreme drought emergency.
  37. BBID received an economic advantage over other legitimate water diverters in the area by forgoing the costs of buying replacement water during the violation period. During 2015, irrigation districts north of the Delta have paid at least \$250 per acre-foot of replacement water. Thus, by illegally diverting 2,067 acre-feet of water from June 13 through June 25, BBID avoided purchased water costs of at least \$516,750.
  38. The Division estimates that its staff cost to investigate the unauthorized diversion issues and develop the enforcement documents to be \$3,000.
  39. BBID is known to be serving water to Mountain House Community Service District and to power generation facilities that may be deemed critical energy suppliers. BBID and Mountain House Community Service District took corrective actions to secure water available via contract and transfer. Although these supplies were not provided during the violation period identified above, they are recognized as progressive correction actions to prevent unauthorized diversions. Also taken into consideration is the fact that BBID has stopped its diversions from June 26.
  40. Having taken into consideration the factors described above, the Assistant Deputy Director for Water Rights recommends an ACL for the unauthorized diversion of water in the amount of \$1,653,250. The recommended penalty is based on the circumstances known to this time, BBID's continued diversions despite lack of availability of water to serve its right during extreme ongoing drought conditions, and to provide a strong disincentive for continued unauthorized diversions by BBID and any similarly-situated parties. The Prosecution Team will consider adjustment of the recommended penalty if BBID provides evidence of the amounts of water pumped that were for health and safety needs or critical power generation.
  41. Should the matter go to hearing, the State Water Board may consider a different liability based on the evidence received, including additional staff costs incurred, up to the maximum amount provided by law. It is estimated that if this matter goes to hearing, additional staff costs incurred for the prosecution staff would be approximately \$10,000.

**RIGHT TO HEARING**

42. BBID may request a hearing on this matter before the State Water Board. Any such request for hearing must be in writing and received or postmarked within 20 days of the date this notice is received. (California Water Code, § 1055, subd. (b).)
43. If BBID requests a hearing, BBID will have an opportunity to be heard and to contest the allegations in this Complaint and the imposition of an ACL by the State Water Board. If a hearing is requested, separate notice setting the time and place for the hearing will be mailed not less than 10 days before the hearing date.
44. If BBID requests a hearing, the State Water Board will consider at the hearing whether to impose the civil liability, and, if so, whether to adjust the proposed liability within the amount authorized by statute. Based on the evidence received at the hearing, the State Water Board may take any appropriate action in accordance with sections 100, 275, and 1050 et seq. of the California Water Code and its responsibilities under the public trust doctrine. Any State Water Board order imposing an ACL shall become final and effective upon issuance.
45. If BBID does not wish to request a hearing, please remit a cashier's check or money order within 20 days of the date of this Complaint for the amount of the ACL set forth above to:  
  
State Water Resources Control Board  
Division of Water Rights  
Enforcement Section  
P.O. Box 2000  
Sacramento, CA 95812-2000
46. If BBID does not request a hearing and does not remit the ACL amount, the State Water Board may seek recovery of the ACL amount as authorized by Water Code section 1055.4.

STATE WATER RESOURCES CONTROL BOARD

  
John O'Hagan, Assistant Deputy Director  
Division of Water Rights

Dated:

JUL 20 2015

# **EXHIBIT 336**

August 27, 1986

STATEMENT OF WILLIAM T. O'LEARY  
REGARDING BYRON-BETHANY IRRIGATION DISTRICT'S  
USE OF WATER IN JULY AND AUGUST OF 1977

I am a civil engineer and an employee of CH2M HILL CALIFORNIA, INC. I am currently Chief Engineer and Assistant Regional Manager of the firm's San Francisco Regional office. Prior to its merger with CH2M, I was an employee of Clair A. Hill & Associates from 1969 until 1971.

Starting in 1962 the Byron-Bethany Irrigation District (BBID) retained Clair A. Hill & Associates to serve as its District Engineer. For the next several years thereafter the District undertook a major improvement project, financed through the Small Reclamation Projects Act of 1956, and the firm provided engineering services for the design and construction of those improvements. I served as Project Manager and, as such, was responsible for the design of those facilities.

During this same period the State was planning and designing various facilities as a part of the State Water Project, including the Tracy Pumping Plant for export of water to the south. Plans for this facility involved excavation of its intake channel between Old River and the new plant. This channel severed the Main Canal of BBID, and the State Department of Water Resources (DWR) planned to build a large diameter pipe flume across the channel to replace the canal.

The District proposed to DWR that the State pay the District the estimated cost for the pipe flume, and in lieu of the canal crossing of the channel, the District would construct two pump stations on the channel, one to pump water to the north and the other, to the south. This would eliminate the need for the proposed pipe flume and its future cost of operation and maintenance. The proposal was agreeable to the State and an agreement to that effect was drawn up and executed in 1964. I was a party to the negotiations for the agreement and participated in several meetings with the District Board, its attorney, and representatives of DWR in that regard. As a result of this agreement the District planned to build the two pump stations on the Intake Channel instead of improving its existing main pumping plant on Old River, and those two pump stations were included in the Improvement Project. In order to meet its irrigation needs during the construction of the State Channel and design and construction of the two pump stations, the District constructed and operated a temporary "inverted siphon" pipeline system across the channel to serve the southern half of the District.

Since completion of the two pumping stations, the District has taken water from the channel in accordance with its long standing water right and the terms of its 1964 Agreement with the State.

It was my understanding at that time that the peripheral canal would be constructed as a part of the State Water Project and the water quality available to the District from the intake channel would not deteriorate. Given the present situation without the peripheral canal or some similar trans-delta facility, the quality of water in the channel is affected by many factors occurring within and around the delta. Water released from the State's Oroville Dam may contribute

to water quality in the channel, along with many other sources and many other factors, but the operation of the State's pump station on the channel has a more immediate effect on both water quality and water levels within the channel. Under this condition, with State export water having to be drawn through and around the many channels and islands of the delta, the District is subject to damage as well as to benefit by the operation of the SWP.

During the drought of 1976/1977 it is my opinion that water would have been available to the District without the operation of the SWP or any other major water supply projects, just as it had been available for the many years the District operated prior to construction of those projects. The delta waters surrounding the District are subject to tidal action, so the District's supply, unlike that of diverters on upstream rivers, is always available even in times of drought. In my opinion therefore the District did not benefit from and should not be obligated to pay for any quantity of water that is claimed to have been provided by the State during July and August of 1977.

The quality of water in the channel may have been affected by operation of the SWP during that period. In fact, as indicated above, it could have been worsened as well as improved. There are many, almost innumerable, factors upstream of the District's pump stations that will have an impact on quality in the channel, but there is only one significant factor downstream, and that is the State's Pumping Plant. During typical drought conditions with low inflow to the delta and marginal encroachment of saline water from the Bay, operation of the State's Pumping Plant can draw in saline water through the delta and into the channel. It is significant to note that the Emergency Order of the SWRCB in June of 1977 used "Clifton Court Forebay and Tracy Pumping

Plant", the inlet to the channel, as the quality control point for Delta Protection and maintenance of salinity levels elsewhere in the delta. It is also significant that a minimum level of quality (200 ppm chlorides) as well as a maximum (300 ppm chlorides) was established by that order. This serves to demonstrate the degree of control the State can exercise over the quality of water in that channel, and its potential impact on BBID.

State records indicate that the level of chlorides in the channel did not exceed 300 ppm during July and August of 1977. During that period the District used that water, as available, just as it has every other year, regardless of quality. To my knowledge the District has never refrained from using delta water because of its quality, and I believe it would have used water during that period regardless of drought conditions and regardless of the impact of the SWP. In my opinion the water available in the channel during that period was of usable quality for the crops of the District and it would have been usable quality without the SWP operations. I cannot say with certainty whether the quality of water available to the District was improved or worsened by the various operations of the SWP. It is my opinion however that if it were improved, the small increment of betterment would have had little or no effect on the crops of the District, and that no measurable benefit would be received.

I declare under penalty of perjury that the foregoing is true and correct and that if I am called as a witness to testify in this matter, I could and would personally, competently and affirmatively testify as to the truth and accuracy of the matters stated herein.

Executed on August 27, 1986 and again on the 3rd day of  
September 1986, in Emeryville, County of Alameda, State of  
California.



---

William T. O'Leary  
CH2M HILL CALIFORNIA, INC.

SFR9/215

# EXHIBIT A

**BEFORE THE  
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

**IN RE THE MATTERS OF:**

**SWRCB Enforcement Actions  
ENFO1951; ENFO1949**

**WEST SIDE IRRIGATION  
DISTRICT CEASE AND DESIST  
ORDER HEARING,**

**and**

**BYRON-BETHANY IRRIGATION  
DISTRICT ADMINISTRATIVE  
CIVIL LIABILITY HEARING.**

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**DEPOSITION OF KATHERINE MROWKA**

**November 16, 2015**

**Reported By: KATHRYN DAVIS, CSR No. 3808**

**kathryndavis** & associates  
deposition reporting





DEPOSITION OF KATHERINE MROWKA

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APPEARANCES CONTINUED

Also Present:

KENNETH R. HENNEMAN  
KENNETH R. HENNEMAN CONSULTING  
  
RICK GILMORE  
BYRON-BETHANY IRRIGATION DISTRICT

--oOo--

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DEPOSITION OF KATHERINE MROWKA

1 A There was no water available under the  
2 priority date of the right based on water supply.  
3 That is independent of whether somebody else needed  
4 the water. There was no water under that priority  
5 date.

6 Q I'm just trying to understand. The water that  
7 BBID took, is that water that senior water right holders  
8 were entitled to, that pre-1903 and riparian water right  
9 holders were entitled to?

10 A There was simply no supply available under  
11 the priority date.

12 Q Right. But BBID diverted water on June the  
13 13th. I'm asking you whose water, then, did BBID  
14 divert?

15 A I don't have that information for you today.

16 Q So in preparing this Administrative Civil  
17 Liability Complaint, you didn't consider whose water  
18 that was?

19 A We considered all of the right holders and  
20 their relative seniority in each watershed where we  
21 issued a water shortage notification. So we did  
22 consider whose water supply was affected based on  
23 priority date of right.

24 Q So whose water supply was affected by BBID's  
25 diversions? Is it pre-1903 and riparian water right

DEPOSITION OF KATHERINE MROWKA

1 holders or someone else?

2 A For BBID, because they have a 1914 priority,  
3 it could be anybody who is more senior to that 1914  
4 priority, not necessarily limited to 1903.

5 Q Okay. So let me phrase it this way. BBID's  
6 seniority date is May the 18th -- I think the claim is  
7 May 18th. Does that ring a bell? I thought it was in  
8 here.

9 So if we assume that BBID's claimed date of  
10 priority was May 18th, 1914, is the ACL based on the  
11 fact that BBID took water that was needed by those with  
12 a priority May of May 17th, 1914, and senior and  
13 riparians?

14 A Yes.

15 Q Anybody else?

16 A No.

17 Q Okay. Go to paragraph 25. Can you read that to  
18 yourself and let me know when you are done?

19 A (Witness reading.) I'm done.

20 Q And then I want you to read the last sentence in  
21 paragraph 27.

22 A Okay.

23 Q Why is the June 12th unavailability notice and  
24 the receipt of it important for the ACL?

25 A Because we always like to document that





# **EXHIBIT B**

**BEFORE THE  
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

**IN RE THE MATTERS OF:**

**SWRCB Enforcement Actions  
ENFO1951; ENFO1949**

**WEST SIDE IRRIGATION  
DISTRICT CEASE AND DESIST  
ORDER HEARING,**

**and**

**BYRON-BETHANY IRRIGATION  
DISTRICT ADMINISTRATIVE  
CIVIL LIABILITY HEARING.**

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**VIDEOTAPE DEPOSITION OF JOHN O'HAGAN  
Volume II**

**November 20, 2015**

**Reported By: KATHRYN DAVIS, CSR No. 3808**

**kathryndavis** & associates  
deposition reporting

1 approval of the temporary urgency change petition by  
2 Reclamation in the operation plan that was approved  
3 therein?

4 MR. CARRIGAN: Calls for a legal conclusion.  
5 Speculation. Lacks foundation.

6 Q BY MR. O'LAUGHLIN: If you know.

7 A Again, we are -- the curtailment analysis was  
8 to protect senior rights and their priorities. That  
9 agreement is dealt probably with stored water.

10 Q If I was to tell you that the agreement only had  
11 a set release from June 1st to October 1st of 150 CSF  
12 per day, does that change your answer that you just  
13 gave?

14 MR. CARRIGAN: Incomplete hypothetical. Same  
15 objections.

16 THE WITNESS: No, because there is upstream  
17 demands for waters that still would be subject to  
18 priority.

19 Q BY MR. O'LAUGHLIN: Upstream of where?

20 A The Bureau's projects.

21 Q Did you direct your staff to do any QA/QC on  
22 people claiming pre-1914 water rights in the Delta?

23 A We investigated compliance with the notices  
24 of curtailment, so we had staff out doing  
25 investigations all year.

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**REPORTER'S CERTIFICATE**

State of California     )  
                                  ) ss.  
County of Sacramento    )

I certify that the witness in the foregoing deposition,

JOHN O'HAGAN,

was by me duly sworn to testify in the within-entitled cause; that said deposition was taken at the time and place therein named; that the testimony of said witness was reported by me, a duly Certified Shorthand Reporter Of the State of California authorized to administer oaths and affirmations, and said testimony was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for either or any of the parties to said deposition, nor in any way interested in the outcome of the cause named in said deposition.

IN WITNESS WHEREOF, I have hereunto set my hand this 24th day of November 2015.

---

KATHRYN DAVIS  
Certified Shorthand Reporter  
Certificate No. 3808

# **EXHIBIT C**

**YOUNG v. STATE WATER RESOURCES CONTROL BD.**

C068559

Court of Appeal of California, 3rd District

October 2, 2012

**Reporter**

2012 CA App. Ct. Briefs LEXIS 3929

DIANNE E. YOUNG, et al., Plaintiffs/Respondents, v. STATE WATER RESOURCES CONTROL BOARD, Respondent/Appellant. WOODS IRRIGATION COMPANY, et al., Real Parties in Interest and Respondents; SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, Real Party in Interest and Appellant.

**Type:** Initial Brief: Appellant-Petitioner

**Prior History:** San Joaquin County Superior Court, Case No. 39-2011-00259191-CU-WM-STK. The Honorable Lesley D. Holland and F. Clark Sueyres, Judges Presiding.

**Counsel**

---

[\*1] KAMALA D. HARRIS, Attorney General of California, KATHLEEN A. KENEALY, Senior Assistant Attorney General, SARA RUSSELL, Supervising Deputy Attorney General, MATTHEW G. BULLOCK, Deputy Attorney General, State Bar No. 243377, San Francisco, CA, Attorneys for State Water Resources Control Board.

**Title**

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Appellant State Water Resources Control Board's Opening Brief

**Text**

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**CERTIFICATE OF INTERESTED PARTIES OR ENTITIES OR PERSONS**

(Check One) INITIAL CERTIFICATE  SUPPLEMENTAL CERTIFICATE

Please check the applicable box:

There are no interested entities or persons to list in this Certificate per California Rules of Court, rule 8.208(d).

Interested entities or persons are listed below:

Full Name of Interested Entity or Party	Party Check One	Non-Party (Explain)	Nature of Interest
	<input type="checkbox"/>	<input type="checkbox"/>	
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The undersigned certifies that the above listed persons or entities (corporations, partnerships, firms or any other association, but not including government entities or their agencies), have either (i) an ownership interest of 10 percent or more in the party if an entity; or (ii) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Attorney Submitting Form

MATTHEW G. BULLOCK

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Party Represented

Attorneys for State Water Resources Control Board

/s/ [Signature]

(Signature of Attorney Submitting Form)

9/26/12

(Date)

## INTRODUCTION

The State Water Resources Control Board (State Water Board) appeals the trial court's judgment that partially eliminated the Board's authority to issue cease and desist orders for unauthorized water diversions and awarded attorneys' fees under the private attorney general statute to a group of petitioners out to protect their commercial interests. The trial court erred because (1) the Legislature's decision to authorize the Board to enjoin illegal diversions necessarily allowed the Board to determine whether the diverter had the riparian and pre-1914 water rights that it claimed and (2) the trial court's attorney fees award cannot be justified because, among other reasons, the anticipated costs of suit did not outweigh the fee claimants' private pecuniary interest in the action. The trial court's orders [\*2] should be reversed.

Since 1914, anyone wishing to divert water from a water body in California must acquire a water rights permit from the State Water Board. If a diverter acquired an appropriative right before 1914 or holds a riparian right, she does not need a Board permit for the diversion. If a diversion is not authorized by one of these water rights, the Board may issue a cease and desist order against the unauthorized diversions. (Wat. Code, § 1831, subd. (d)(1).)

In this case, following an investigation and hearing under Water Code section 1051 the State Water Board determined that Woods Irrigation Company's riparian and pre-1914 rights entitled it to divert no more than 77.7 cubic feet per second (cfs) of water, and that Woods had diverted in excess of that amount. The Board issued a cease and desist order limiting diversions to 77.7 cfs, thus prohibiting Woods from diverting water that rightfully should go to authorized diverters.

Respondents (the Young Parties) are commercial farmers. They receive water through and are shareholders in Woods Irrigation Company. They filed a petition for writ of mandate and/or prohibition challenging the cease and desist order against Woods. [\*3] The Young Parties claimed to hold riparian and pre-1914 rights, and argued that the State Water Board did not

have jurisdiction to issue the cease and desist order because it does not have authority to regulate riparian or pre-1914 rights. The trial court agreed and found that the Board had no jurisdiction. It ruled that a diverter's assertion that she holds a riparian or pre-1914 water right suffices to strip the Board of its authority to determine whether that right actually exists and to issue a cease and desist order if the right does not exist.

The trial court erred. For many years, the State Water Board has possessed authority to investigate diversions and determine whether they are unauthorized, even when the diverter alleges a riparian or pre-1914 right. (Wat. Code, § 1051; *Meridian, Ltd. v. City and County of San Francisco* (1939) 13 Cal.2d 424.) In 2002 the Legislature expanded this authority and granted the Board authority to issue administrative cease and desist orders against unauthorized diversions. (Wat. Code, § 1831, subd. (d)(1).) Allowing unauthorized diverters to evade the Board's jurisdiction by asserting they are not subject to that jurisdiction [\*4] contradicts case law and the Legislature's express intent authorizing the Board to administratively enjoin unauthorized diversions.

Following judgment, the Young Petitioners moved for, and the trial court granted, attorneys' fees under the private attorney general statute. The fees award was an abuse of discretion. Among other reasons, the Young Parties failed to meet their burden of showing that their shared costs in bringing the case outweighed their considerable pecuniary interest in the litigation - a personal self-interest that was amply demonstrated by their claims of financial hardship.

The State Water Board requests that this Court reverse the trial court's judgment limiting the Board's jurisdiction under Water Code section 1831 and awarding attorneys' fees.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **I. ADMINISTRATIVE PROCEEDINGS**

Woods Irrigation Company (Woods) diverts water from Middle River in the Sacramento-San Joaquin River Delta and provides water, primarily for commercial agricultural purposes, to

customers on Middle Roberts Island, which is located just west of Stockton. (CT1:28.)<sup>1</sup> Following an investigation of Woods' diversions suggesting that Woods may [\*5] be making unauthorized diversions, the State Water Board issued a notice of proposed cease and desist order to Woods. (CT1:29.) Upon Woods' request for a hearing under Water Code section 1835, the Board held a hearing over six days in June and July of 2010. (CT1:29-30.) At the administrative hearing, Woods provided evidence supporting riparian or pre-1914 water rights to divert no more than 77.7 cfs. (CT1:84.) The evidence showed this was the extent of all Woods' contractual delivery obligations to its customers. (CT1:51.)

The Young Parties sought to intervene in the proceedings after the date to do so had passed. (CT1:153.) The Board denied intervention because of the untimeliness of the request. (*Ibid.*) At the hearing's conclusion, the Board issued a cease and desist order against Woods [\*6] that limited Woods' diversions to the 77.7 cfs that Woods established a right to divert and that was its full obligation to its customers.<sup>2</sup> (CT1:24-86 [State Water Board Order WR-2011-2005].) The Board's order protected Woods' customers by including provisions that allowed Woods to seek a diversion rate increase "based on additional evidence regarding the water rights of landowners not addressed in this order" and allowing Woods to deliver water to users or water right holders if they provide satisfactory information demonstrating "an additional basis of right for deliveries of water." (CT1:85.)

## II. TRIAL COURT PROCEEDINGS

The Young Parties<sup>3</sup> are customers of, and shareholders in, Woods. Woods diverts water from Middle River and delivers it to the Young Parties, among others. The Young Parties or their lessees use the water across hundreds of acres of commercial agricultural [\*7] land. (CT2:343:9-15; CT2:358:8-13; CT2:364:14-16; CT2:392:6-10.) Following issuance of the State

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<sup>1</sup> Citations to the Clerk's Transcript are in the format CT[volume]:[page]:[line (where applicable)]. Citations to the Supplemental Clerk's Transcript (Supp. CT) and Reporter's Transcript (RT) follow the same format.

<sup>2</sup> For reference, a rate of 77.7 cubic feet per second would fill an Olympic size swimming pool in just under twenty minutes.

<sup>3</sup> Dianne E. Young, Ronald and Janet Del Carlo, RDC Farms, Inc., Eddie Vierra Farms, LLC, and Warren P. Schmidt, Trustee of the Schmidt Family Recoverable Trust.

Water Board cease and desist order against Woods, the Young Parties filed their Ex Parte Application for Alternative Writ of Administrative Mandamus and/or Prohibition. (CT2:329 et seq.) Their petition made two claims. First, the Young Parties alleged that their due process rights were violated because the Board did not grant their late request to join and participate as parties in the Board proceedings. Second, the Young Parties - who claim to hold riparian and pre-1914 rights - alleged that the Board did not have jurisdiction to issue a cease and desist order against Woods or the Young Parties on the theory that the Board does not have jurisdiction to regulate riparian or pre-1914 rights under its cease and desist authority in Water Code section 1831. The Young Parties contended that instead of issuing an order itself, the State Water Board must seek a cease and desist order from the court when the diverter claims to hold a riparian or pre-1914 right. (CT2:427.)

[\*8]

After an ex parte hearing, the trial court issued an alternative writ and set the hearing on the order to show cause for 29 days later (April 8, 2011) over the Board's objection that this would preclude preparation of the administrative record and a full briefing schedule. The Young Parties argued that the abbreviated hearing schedule was necessary because, without relief, they faced imminent financial disaster. (CT2:331:4-5 [ex parte relief appropriate because of irreparable harm].)

After briefing, the trial court conducted the hearing on the order to show cause on Friday, April 8, 2011. (RT: 1-64.) On the following Monday, the court issued an order granting the Young Parties' petition based on their due process claim and declaring the Board's cease and desist order against Woods void. (CT3:861-869 [April 11 ruling].) With regard to the jurisdictional claim, it stated:

[T]he State may certainly exercise its statutory authority to "investigate whether illegal diversions and other violations of water right permit and license conditions are occurring in the Bay-Delta watershed" (quoting from Water Resources Control Board form letter, dated February 18, 2009; Cal. Const. [\*9] , art. X, § 2; Water Code §§ 100, 275; Respondents'

Opposition Brief, 3:23-25) and, after fair notice and a fair hearing, take appropriate action. However, State agencies must proceed in the manner required by law.

(CT3:866:6-12.)

The Young Parties submitted a proposed statement of decision, writ, and judgment to the trial court on April 13, 2011. On April 22, the State Water Board filed timely objections to the proposed statement of decision. (CT3:870; see Cal. Rules of Court, rule 3.1590.) That same day, the court issued the final judgment, writ of mandamus and/or prohibition, and statement of decision prepared by the Young Parties. (CT4:940-955.) The writ commanded that the State Water Board set aside the cease and desist order, and that it file a return within ten days showing compliance.

After the parties jointly requested that the court clarify its ruling on the jurisdictional cause of action (CT4:916), the trial court issued a second statement of decision (CT4:1015) and an "amended" final judgment and writ of mandamus incorporating the second statement of decision. (CT4:1011.) The amended writ commanded the same action as the first writ. (CT4:1030.) The second statement [\*10] of decision retained the earlier quoted language stating that the State may exercise its statutory authority to investigate and take appropriate action. (CT4:1018.) However, the trial court went on to address the jurisdictional cause of action:

The Court's tentative ruling was intended to reach the issues raised in Petitioners' second cause of action.

The issue presented in the second cause of action was not the State Board's power to investigate. Rather, as Petitioners contend, the issue was whether the State Board exceeded its jurisdiction. The Court finds in Petitioners' favor - i.e., that the State Board lacked jurisdiction to determine the extent of riparian and pre-1914 appropriative water rights through the use of its limited cease and desist order authority pursuant to Water Code § 1[8]31.

(CT4:1021:16-24.) That is the trial court's entire explanation of its jurisdictional ruling. (*Ibid.*)

The Young Parties filed notice of entry of judgment on May 4, 2011, and notice of entry of the amended judgment on June 23, 2011. (CT4:936, 1007.) They filed a motion for attorneys' fees on July 8, 2011. (Supp. CT: 16.) After briefing and a hearing (RT:65-84), [\*11] the trial court issued a minute order granting the attorneys' fees request. (Supp. CT: 214-216.) On October 28 the trial court adopted and issued the Young Parties' proposed order granting fees. (Supp. CT:217, 225.)

The State Water Board timely appealed both the judgment and the amended judgment. (CT4:1039-1043, 1045-1049.) Real Party in Interest San Luis & Delta-Mendota Water Authority also appealed the judgment.<sup>4</sup> (CT4:1055-1058.) The State Water Board filed a timely notice of appeal of the fees orders. (Supp. CT:230-234.)

### III. LATER ADMINISTRATIVE PROCEEDINGS

After judgment in the trial court, the State Water Board adopted State Water Board Order WR-2012-0012 on August 7, 2012. (Request for Judicial Notice, filed concurrently herewith, 2012, Exh. A [Order WR-2012-0012]. [\*12] ) The Board's reconsideration order reopens the State Water Board hearing on Woods' diversions, permitting the Young Parties to submit evidence and cross examine witnesses. (*Ibid.*) The Board's order moots the due process issue in this case, so the Board is not appealing the due process portion of the judgment. (*Keefe v. Keefe (1939) 31 Cal.App.2d 335, 337.*) The parties have stipulated that the reopened hearing will be stayed pending resolution of this appeal.

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<sup>4</sup> San Luis & Delta-Mendota Water Authority consists of public agency water users in the Sacramento-San Joaquin Delta. They participated as interested parties in the administrative and trial court proceedings leading to this appeal.

## LEGAL BACKGROUND

### I. TYPES OF WATER RIGHTS

California law recognizes two principal types of rights to the use of surface water: riparian rights and appropriative rights.<sup>5</sup>

A. Riparian Rights. These rights generally attach to the smallest parcel of real property contiguous to a watercourse held under [\*13] one title in the chain of title leading to the present owner. (*Pleasant Valley Canal Co. v. Borror* (1998) 61 Cal.App.4th 742, 774-775.) A riparian right is limited to the natural flow of the watercourse (*id.* at p. 118), and to reasonable and beneficial use on the riparian parcel. (*Lux v. Haggin* (1886) 69 Cal. 255, 390; Cal. Const., art. X, § 2.)

B. Appropriative Rights. Diverters acquire appropriative rights by diverting water and applying it to beneficial use. The maxim "first in time, first in right" governs the relative priority of appropriative rights, and the rights of senior appropriators are served completely before those of junior appropriators. (*City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 926.) Appropriators may develop rights regardless of land ownership or location of use on the land, use the water outside of the watershed, and lose their rights through non-use. (*Miller v. Bay Cities Water Co.* (1910) 157 Cal. 256; *Smith v. Hawkins* (1898) 120 Cal. 86, 88; *Crandell v. Woods* (1857) 8 Cal. 136, 142; Wat. Code, § 1241.) An appropriative right is defined [\*14] by priority date, quantity of water, season of use, point of diversion, place of use, and purpose of use. (Hutchins (1956) *The California Law of Water Rights*, pp. 130-150 [attached hereto as Attachment 1].)

Prior to December 19, 1914, the effective date of the Water Commission Act, diligent appropriation and application of the water to beneficial use alone sufficed to establish the right. These appropriative rights established before the Water Commission Act are known as "pre-1914 rights." Since 1914 the exclusive means to obtain an appropriative water right is by

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<sup>5</sup> There are also a limited number of pueblo rights and federally reserved water rights in the state. (*Lux v. Haggin* (1886) 69 Cal. 255, 384-409.) These types of rights are not at issue in this case.

obtaining a water right permit from the State Water Board (or its predecessor agency) under division 2 (commencing with section 1000) of the Water Code. (Wat. Code, § 1225; Pleasant Valley Canal Co., supra, 61 Cal.App.4th at p. 777.) Division 2 establishes a comprehensive scheme to regulate and permit all water not appropriated before 1914; it is designed to ensure that water rights are exercised in an orderly fashion, and that the State's water resources are put to beneficial use to the fullest extent possible. (People v. Shirokow (1980) 26 Cal.3d 301, 308-309.)

In addition to its permitting [\*15] authority, the State Water Board has responsibilities that cover all water rights. These include the prevention of the waste or unreasonable use of water, the protection of in-stream beneficial uses, and the protection of the public interest. (Cal. Const., art. X, § 2; Wat. Code, §§ 100, 275, 1831, subd. (d)(3).) The public trust doctrine also imposes upon the State Water Board the duty to protect public trust interests - including interests in commerce, fisheries, recreation, and ecology. (National Audubon Society v. Superior Court (1983) 33 Cal.3d 419; see generally In re Water of Hallett Creek Stream System (1988) 44 Cal.3d 448, 472 fn. 16 [State Water Board has jurisdiction to conduct administrative proceedings to apply public trust and reasonable use doctrines to riparian right holders]; Imperial Irrigation Dist. v. State Wat. Resources Control Bd. (1990) 225 Cal.App.3d 548, 557-561 [State Water Board has jurisdiction to conduct administrative proceedings to apply reasonable use requirements to holder of pre-1914 right].)

## **STANDARD OF REVIEW**

Matters presenting pure questions of law, such as the jurisdictional claim [\*16] here, are subject to the appellate court's de novo review. (Ghirardo v. Antonioli (1994) 8 Cal.4th 791, 799; Topanga & Victory Partners, LLP v. Toghia (2002) 103 Cal.App.4th 775, 780-781.) Moreover, in a section 1094.5 mandamus proceeding the appellate court gives no deference to the trial court's ruling or the reasons for its ruling, but instead decides the matter anew. (Bostean v. Los Angeles Unified School Dist. (1998) 63 Cal. App. 4th 95, 107.) Appellate courts independently determine the proper interpretation of a statute; they are not bound by evidence

on the question presented in the trial court or the trial court's interpretation. (*People ex. Rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432; *in re Clarissa H.* (2003) 105 Cal.App.4th 120, 125.)<sup>6</sup>

[\*17]

Although the scope of an agency's jurisdiction is ultimately a legal question for the appellate court, the court may take into account the agency's interpretation of the statutes it is charged to administer. (*PG&E Corp. v. Public Utilities Comm.* (2004) 118 Cal.App.4th 1174, 1195.) The agency's interpretation is not controlling but is accorded weight commensurate with the thoroughness, validity, and consistency of the agency's reasoning. (*Ibid.*) The agency's interpretation is one "among - several tools available to the court" in determining the meaning and legal effect of a statute. (*Ibid*; *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal. 4th 1, 7.)

With regard to the attorneys' fees award, a trial court order awarding fees is reviewed for abuse of discretion. (*County of Colusa v. Cal. Wildlife Conserv. Bd* (2006) 145 Cal. App. 4th 637, 648.) "On appeal, we must pay particular attention to the trial court's stated reasons in denying or awarding fees and [see] whether it applied the proper standards of law in reaching its decision. [citations]" (*Ibid.*, internal quotations marks omitted.) "Discretion may [\*18] not be exercised whimsically and, accordingly, reversal is appropriate where no reasonable basis for the action is shown. [citation]" (*Cal. Licensed Foresters Assn. v. State Bd. of Forestry* (1994) 30 Cal. App. 4th 562, 569, internal quotation marks omitted.)

## ARGUMENT

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<sup>6</sup> The trial court itself approached this case as a purely legal matter, for which no administrative record was even permitted. (CT2:416:19-22 [Young Parties argue no need for administrative record because case involves purely legal questions].) To the extent that the trial court made any findings that were not purely legal, those findings would be reversible error because the court precluded preparation of an administrative record and had no facts before it. (See Code Civ. Proc., § 1094.5, subd. (c); *Elizabeth D. v. Zolin* (1993) 21 Cal.App.4th 347, 354.) The trial court in any event does not make factual findings in a section 1094.5 mandamus action but looks only to whether the agency exceeded its jurisdiction, whether there was a fair trial, and whether the agency abused its discretion. (Code Civ. Proc., § 1094.5, subd. (b).)

**I. THE STATE WATER BOARD HAS JURISDICTION TO ISSUE A CEASE AND DESIST ORDER WHEN IT DETERMINES A DIVERSION IS UNAUTHORIZED, EVEN IF THE DIVERTER CLAIMS THAT THE DIVERSION IS UNDER A RIPARIAN OR PRE-1914 RIGHT.**

The trial court found that the State Water Board does not have jurisdiction to issue an administrative cease and desist order under Water Code section 1831 against a diverter claiming to hold a riparian or pre-1914 water right. The trial court erred because, as 100 years of history will demonstrate, the Board's jurisdiction extends to enforcement authority over all unauthorized diversions or use of water, including diversions by those claiming to hold riparian and pre-1914 water rights. Any other interpretation would allow an illegal diverter to escape the Board's authority by just asserting a riparian or pre-1914 water right.

**A. The State Water Board's Enforcement History [\*19] Demonstrates That The Legislature Has Authorized The Board to Determine If Diversions Are Made under A Valid Right, Including A Riparian or Pre-1914 Right.**

Over the past 100 years, the Legislature has expanded the State Water Board's enforcement authority under division 2 against unauthorized diversion or use of water. Initially, the Board could only exercise its enforcement powers by filing a complaint or petition against the unauthorized diverter in a trial court. Today, if the Board ascertains that a diverter does not hold a valid riparian or pre-1914 right, or is diverting in violation of its permit, the Board can issue an administrative civil liability, a cease and desist order, or both, against that unauthorized diverter. A short history lesson explains the serious error in the trial court's ruling.

The Water Commission Act became effective in 1914 (Stats. 1913, ch. 586) and was later codified in division 2 of the Water Code. Section 11 of the Water Commission Act, later amended and codified as Water Code sections 1201 and 1202, described the water over which the State Water Board acquired permitting authority as all water not otherwise properly diverted or used under a [\*20] non-statutory (riparian or pre-1914) right. <sup>7</sup>

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<sup>7</sup> Water Code section 1201 provides:

Section 10 of the Water Commission Act, codified as Water Code section 1051, granted the State Water Board power to investigate waters of the State, take testimony regarding water rights, and ascertain whether water had been appropriated under the laws of State. (Stats. 1913, ch. 586, § 10.)

Section 38 of the Water Commission Act, codified as Water Code section 1052, stated:

The diversion [\*21] or use of water subject to the provisions of this division other than as authorized in this division is a trespass, and the [State Water Board<sup>8</sup>] may institute in the trial court in and for any county wherein such diversion or use is attempted appropriate action to have such trespass enjoined.

(Stats. 1913, ch. 586, § 38.)

Thus, when the statute now codified as Water Code section 1052 was first enacted, the State Water Board had to seek judicial recourse to enjoin unauthorized diversions of water. The Board's threshold power under Water Code section 1051 to investigate unauthorized diversions and to seek judicial recourse under section 1052, however, included investigations into whether a diverter who claimed to hold a riparian or pre-1914 right actually had [\*22] such a right. (*Ibid.*) The Supreme Court confirmed this principle over 70 years ago in Meridian, Ltd. v. City and County of San Francisco (1939) 13 Cal.2d 424 (Meridian).

The *Meridian* case involved diversions by the City of San Francisco in excess of its pre-1914 rights for the Hetch Hetchy project. The California Supreme Court affirmed that the State Water Board

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Water declared public and subject to appropriation All water flowing in any natural channel, excepting so far as it has been or is being applied to useful and beneficial purposes upon, or in so far as it is or may be reasonably needed for useful and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is hereby declared to be public water of the State and subject to appropriation in accordance with the provisions of this code.

(See also Wat. Code, § 1202 [describing unappropriated water].)

<sup>8</sup> The agency responsible for water right administration in California has changed several times over the past 100 years. For ease of reading, we refer to the State Water Board and its predecessor agencies simply as the State Water Board.

has the power under section 10 [of the Water Commission Act, later codified as Water Code section 1051,] to investigate all streams of the state for the purpose of ascertaining whether the use of water therein is in conformity with the water appropriation laws of the state. And the power extends to the use of water made under appropriations or attempted appropriations acquired or asserted prior to [1914].

*(Meridian, supra, 13 Cal.2d at p. 450.)* Thus, as things stood following *Meridian*, the Board could investigate unauthorized diversions of any kind, even those claimed under riparian or pre-1914. The Board's enforcement remedy was limited to filing judicial actions, but that was true for unauthorized diversions based on post-1914 water rights as well as riparian [\*23] and pre-1914 rights.

Beginning in 1980, the Legislature began creating ways to expand the State Water Board's enforcement authority. That was the year that the Legislature enacted Water Code section 1831 within division 2. Section 1831 authorized the Board to issue a "preliminary" cease and desist order against "any person holding a permit or license to appropriate water" who was "violating any term or condition of the permit or license." (Former Wat. Code, § 1831, added by Stats. 1980, ch. 933, § 13.) This allowed the Board to enforce the terms of permits or licenses through its own administrative action.

In 1987, the Legislature amended Water Code section 1052 to again expand the State Water Board's administrative enforcement powers. (Former Wat. Code, § 1052, amended by Stats. 1987, ch. 756, § 1.) The amendments authorized the Board to petition the trial court to impose civil liability of up to \$ 500 per day for diverting water "other than as authorized" in division 2 of the Water Code. (*Id.*, subs. (a), (d).) The Legislature also granted the Board the authority to impose civil liability administratively, though only in years declared critically dry by the Department of [\*24] Water Resources. (*Id.*, subs.(a), (b).) In 1991, the Legislature removed the "critically dry" requirement, allowing the Board to impose administrative civil liability in response to any unauthorized diversion or use of water. (Former Wat. Code, § 1052, amended by Stats. 1991, ch. 1098, § 1 (AB 2017), subs. (a), (b).)

In 2002, the Legislature amended Water Code section 1831, and again expanded the Board's enforcement powers by authorizing the Board to issue administrative cease and desist orders against any unauthorized diversions. (Stats. 2002, ch. 652, § 6 (AB 2267).) Since 2002, section 1831 has stated:

- (a) When the board determines that any person is violating, or threatening to violate, any requirement described in subdivision (d), the board may issue an order to that person to cease and desist from that violation.

\* \* \*

(d) The board may issue a cease and desist order in response to a violation or threatened violation of any of the following:

- (1) The prohibition set forth in Section 1052 against the unauthorized diversion or use of water subject to this division.
- (2) Any term or condition of a permit, license, certification, [\*25] or registration issued under this division.
- (3) Any decision or order of the board issued under this part, Section 275, or Article 7 (commencing with Section 13550) of Chapter 7 of Division 7, in which decision or order the person to whom the cease and desist order will be issued, or a predecessor in interest to that person, was named as a party directly affected by the decision or order.

(Wat. Code, § 1831, subds. (a), (d).)

Section 1831 is the culmination of the Legislature's expansion of the Board's cease and desist authority over unauthorized diversions, including those claimed under riparian or pre-1914 rights. The California Supreme Court in *Meridian* recognized the Board's power to investigate diversions (including those exercised under a pre-1914 right) and to seek judicial enforcement if the diversion was unauthorized. (*Meridian, supra*, 13 Cal.2d at p. 450.) The underlying principle in *Meridian* has never changed, but the Legislature has continually expanded the

Board's power to remedy unauthorized diversions leading to the creation of its administrative cease and desist power in section 1831, subdivision (d)(1).

The State Water [\*26] Board therefore was authorized to issue a cease and desist order against Woods' unauthorized diversions, even if Woods claimed those diversions were under a riparian or pre-1914 water right.

**B. Public Policy and Case Law Support the Conclusion That Water Code Section 1831, subdivision (d)(1) Authorizes the State Water Board to Issue an Administrative Cease And Desist Order Against Unauthorized Diversions, Including Those Under a Claim of Riparian or Pre-1914 Rights.**

**1. The Water Code authorizes the State Water Board, not the diverter, to determine whether the Board has jurisdiction over unauthorized diversions.**

A diverter cannot legally divert water absent a water right. (Wat. Code, § 1052, subd. (a).) The Legislature has directed the State Water Board to take "vigorous action" to prevent the unlawful diversion of water. (Wat. Code, § 1825.) The Board's administrative action in this case is an unexceptional exercise of its authority to prevent unauthorized diversions under Water Code section 1831, subdivision (d)(1).

Under the trial court's ruling, a diverter can put herself beyond the jurisdiction of the State Water Board's administrative cease and desist power by [\*27] simply asserting that she has a riparian or pre-1914 appropriative right. The Young Parties, for example, are claiming rights to divert under riparian and pre-1914 rights, yet argue they have no obligation to demonstrate that their rights are legitimate.<sup>9</sup> The trial court's ruling, if upheld, would drastically undermine the administrative cease and desist authority that the Legislature granted to the Board in Water

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<sup>9</sup> The Young Parties assert they hold property in the form of "claimed riparian and pre-1914 appropriative rights." (CT2:392:11-12; CT2:364:17-19; CT2:358:14-16; CT2:343:11-13.) They also claim indeterminate "other rights." (CT2:400, 407; CT2:383; CT2:350, 352.) They do not state what portion of the alleged rights are riparian, appropriative, or "other." They do not make any claim as to the size of the rights, whether in terms of volume, rate, or otherwise. Young makes no attempt to quantify her rights by season or month. Some of the Young Parties claim a priority date of "approximately 1909." (CT2:392:18-19; CT1:264:24-25; CT2:358:23-24; CT2:343:19-20.) Elsewhere, three claim a priority date generally of the "1800s" or "late 1800's." (CT2:400; CT2:383; CT2:350.) Nowhere have the Young Parties claimed any specific volume of water, season of

Code section 1831. Much as the Young Parties did in this case, any unlawful diverter would need only make an unsupported claim that she holds a riparian or pre-1914 right to avoid an administrative cease and desist hearing. The trial court's ruling would not only undermine the Legislative intent to strengthen the Board's administrative enforcement powers, but would overburden the courts with complicated and lengthy water right determinations and would also encourage fraudulent claims to riparian and pre-1914 rights.

[\*28]

The United States Supreme Court rejected a similar argument that an entity can avoid an agency's jurisdiction by claiming to be exempt from the agency's jurisdiction. In *Weinberger v. Hynson, Westcott and Dunning, Inc.* (1973) 412 U.S. 609, a drug manufacturer claimed that a certain drug was not a "new drug" subject to regulation by the Food and Drug Administration (FDA) under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. §§ 301 et seq.). (*Id.*, at pp. 623-627.) The manufacturer further contended that the FDA lacked jurisdiction to determine the validity of the manufacturer's claimed immunity from regulation. (*Ibid.*) The Supreme Court rejected the manufacturer's contention, holding:

It is clear to us that FDA has power to determine whether particular drugs require an approved NDA [new drug application] in order to be sold to the public. FDA is indeed the administrative agency selected by Congress to administer the Act, and it cannot administer the Act intelligently and rationally unless it has authority to determine what drugs are 'new drugs' . . . and whether they are exempt from the efficacy requirements . [\*29] . . .

(*Id.* at p. 624.) Likewise, the State Water Board cannot administer the water right permit system effectively, or carry out its statutory mandate to prevent the unlawful diversion of water, unless it has authority to decide the validity of a diverter's claim to be exempt from the permitting system. In many cases that will entail evaluating the validity of a diverter's riparian or pre-1914 appropriative claim of right.

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diversion, or priority date. The Young Parties' assertion that they hold water rights lacks a description of the basic characteristics inherent to a water right.

This Court's holding in *Phelps v. State Water Resources Control Board (2007) 157 Cal.App.4th 89 (Phelps)* lends further support to the conclusion that the State Water Board has authority to take enforcement action against a diverter who claims to hold a riparian or pre-1914 appropriative right if the Board determines that the claim is invalid. The *Phelps* case involved an administrative enforcement proceeding similar to the one in this case. In *Phelps*, the Board concluded that certain individuals had diverted and used water without authorization and issued an order imposing administrative civil liability against them. In reaching the conclusion that the individuals had diverted water illegally, the State Water [\*30] Board addressed the individuals' claimed riparian and pre-1914 appropriative rights, and concluded that their diversion and use of this water was not authorized by valid riparian or pre-1914 appropriative rights. (*Id. at p. 113.*) On appeal, this Court upheld the Board's conclusions regarding the individuals' riparian and pre-1914 appropriative claims. (*Id., at pp. 116-119.*) Although the Board's authority to decide the validity of these claims was not challenged in *Phelps*, the conclusion that the State Water Board did not exceed its authority by addressing the riparian and pre-1914 claims and taking administrative enforcement action is implicit in the Court's holding. (See also *North Gualala Water Co. v. State Water Resources Control Board (2006) 139 Cal.App.4th 1577, 1589* [State Water Board's interpretation of statutory definition of groundwater within its regulatory authority entitled to judicial deference].)

The State Water Board's authority to determine its jurisdiction extends to finding that a diverter has demonstrated a valid right to only a portion of the diversion. In this case, for example, where a diverter has demonstrated [\*31] a riparian or pre-1914 right to 77.7 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. Nor would a riparian right on parcel A immunize a diverter from Board regulation of unauthorized diversions on parcel B. In all these cases, to exercise its division 2 regulatory powers over the unauthorized diversions, the Board must be able to make a determination as to the scope of the

valid right, "regardless of the basis under which the right is held." (*California Farm Bureau Federation v. State Water Resources Control Bd.* (2011)51 Cal.4th 421, 429.)

The trial court's decision was incorrect and should be reversed. The State Water Board has authority to ascertain whether a diversion or use of surface water is authorized. If the diversion is not authorized, the Board can issue a cease and desist order. The diverter can then challenge the order, with the benefit of a full administrative record, before the trial court. (Code Civ. [\*32] Proc, § 1094.5.) But the diverter cannot escape the Board's authority to prevent unauthorized diversions simply by claiming that it holds a riparian or pre-1914 right.

**2. Water Code section 1831, subdivision (e) does not prevent the State Water Board from issuing a cease and desist order against an unauthorized diverter simply because she claims to hold a riparian or pre-1914 right.**

As part of the 2002 amendments to Water Code section 1831, the Legislature added subdivision (e), which specifies: "This article shall not authorize the board to regulate in any manner the diversion or use of water not otherwise subject to regulation of the board under this part." This subdivision should not be construed, as the Young Parties argued below, to deny the State Water Board jurisdiction to issue cease and desist orders any time the diverter claims her diversion is not subject to regulation.

Unappropriated water is subject to regulation of the State Water Board under part 2 of division 2 of the Water Code. (Wat. Code, §§ 1201, 1202; see *id.*, § 1052, subd. (a).) Diversions of unappropriated water therefore fall within the Board's cease and desist jurisdiction. (*Ibid.*; Wat. Code, [\*33] § 1831.)

Unappropriated water includes:

- . Water that has never been appropriated. (Wat. Code, § 1202, subd. (a).)
- . Water subject to a pre-1914 right, but which was not perfected by putting the water to beneficial use with due diligence. (*Id.*, subd. (b).)

Water for which a right had been perfected by putting the water to use under a pre-1914 right, but where the use later ceased. (*Ibid.*; see also id. § 1240 [appropriative rights are lost for non-use]; *Erickson v. Queen Valley Ranch Co. (1971) 22 Cal.App.3d 578, 582* [forfeiture applies to both pre-1914 and statutory appropriations.]

Under 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. If the Board finds that the water is validly claimed under a riparian or pre-1914 right, the State Water Board does not have cease and desist authority under Water Code section 1831, subdivision (d)(1) over that water. But if the Board finds that the water is not validly claimed, the water is unappropriated water subject to the Board's authority under [\*34] subdivision (d)(1).

Thus, issuing a cease and desist order to enjoin unauthorized diversions does not violate section 1831, subdivision (e) because subdivision (e) does not prohibit the State Water Board from exercising its authority in subdivision (d)(1) over unauthorized diversions. (See *California Farm Bureau Federation v. State Water Resources Control Bd., supra, 51 Cal.4th at p. 429* [State Water Board "has no permitting or licensing authority over riparian or pueblo rights, or over appropriative rights acquired before 1914. The [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. ([Water Code,] § 275.)"], footnotes omitted.)

The Young Parties argued below that section 1831, subdivision (e) should be broadly construed because otherwise its language would be surplusage. But subdivision (e) is not surplusage. For example, although section 1831, subdivision (d)(1) allows the Board to determine whether a diversion is authorized under a riparian or pre-1914 right, it does not allow the Board to diminish or reduce a valid riparian or pre-1914 right, [\*35] or require a permit to exercise that right.

The language in section 1831, subdivision (e) was necessary because of contemporary concerns at the time it was passed. When the Legislature added subdivision (e) in 2002 as part

of the bill expanding the State Water Board's cease and desist powers over unauthorized diversions (Stats. 2002, ch. 652), there was a substantial controversy about whether the State Water Board might seek to expand its authority over groundwater. (See Sandino, *California's Groundwater Management Since the Governor's Commission Review: The Consolidation of Local Control* (2005) 36 *McGeorge L. Rev.* 471, 475 fn. 42.) In this context, subdivision (e) provides reassurance that the bill expanding the Board's cease and desist powers would not be interpreted to expand the water right permitting program to percolating groundwater or other rights not then subject to the program.

Thus, Water Code section 1831, subdivision (e) does not prevent the State Water Board from issuing a cease and desist order when it determines that a claimed riparian or pre-1914 right is invalid.

**C. The Temescal Case Demonstrates That The State Water Board Has Jurisdiction to Determine Whether A Diversion is Unauthorized And Therefore Subject to A Cease And Desist Order.**

The Young Parties argued below that the State Water Board's authority over an unauthorized diversion is dependent on a prior judicial determination to the same effect (i.e. a court ruling that the diversion is unauthorized). That argument was rejected by the California Supreme Court in *Temescal Water Co. v. Department of Public Works* (1955) 44 *Cal.2d* 90 (*Temescal*).

In *Temescal* a mutual water company challenged the issuance of a water right permit, claiming that it had a pre-1914 appropriative right and that, taking into account the water needed for vested riparian and appropriative rights, there was no unappropriated water. (*Id. at pp. 93-94.*) The company claimed that the availability of unappropriated water was a jurisdictional issue that must be determined in an independent judicial proceeding. (*Id. at p. 103.*) The court rejected this argument, noting that "an independent judicial proceeding to determine the availability of unappropriated water . . . would deprive the administrative proceeding of all of its proper functions. [\*37] " (*Id. at pp. 105-106; see U.S. v. Superior Court* (1941) 19 *Cal.2d* 189, 195 ["it lies within the power of the administrative agency to determine in the first instance, and

before judicial relief may be obtained, whether a given controversy falls within the statutory grant of jurisdiction".)

Similarly here, to determine whether to issue a cease and desist order for the unauthorized diversion or use of water, the State Water Board has jurisdiction to determine whether the diversion is authorized. Like the availability of unappropriated water in Temescal, the Board must make the "jurisdictional" determination whether a diversion is authorized, because the water is considered unappropriated and subject to the Board's enforcement power only if the diversion is unauthorized.. (*Temescal, supra, 44 Cal.2d at p. 103* [availability of unappropriated water is basis of authority to issue permit]; *id. at p. 105* ["no distinction was made between 'jurisdictional facts' and other factual determinations made by an administrative agency".]) *Temescal* demonstrates that the Board may make its own threshold determination of whether [\*38] water is unappropriated even if that implicates claims to riparian and pre-1914 rights.

#### **D. Jurisdiction in the State Water Board Benefits The Courts.**

Having the State Water Board decide the validity of a claimed riparian or pre-1914 water right also benefits the courts. Determination of riparian and pre-1914 water rights is a highly technical and fact-intensive process, which the Board has the expertise to undertake. (*National Audubon Society v. Superior Court, supra, 33 Cal.3d at pp. 426, 450* [State Water Board better suited for such determinations than a court of general jurisdiction]; Wat. Code, §§ 174, 1051.) This process is lengthy and time consuming, as this case with its 63-page administrative decision demonstrates.

The Board's cease and desist order remains reviewable by the courts under Code of Civil Procedure section 1094.5, where the court will have the benefit of the Board's expertise, its findings, and a fully developed administrative record upon which to review the Board's decisionmaking. The Legislature's plan to shift the enforcement burden to the Board and away from the overtaxed courts would be defeated by the trial court's approach. [\*39]

The trial court's judgment should be reversed.

## **II. THE TRIAL COURT'S ORDER GRANTING ATTORNEYS' FEES TO THE YOUNG PARTIES MUST BE REVERSED.**

The trial court awarded attorneys' fees to the Young Parties based on the private attorney general fee statute, Code of Civil Procedure section 1021.5. (CT1:204.) That section permits an award of fees:

in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement . . . are such as to make the award appropriate . . . .

(*Ibid.*)

The award of attorneys' fees to the Young Parties under Code of Civil Procedure section 1021.5 must be reversed. First, section 1021.5 requires that the necessity and financial burden on the Young Parties are such as to make the award appropriate, and all evidence in this case was to the contrary. Second, section 1021.5 requires that the case provide a significant benefit to the general public or a large class of persons. The trial court's finding of such [\*40] a benefit was an abuse of discretion, whether that supposed benefit be the due process claim or the jurisdictional claim.

### **A. The Trial Court's Findings on Financial Burden Are Not Supported by The Record Because The Trial Court Ignored The Young Parties' Admission of Financial Interest.**

The Young Parties did not show that the necessity and financial burden of bringing the action were such as to make a fees award appropriate. (Code Civ. Proc, § 1021.5.) To meet the financial burden requirement to recover fees under Code of Civil Procedure section 1021.5, a litigant must demonstrate that the anticipated costs of suit outweighed her private interest in the action. (*Woodland Hills Residents Assn., Inc. v. City Council of Los Angeles* (1979) 23 Cal.3d 917, 941; *Cal. Licensed Foresters Assn. v. State Bd. of Forestry* (1994) 30 Cal.App.4th 562.

570; Supp. CT1:209:3-21.) A fee award is appropriate only ". . . when the necessity for pursuing the lawsuit placed a burden on the plaintiff out of proportion to his individual stake in the matter." (*County of Inyo v. City of Los Angeles (1978) 78 Cal.App.3d 82, 89.*) The party seeking fees [\*41] has the burden to prove the financial burden criterion. (*Luck v. Southern Pacific Transportation Co. (1990) 218 Cal.App.3d 1, 30.*)

The Young Parties, who use the water at issue for commercial agriculture on their extensive land holdings (CT2:343:9-15; CT2:358:8-13; CT2:364:14-16; CT2:392:6-10), failed to satisfy this burden. Their "primary purpose in bringing suit was to pursue and protect [their] own property rights rather than to further a significant public interest." (*Terminal Plaza Corp. v. City and County of San Francisco (1986) 177 Cal.App.3d 892, 914.*) The Young Parties' numerous admissions throughout the litigation demonstrated their personal economic interests, as they urged that immediate relief was necessary to protect those interests. These admissions included statements that:

- . ex parte relief was appropriate because of irreparable harm (CT2:331:4-5);
- . losing case will result in crop loss (CT1:7:23-26);
- . the Board's order "will cause injury to business operations" (CT1:8:7-8);
- . the Board's order "directly threatens [Young Parties'] livelihood" (CT2:416:12-13);
- . compliance with Board's order likely [\*42] to result in death of commercial crops on property (CT2:428:11); and
- . damage from losing case or slow resolution will be dead commercial crops or buying replacement water on open market (RT1-.63:14-21).

Despite the evidence that the Young Parties brought this action to vindicate their personal, financial interests, the trial court found that the "the necessity and financial burden of private enforcement were such as to make an award appropriate." (Supp. CT:215:17-18.) The trial court's ruling does not refer to any evidence to support this conclusion. (Supp. CT:214-215.) The only "support" in the record for this finding is the statement in the Young Parties' fees reply

brief that they "had no financial interest in the litigation [sic] this case." (CT1:208:24-25.) This statement was not only unsupported by evidence but also contradicted the Young Parties' many admissions of financial self-interest. That the Young Parties' litigation costs presumably were shared among five separate sets of petitioners only further undermines their claim that their burden outweighed their financial interest.

The trial court therefore abused its discretion when it found that the Young Parties' [\*43] burden in bringing the case outweighed their financial interest. Where a prevailing party has a sufficient property, economic, or business interest in the subject matter to warrant bringing the suit, fees should be disallowed. (*Angelheart v. City of Burbank (1991) 232 Cal.App.3d 460, 468-470.*) There was no evidence in the record to support a finding that the Young Parties' financial stake in the case was "so disproportionate to the cost of litigation that the lawsuit would not have been brought without the additional incentive of an award of attorney fees." (*Satrap v. Pacific Gas & Electric Co. (1996) 42 Cal.App.4th 72, 78.*).

**B. The Trial Court's Finding of A Significant Benefit to The Public Was An Abuse of Discretion.**

In order to grant fees under Code of Civil Procedure section 1021.5, the trial court must find that the litigation conferred a significant benefit on the general public or a large class of persons. (Code Civ. Proc, § 1021.5.) The sole relief granted by the trial court was a writ commanding the State Water Board to set aside the cease and desist order against Woods and file a return within ten days demonstrating compliance. [\*44] (CT4:1030.)

The trial court's attorney fees order is so conclusory that it is difficult to ascertain whether the supposed significant benefit concerned the Young Parties' due process claim or their jurisdictional claim. Presumably referring to the jurisdictional claim (RT:76:9-77:1; RT:79:19-20), the court based its finding on a determination that this was a "vanguard action" such that its ruling, "if affirmed on appeal, will in fact have a broad procedural impact on many similar cases." (Supp. CT:215, fn. 1.)

The court's finding under either theory was an abuse of discretion. Apparently referring to the jurisdictional claim, the court found that the Young Parties' suit conferred a significant benefit to the public because

counsel for Petitioners and counsel for Respondents/Real Parties represent that other similar actions involving similar water interests and issues already exist or are planned; the instant case is a vanguard action.

(Supp. CT:215, fn. 1.) The State Water Board's counsel, however, did not make those representations. (See RT:76:13-19.) Real Party's Counsel did not make those representations. (RT, generally.) The Young Parties' Counsel *did* make those [\*45] representations. (RT:83:9-83:21.) But the Board's attorney objected to the admissibility of this unsworn testimony, and the court assured counsel that it would not consider improper evidence. (RT:84:9-16.) That the court relied on this inadmissible testimony as the basis for concluding that this was a "vanguard action" demonstrates an abuse of discretion.

Regardless, there is no basis on which to infer that this action conferred a substantial benefit on a significant number of persons under either the trial court's due process ruling or its jurisdictional ruling.

First, the trial court's due process ruling did not confer any substantial benefit. The Young Parties' due process claim became moot when the State Water Board granted the motion to reconsider the cease and desist order.

Had the issue remained viable, the Board would have demonstrated on appeal that the due process argument was meritless. The alleged due process deprivation concerned a routine procedural matter: the Board's hearing officer ruled that the Young Parties' motion to intervene was untimely, but then crafted an order to protect their interests if they could show that they had water rights in addition to those [\*46] exercised by Woods on their behalf. The hearing officer's exercise of discretion was reasonable but, even if mistaken, it would not elevate a pedestrian, fact-specific procedural decision into a constitutional due process claim of broad import.

The Young Parties' due process claim has no significant public benefit. If accepted, it would mean that the State Water Board would be forced to name an irrigation company's customers as defendants every time that it brought an enforcement action against the irrigation company. That is a "benefit" that most customers could live without it. The Young Parties' due process rule also would be unwieldy and unworkable - taken to its logical conclusion, it would mean that the Board would be forced to name as a defendant every single customer of an irrigation company or water utility whose ability to obtain water might be affected by the Board's enforcement decision.

Second, the Young Parties' jurisdictional claim confers no significant public benefit. If reversed on appeal, it confers no benefit. If upheld, there is no apparent benefit. Other than the representations of the Young Parties' counsel, there is no evidence that this jurisdictional ruling [\*47] would affect a large class of people. And the ones that stand to gain the most from the decision are those who wish to avoid the administrative process by claiming a riparian or pre-1914 right, whether substantiated or not. The practical consequence of the Young Parties' jurisdictional claim, if accepted, would be to force the Board to file judicial actions against the customers, forcing them into more lengthy and more expensive judicial proceedings. It is difficult to see the public benefit in that.

This case provided no tangible benefit to the public and no relief except to void the State Water Board order addressed solely to Woods. The trial court's attorney fees award was an abuse of discretion

## **CONCLUSION**

For these reasons, the State Water Board respectfully requests the Court reverse the trial court's judgment and its order awarding attorney fees and that it remand the matter to the State Water Board to resume its administrative proceedings.

Dated: September 26, 2012

Respectfully submitted,

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Senior Assistant Attorney General

SARA RUSSELL

Supervising Deputy Attorney General

/s/ [\*48] [Signature]

MATTHEW G. BULLOCK

Deputy Attorney General

*Attorneys for State Water Resources*

*Control Board*

**CERTIFICATE OF COMPLIANCE**

I certify that the attached APPELLANT STATE WATER RESOURCES CONTROL BOARD'S OPENING BRIEF uses a 13 point Times New Roman font and contains 10,045 words.

Dated: September 26, 2012

KAMALA D. HARRIS

Attorney General of California

KATHLEEN A. KENEALY

Senior Assistant Attorney General

SARA RUSSELL

Supervising Deputy Attorney General

/s/ [Signature]

MATTHEW G. BULLOCK

Deputy Attorney General

*Attorneys for State Water Resources*

*Control Board*

**DECLARATION OF SERVICE BY U.S. MAIL AND EMAIL (PERSONAL SERVICE ON THE SUPREME COURT)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed [\*49] in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On September 27, 2012, I served the attached

**APPELLANT STATE WATER RESOURCES CONTROL BOARD'S OPENING BRIEF**

by personal service where indicated or by transmitting a copy in pdf format via email and by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004 addressed as follows:

**PLEASE SEE ATTACHED SERVICE LIST**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 27, 2012, at San Francisco, California.

Sonya Walters

Declarant

/s/ [Signature]

Signature

**SERVICE LIST**

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A California Professional Corporation

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***South Delta Water Agency Central Delta Water  
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***Respondent:***

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***Attorneys [\*52] for Real Party in Interest and Respondent:***

***State Water Project Contractors, Inc.***

**PERSONAL SERVICE OF 4 COPIES**

California Supreme Court

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***Attorneys for Real Party in Interest and***

***Respondent:***

***San Joaquin County and the San Joaquin County***

***Flood Control And Water Conservation District***

**BY MAIL ONLY**

Clerk of the Court

Civil Division

Superior Court for the County of San Joaquin

222 E Weber Avenue  
Stockton, CA 95202

[SEE APPENDIX 1 IN ORIGINAL]

[SEE APPENDIX 1 IN ORIGINAL]

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REPORTER'S CERTIFICATE

State of California     )  
                                  ) ss.  
County of Sacramento    )

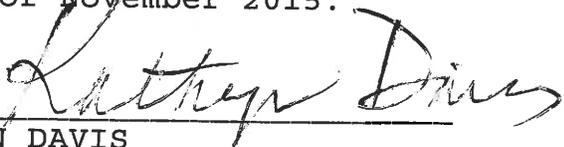
I certify that the witness in the foregoing deposition,

JOHN O'HAGAN,

was by me duly sworn to testify in the within-entitled cause; that said deposition was taken at the time and place therein named; that the testimony of said witness was reported by me, a duly Certified Shorthand Reporter Of the State of California authorized to administer oaths and affirmations, and said testimony was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for either or any of the parties to said deposition, nor in any way interested in the outcome of the cause named in said deposition.

IN WITNESS WHEREOF, I have hereunto set my hand this 24th day of November 2015.



KATHRYN DAVIS  
Certified Shorthand Reporter  
Certificate No. 3808

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

**DECLARATION OF LAUREN D. BERNADETT IN SUPPORT OF MOTION TO DISMISS ADMINISTRATIVE CIVIL LIABILITY PROCEEDING IN ENF01951 FOR LACK OF STATUTORY AUTHORITY UNDER WATER CODE SECTION 1052**

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 January 25, 2016 at Sacramento, California.

  
\_\_\_\_\_  
Yolanda De La Cruz

**SERVICE LIST OF PARTICIPANTS  
BYRON-BETHANY IRRIGATION DISTRICT  
ADMINISTRATIVE CIVIL LIABILITY HEARING  
(Revised 9/2/15; Revised: 9/11/15)**

SOMACH SIMMONS & DUNN  
A Professional Corporation

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<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>Division of Water Rights Prosecution Team Andrew Tauriainen, Attorney III SWRCB Office of Enforcement 1001 I Street, 16th Floor Sacramento, CA 95814 <a href="mailto:andrew.tauriainen@waterboards.ca.gov">andrew.tauriainen@waterboards.ca.gov</a></p>	<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>Byron-Bethany Irrigation District Daniel Kelly Somach Simmons &amp; Dunn 500 Capitol Mall, Suite 1000 Sacramento, CA 95814 <a href="mailto:dkelly@somachlaw.com">dkelly@somachlaw.com</a></p>
<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>Patterson Irrigation District Banta-Carbona Irrigation District The West Side Irrigation District Jeanne M. Zolezzi Herum\Crabtree\Suntag 5757 Pacific Avenue, Suite 222 Stockton, CA 95207 <a href="mailto:jzolezzi@herumcrabtree.com">jzolezzi@herumcrabtree.com</a></p>	<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>City and County of San Francisco Jonathan Knapp Office of the City Attorney 1390 Market Street, Suite 418 San Francisco, CA 94102 <a href="mailto:jonathan.knapp@sfgov.org">jonathan.knapp@sfgov.org</a></p>
<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>Central Delta Water Agency Jennifer Spaletta Law PC P.O. Box 2660 Lodi, CA 95241 <a href="mailto:jennifer@spalettalaw.com">jennifer@spalettalaw.com</a></p> <p>Dante John Nomellini Daniel A. McDaniel Dante John Nomellini, Jr. NOMELLINI, GRILLI &amp; MCDANIEL 235 East Weber Avenue Stockton, CA 95202 <a href="mailto:ngrmpics@pacbell.net">ngrmpics@pacbell.net</a> <a href="mailto:dantejr@pacbell.net">dantejr@pacbell.net</a></p>	<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>California Department of Water Resources Robin McGinnis, Attorney P.O. Box 942836 Sacramento, CA 94236-0001 <a href="mailto:robin.mcginis@water.ca.gov">robin.mcginis@water.ca.gov</a></p>
<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>Richard Morat 2821 Berkshire Way Sacramento, CA 95864 <a href="mailto:rmorat@gmail.com">rmorat@gmail.com</a></p>	<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>San Joaquin Tributaries Authority Tim O'Laughlin Valerie C. Kincaid O'Laughlin &amp; Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95816 <a href="mailto:towater@olaughlinparis.com">towater@olaughlinparis.com</a> <a href="mailto:vkincaid@olaughlinparis.com">vkincaid@olaughlinparis.com</a></p>

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<u>VIA ELECTRONIC MAIL</u>	<u>VIA ELECTRONIC MAIL</u>
South Delta Water Agency John Herrick Law Offices of John Herrick 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 Email: Jherrlaw@aol.com	State Water Contractors Stefani Morris 1121 L Street, Suite 1050 Sacramento, CA 95814 smorris@swc.org

**SERVICE LIST  
WEST SIDE IRRIGATION DISTRICT  
CEASE AND DESIST ORDER HEARING**

**SOMACH SIMMONS & DUNN**  
A Professional Corporation

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<p>Division of Water Rights Prosecution Team Andrew Tauriainen, Attorney III SWRCB Office of Enforcement 1001 I Street, 16th Floor Sacramento, CA 95814 <a href="mailto:andrew.tauriainen@waterboards.ca.gov">andrew.tauriainen@waterboards.ca.gov</a></p>	<p>The West Side Irrigation District Jeanne M. Zolezzi Karna Harringfeld Janelle Krattiger Herum\Crabtree\Suntag 5757 Pacific Avenue, Suite 222 Stockton, CA 95207 <a href="mailto:jzolezzi@herumcrabtree.com">jzolezzi@herumcrabtree.com</a> <a href="mailto:kharringfeld@herumcrabtree.com">kharringfeld@herumcrabtree.com</a> <a href="mailto:jkrattiger@herumcrabtree.com">jkrattiger@herumcrabtree.com</a></p>
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<p>South Delta Water Agency John Herrick Law Offices of John Herrick 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 Email: <a href="mailto:Jherrlaw@aol.com">Jherrlaw@aol.com</a></p>	<p>Central Delta Water Agency Jennifer Spaletta Law PC P.O. Box 2660 Lodi, CA 95241 <a href="mailto:jennifer@spalettalaw.com">jennifer@spalettalaw.com</a></p> <p>Dante Nomellini and Dante Nomellini, Jr. NOMELLINI, GRILLI &amp; MCDANIEL <a href="mailto:ngmplcs@pacbell.net">ngmplcs@pacbell.net</a> <a href="mailto:dantejr@pacbell.net">dantejr@pacbell.net</a></p>
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<p>Byron-Bethany Irrigaton District Daniel Kelly Somach Simmons &amp; Dunn 500 Capitol Mall, Suite 1000 Sacramento, CA 95814 <a href="mailto:dkelly@somachlaw.com">dkelly@somachlaw.com</a></p>	<p>California Department of Water Resources Robin McGinnis, Attorney P.O. Box 942836 Sacramento, CA 94236-0001 <a href="mailto:robin.mcginnis@water.ca.gov">robin.mcginnis@water.ca.gov</a></p>

1 SOMACH SIMMONS & DUNN  
A Professional Corporation  
2 DANIEL KELLY, ESQ. (SBN 215051)  
MICHAEL E. VERGARA, ESQ. (SBN 137689)  
3 LAUREN D. BERNADETT, ESQ. (SBN 295251)  
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Telephone: (916) 446-7979  
5 Facsimile: (916) 446-8199

6 Attorneys for Petitioner/Plaintiff BYRON-  
BETHANY IRRIGATION DISTRICT  
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8  
9 BEFORE THE  
10 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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

SWRCB Enforcement Action  
ENF01951 and ENF01949

DECLARATION OF LAUREN D.  
BERNADETT IN SUPPORT OF  
MOTION TO DISQUALIFY  
HEARING OFFICER

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

20  
21 I, Lauren D. Bernadett, declare:

22 1. I am an attorney at law licensed to practice before the courts of the State of  
23 California. I am an associate with Somach Simmons & Dunn. The following matters are  
24 within my personal knowledge and, if called as a witness, I can competently testify  
25 thereto.

26 2. Attached hereto as BBID Exhibit 202 is a true and correct copy of Byron-  
27 Bethany Irrigation Company's Notice of Appropriation of Water, dated May 18, 1914.

28 3. Attached hereto as BBID Exhibit 219 is a true and correct copy of the State

1 Water Resources Control Board's Notice of Unavailability of Water and Need for  
2 Immediate Curtailment for those Diverting Water in the Sacramento-San Joaquin  
3 Watersheds and Delta with a Pre-1914 Appropriative Claim Commencing During or After  
4 1903, dated June 12, 2015.

5 4. Attached hereto as BBID Exhibit 277 is a true and correct copy of the State  
6 Water Resources Control Board's Administrative Civil Liability Complaint in the Matter of  
7 Unauthorized Diversion by Byron-Bethany Irrigation District (including cover letter from  
8 John O'Hagan, Assistant Deputy Director of the Division of Water Rights, to Rick  
9 Gilmore and Daniel Kelly regarding Enforcement Action ENF01951), dated July 20,  
10 2015.

11 5. Attached hereto as BBID Exhibit 280 is a true and correct copy of an email  
12 from F. Spivy-Weber cc'ing J. O'Hagan, dated April 1, 2015.

13 6. Attached hereto as BBID Exhibit 281 is a true and correct copy of an email  
14 from J. O'Hagan to D. D'Adamo cc'ing K. Mrowka, dated April 2, 2015.

15 7. Attached hereto as BBID Exhibit 282 is a true and correct copy of an email  
16 from K. Mrowka to D. D'Adamo and J. O'Hagan, dated May 19, 2015.

17 8. Attached hereto as BBID Exhibit 283 is a true and correct copy of an email  
18 from K. Mrowka to F. Marcus, dated June 17, 2015.

19 9. Attached hereto as BBID Exhibit 284 is a true and correct copy of an email  
20 from C. Trgovcich to D. D'Adamo, CC: J. O'Hagan dated June 25, 2015.

21 10. Attached hereto as BBID Exhibit 285 is a true and correct copy of an email  
22 from C. Trgovcich, dated July 17, 2015.

23 11. Attached hereto as BBID Exhibit 286 is a true and correct copy of an email  
24 from F. Marcus to B. Envoy CC: J. O'Hagan, Sept. 17, 2015.

25 12. Attached hereto as BBID Exhibit 296 is a true and correct copy of the State  
26 Water Resources Control Board Division of Water Rights, Hearings and Special  
27 Programs Branch Organization Chart, dated January 1, 2016.

28 13. Attached hereto as BBID Exhibit 297 is a true and correct copy of the State

1 Water Resources Control Board's Organization Chart, dated January 1, 2016.

2 14. Attached hereto as BBID Exhibit 299 is a true and correct copy of the  
3 Declaration of John O'Hagan in Opposition to Petitioner/Plaintiff's Application for Stay  
4 and/or in the Alternative Temporary Restraining Order and/or Preliminary Injunction,  
5 *Banta-Carbona Irrigation District v. State Water Resources Control Board*, Case No. 39-  
6 2015-00326421, San Joaquin County Superior Court, dated June 22, 2015.

7 15. Attached hereto as BBID Exhibit 301 is a true and correct copy of the  
8 Order After Hearing on Ex Parte Application for Temporary Stay Re: Enforcement of  
9 Curtailment Notice or in the Alternative Temporary Restraining Order and/or for Order to  
10 Show Cause Re: Preliminary Injunction, *The West Side Irrigation District et al. v. State*  
11 *Water Resources Control Board*, Case No. 34-2015-80002121, Sacramento County  
12 Superior Court, dated July 10, 2015.

13 16. Attached hereto as BBID Exhibit 302 is a true and correct copy of the State  
14 Water Resources Control Board's Notice of Public Hearing and Pre-Hearing Conference,  
15 dated August 19, 2015.

16 17. Attached hereto as BBID Exhibit 306 is a true and correct copy of the  
17 Transcript of SWRCB Board Meeting/Hearing January 6, 2015.

18 18. Attached hereto as BBID Exhibit 308 is a true and correct copy of  
19 Transcript of SWRCB Board Meeting/Hearing January 20, 2015.

20 19. Attached hereto as BBID Exhibit 310 is a true and correct copy of  
21 Transcript of SWRCB Board Meeting/Hearing February 3, 2015.

22 20. Attached hereto as BBID Exhibit 312 is a true and correct copy of  
23 Transcript of SWRCB Board Meeting/Hearing February 17, 2015.

24 21. Attached hereto as BBID Exhibit 314 is a true and correct copy of  
25 Transcript of SWRCB Board Meeting/Hearing March 17, 2015.

26 22. Attached hereto as BBID Exhibit 316 is a true and correct copy of  
27 Transcript of SWRCB Board Meeting/Hearing April 21, 2015.

28 23. Attached hereto as BBID Exhibit 318 is a true and correct copy of

1 Transcript of SWRCB Board Meeting/Hearing May 5, 2015.

2 24. Attached hereto as BBID Exhibit 322 is a true and correct copy of  
3 Transcript of SWRCB Board Meeting/Hearing May 20, 2015, File I.

4 25. Attached hereto as BBID Exhibit 323 is a true and correct copy of  
5 Transcript of SWRCB Board Meeting/Hearing May 20, 2015, File II.

6 26. Attached hereto as BBID Exhibit 324 is a true and correct copy of  
7 Transcript of SWRCB Board Meeting/Hearing May 20, 2015, File III.

8 27. Attached hereto as BBID Exhibit 328 is a true and correct copy of  
9 Transcript of SWRCB Board Meeting/Hearing June 16, 2015.

10 28. Attached hereto as BBID Exhibit 330 is a true and correct copy of  
11 Transcript of SWRCB Board Meeting/Hearing July 7, 2015.

12 29. Attached hereto as BBID Exhibit 332 is a true and correct copy of  
13 Transcript of SWRCB Board Meeting/Hearing July 21, 2015.

14 30. Attached hereto as BBID Exhibit 334 is a true and correct copy of  
15 Transcript of SWRCB Board Meeting/Hearing August 4, 2015.

16 31. Attached hereto as BBID Exhibit 337 is a true and correct copy of the  
17 SWRCB Letter in reference to Notice of Surface Water Shortage and Potential For  
18 Curtailment of Water Rights Diversions, dated January 17, 2014.

19 32. Attached hereto as BBID Exhibit 338 is a true and correct copy of the  
20 SWRCB Letter in reference to Notice of Unavailability of Water and Immediate  
21 Curtailment for Those Diverting Water in the Sacramento and San Joaquin River  
22 Watersheds with a Post-1914 Appropriative Right, dated May 27, 2014.

23 33. Attached hereto as BBID Exhibit 339 is a true and correct copy of the  
24 SWRCB Letter in reference to Notice of Unavailability of Water and Immediate  
25 Curtailment for Those Diverting Water from the Russian River Watershed Upstream of  
26 the Russian River's confluence with Dry Creek, and with a Post-1914 Appropriate Right  
27 Having A Priority Date of February 19, 1954 or Later, dated May 27, 2014.

28 34. Attached hereto as BBID Exhibit 340 is a true and correct copy of the

1 SWRCB Letter in reference to Notice of Unavailability of Water and Need for Immediate  
2 Curtailment for those Diverting Water Under a Junior Priority Class Right in the Scott  
3 River Watershed Subject to Decree No. 30662, dated April 23, 2015.

4 35. Attached hereto as BBID Exhibit 341 is a true and correct copy of the  
5 SWRCB Letter in reference to Notice of Unavailability of Water and Immediate  
6 Curtailment for those Diverting Water on the San Joaquin River Watershed with a post-  
7 1914 Appropriative Right, dated April 23, 2015.

8 36. Attached hereto as BBID Exhibit 342 is a true and correct copy of the  
9 SWRCB Letter to Term 91 Right Owner's Name in reference to Notice of Immediate  
10 Curtailment Term 91 Water Right Permit/License, dated April 30, 2015.

11 37. Attached hereto as BBID Exhibit 343 is a true and correct copy of the  
12 SWRCB Letter in reference to Notice of Unavailability of Water and immediate  
13 Curtailment for those Diverting Water in the Sacramento River Watershed with a Post-  
14 1914 Appropriative Right, dated May 1, 2015.

15 38. Attached hereto as BBID Exhibit 344 is a true and correct copy of the  
16 SWRCB Letter to BBID in reference to Notice of Unavailability for Water and Need for  
17 Immediate Curtailment for those Diverting Water in the Sacramento-San Joaquin  
18 Watersheds and Delta with a Pre-1914 Appropriative Claim Commencing During or After  
19 1903, dated June 12, 2015.

20 39. Attached hereto as BBID Exhibit 345 is a true and correct copy of the  
21 SWRCB Letter to BBID in reference to Partial Rescission of April, May and June 2015  
22 Curtailment Notices and Clarification of State Water Board Position Re: Notices of  
23 Unavailability of Water for those Diverting Water in the Sacramento River Watershed,  
24 San Joaquin River Watershed and Delta, and Scott River, dated July 15, 2015.

25 40. Attached hereto as BBID Exhibit 346 is a true and correct copy of an email  
26 from D. Riddle to L. Grober, CCing J. O'Hagan, dated March 14, 2014.

27 41. Attached hereto as BBID Exhibit 347 is a true and correct copy of an email  
28 from J. Kassel to O'Hagan et al., CCing L. Grober, dated March 14, 2014.

- 1           42.     Attached hereto as BBID Exhibit 348 is a true and correct copy of an email  
2 from J. Yeazell to J. O'Hagan and L. Grober, dated July 1, 2014.
- 3           43.     Attached hereto as BBID Exhibit 349 is a true and correct copy of an email  
4 from J. O'Hagan to L. Grober, dated August 8, 2014.
- 5           44.     Attached hereto as BBID Exhibit 350 is a true and correct copy of an email  
6 from B. Coats to L. Grober, dated September 25, 2014.
- 7           45.     Attached hereto as BBID Exhibit 351 is a true and correct copy of an email  
8 from L. Grober to J. O'Hagan, dated September 29, 2014.
- 9           46.     Attached hereto as BBID Exhibit 352 is a true and correct copy of an email  
10 from L. Grober to B. Envoy CCing D. Riddle and J. O'Hagan, dated October 1, 2014.
- 11          47.     Attached hereto as BBID Exhibit 353 is a true and correct copy of an email  
12 from J. O'Hagan to W. Croyle CCing L. Grober, dated October 24, 2014.
- 13          48.     Attached hereto as BBID Exhibit 354 is a true and correct copy of an email  
14 from L. Grober to T. Howard CCing J. O'Hagan, dated October 30, 2014.
- 15          49.     Attached hereto as BBID Exhibit 355 is a true and correct copy of an email  
16 from J. O'Hagan to K. Mrowka CCing K. Mrowka, dated October 31, 2014.
- 17          50.     Attached hereto as BBID Exhibit 356 is a true and correct copy of an email  
18 from T. Howard to J. O'Hagan CCing K. Mrowka, dated November 12, 2014.
- 19          51.     Attached hereto as BBID Exhibit 357 is a true and correct copy of an email  
20 from R. Satkowski to J. O'Hagan, L. Grober, K. Mrowka, and D. Riddle, dated November  
21 19, 2014.
- 22          52.     Attached hereto as BBID Exhibit 358 is a true and correct copy of an email  
23 from J. O'Hagan to L. Grober and D. Riddle, CCing K. Mrowka, dated January 16, 2015.
- 24          53.     Attached hereto as BBID Exhibit 359 is a true and correct copy of an email  
25 from S. Ligare to L. Grober Ccing K.Mrowka, dated February 17, 2015.
- 26          54.     Attached hereto as BBID Exhibit 360 is a true and correct copy of an email  
27 from J. Yeazell to L. Grober, CCing J. O'Hagan, K. Mrowka, and D. Riddle, dated  
28 February 17, 2015.

1           55.     Attached hereto as BBID Exhibit 361 is a true and correct copy of an email  
2 from L. Grober Ccing K. Mrowka, dated February 17, 2015.

3           56.     Attached hereto as BBID Exhibit 362 is a true and correct copy of an email  
4 from K. Mrowka to L. Grober, O'Hagan and D. Riddle, dated April 13, 2015.

5           57.     Attached hereto as BBID Exhibit 363 is a true and correct copy of an email  
6 from B. Envoy to K. Mrwoka, dated April 16, 2015.

7           58.     Attached hereto as BBID Exhibit 364 is a true and correct copy of an email  
8 from B. Evoy to J. O'Hagan, K. Mrowka, and L. Grober, dated April 20, 2015.

9           59.     Attached hereto as BBID Exhibit 365 is a true and correct copy of an email  
10 from O'Hagan to L. Grober CCing K. Mrowka, dated April 21, 2015.

11          60.     Attached hereto as BBID Exhibit 366 is a true and correct copy of an email  
12 from T. Howard to L. Grober, CCing J. O'Hagan, dated April 21, 2015.

13          61.     Attached hereto as BBID Exhibit 367 is a true and correct copy of an email  
14 from K. Mrowka to L. Grober CCing J. O'Hagan, dated May 18, 2015.

15          62.     Attached hereto as BBID Exhibit 368 is a true and correct copy of an email  
16 from B. Evoy to L. Grober CCing J. O'Hagan, dated May 21, 2015.

17          63.     Attached hereto as BBID Exhibit 369 is a true and correct copy of an email  
18 from L. Grober to J. O'Hagan, dated May 27, 2015.

19          64.     Attached hereto as BBID Exhibit 370 is a true and correct copy of an email  
20 from B. Evoy to J. O'Hagan, K. Mrowka, and L. Grober, dated June 10, 2015.

21          65.     Attached hereto as BBID Exhibit 371 is a true and correct copy of an email  
22 from B. Evoy to L. Grober and J. O'Hagan, dated June 12, 2015.

23          66.     Attached hereto as BBID Exhibit 372 is a true and correct copy of an email  
24 from B. Evoy to J. O'Hagan and L. Grober, dated June 30, 2015.

25          67.     Attached hereto as BBID Exhibit 373 is a true and correct copy of an email  
26 from K. Mrowka to J O'Hagan, L. Grober, and D. Riddle, dated July 1, 2015.

27          68.     Attached hereto as BBID Exhibit 374 is a true and correct copy of an email  
28 from K. Mrowka to L. Grober, dated July 9, 2015.

1           69.    Attached hereto as BBID Exhibit 375 is a true and correct copy of an email  
2 from B. Evoy to J. O'Hagan, D. Riddle, and L. Grober, dated July 20, 2015.

3           70.    Attached hereto as BBID Exhibit 376 is a true and correct copy of an email  
4 from B. Evoy to L. Grober, D. Riddle, John O'Hagan, and K. Mrowka, dated, July 27,  
5 2015.

6           71.    Attached hereto as BBID Exhibit 377 is a true and correct copy of an email  
7 from J. O'Hagan to L. Grober and K.CCing D. Riddle, dated September 15, 2015.

8           72.    Attached hereto as BBID Exhibit 378 is a true and correct copy of an email  
9 from C. Trgovcich to J. O'Hagan and K. Mrowka CCing L. Grober, dated September 17,  
10 2015.

11          73.    Attached hereto as Exhibit A is a true and correct copy of excerpts from  
12 Deposition of Michael George, dated December 7, 2015.

13          74.    Attached hereto as Exhibit B is a true and correct copy of an email from K.  
14 Mrowka to G. Kostyrko regarding San Joaquin Curtailments, dated June 2, 2015.

15          75.    Attached hereto as Exhibit C is a true and correct copy of the Byron-  
16 Bethany Irrigation District's Amended Complaint, dated September 2, 2015.

17          76.    Attached hereto as Exhibit D is a true and correct copy of excerpts from the  
18 Deposition of Thomas Howard, Volume I, dated November 19, 2015.

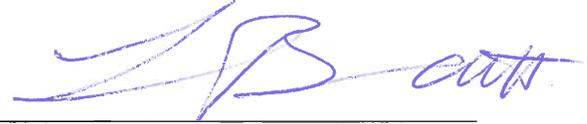
19          77.    Attached hereto as Exhibit E is a true and correct copy of excerpts from the  
20 Deposition of Thomas Howard, Volume II, dated November 25, 2015.

21          78.    Attached hereto as Exhibit F is a true and correct copy of excerpts from the  
22 Deposition of John O'Hagan, Volume I, dated November 19, 2015.

23          79.    Attached hereto as Exhibit G is a true and correct copy of the State Water  
24 Resources Control Board's Procedural Ruling, dated December 16, 2015.

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1 I declare under penalty of perjury under the laws of the State of California that the  
2 facts recited above are true and correct. Executed this 25th day of January 2016 at  
3 Sacramento, California.

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6 Lauren D. Bernadett

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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.

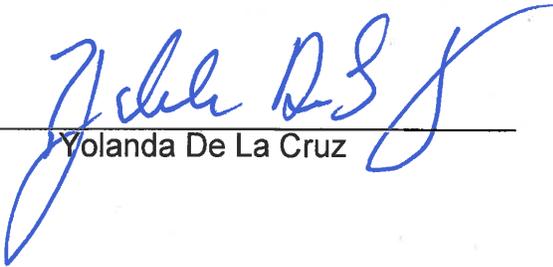
On January 25, 2016, I served the following document(s):

**DECLARATION OF LAUREN D. BERNADETT IN SUPPORT OF MOTION TO DISQUALIFY HEARING OFFICER**

(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 January 25, 2016 at Sacramento, California.

  
\_\_\_\_\_  
Yolanda De La Cruz

**SERVICE LIST OF PARTICIPANTS  
BYRON-BETHANY IRRIGATION DISTRICT  
ADMINISTRATIVE CIVIL LIABILITY HEARING  
(Revised 9/2/15; Revised: 9/11/15)**

**SOMACH SIMMONS & DUNN**  
A Professional Corporation

<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>Division of Water Rights Prosecution Team Andrew Tauriainen, Attorney III SWRCB Office of Enforcement 1001 I Street, 16th Floor Sacramento, CA 95814 <a href="mailto:andrew.tauriainen@waterboards.ca.gov">andrew.tauriainen@waterboards.ca.gov</a></p>	<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>Byron-Bethany Irrigation District Daniel Kelly Somach Simmons &amp; Dunn 500 Capitol Mall, Suite 1000 Sacramento, CA 95814 <a href="mailto:dkelly@somachlaw.com">dkelly@somachlaw.com</a></p>
<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>Patterson Irrigation District Banta-Carbona Irrigation District The West Side Irrigation District Jeanne M. Zolezzi Herum\Crabtree\Suntag 5757 Pacific Avenue, Suite 222 Stockton, CA 95207 <a href="mailto:jzolezzi@herumcrabtree.com">jzolezzi@herumcrabtree.com</a></p>	<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>City and County of San Francisco Jonathan Knapp Office of the City Attorney 1390 Market Street, Suite 418 San Francisco, CA 94102 <a href="mailto:jonathan.knapp@sfgov.org">jonathan.knapp@sfgov.org</a></p>
<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>Central Delta Water Agency Jennifer Spaletta Law PC P.O. Box 2660 Lodi, CA 95241 <a href="mailto:jennifer@spalettalaw.com">jennifer@spalettalaw.com</a></p> <p>Dante John Nomellini Daniel A. McDaniel Dante John Nomellini, Jr. NOMELLINI, GRILLI &amp; MCDANIEL 235 East Weber Avenue Stockton, CA 95202 <a href="mailto:ngrnpics@pacbell.net">ngrnpics@pacbell.net</a> <a href="mailto:dantejr@pacbell.net">dantejr@pacbell.net</a></p>	<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>California Department of Water Resources Robin McGinnis, Attorney P.O. Box 942836 Sacramento, CA 94236-0001 <a href="mailto:robin.mcginnis@water.ca.gov">robin.mcginnis@water.ca.gov</a></p>
<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>Richard Morat 2821 Berkshire Way Sacramento, CA 95864 <a href="mailto:rmorat@gmail.com">rmorat@gmail.com</a></p>	<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>San Joaquin Tributaries Authority Tim O'Laughlin Valerie C. Kincaid O'Laughlin &amp; Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95816 <a href="mailto:towater@olaughlinparis.com">towater@olaughlinparis.com</a> <a href="mailto:vkincaid@olaughlinparis.com">vkincaid@olaughlinparis.com</a></p>

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<u>VIA ELECTRONIC MAIL</u>	<u>VIA ELECTRONIC MAIL</u>
South Delta Water Agency John Herrick Law Offices of John Herrick 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 Email: <a href="mailto:Jherrlaw@aol.com">Jherrlaw@aol.com</a>	State Water Contractors Stefani Morris 1121 L Street, Suite 1050 Sacramento, CA 95814 <a href="mailto:smorris@swc.org">smorris@swc.org</a>

**SERVICE LIST  
WEST SIDE IRRIGATION DISTRICT  
CEASE AND DESIST ORDER HEARING**

SOMACH SIMMONS & DUNN  
A Professional Corporation

<p>1 2 3 4 5 6 7 8 9</p>	<p>Division of Water Rights Prosecution Team Andrew Tauriainen, Attorney III SWRCB Office of Enforcement 1001 I Street, 16th Floor Sacramento, CA 95814 <a href="mailto:andrew.tauriainen@waterboards.ca.gov">andrew.tauriainen@waterboards.ca.gov</a></p>	<p>The West Side Irrigation District Jeanne M. Zolezzi Karna Harringfeld Janelle Krattiger Herum\Crabtree\Suntag 5757 Pacific Avenue, Suite 222 Stockton, CA 95207 <a href="mailto:jzolezzi@herumcrabtree.com">jzolezzi@herumcrabtree.com</a> <a href="mailto:kharringfeld@herumcrabtree.com">kharringfeld@herumcrabtree.com</a> <a href="mailto:jkrattiger@herumcrabtree.com">jkrattiger@herumcrabtree.com</a></p>
<p>10 11 12 13 14 15 16</p>	<p>State Water Contractors Stefani Morris 1121 L Street, Suite 1050 Sacramento, CA 95814 <a href="mailto:smorris@swc.org">smorris@swc.org</a></p>	<p>Westlands Water District Daniel O'Hanlon Rebecca Akroyd Kronick Moskovitz Tiedemann &amp; Girad 400 Capitol Mall, 27<sup>th</sup> Floor Sacramento, CA 95814 <a href="mailto:dohanlon@kmtg.com">dohanlon@kmtg.com</a> <a href="mailto:rakroyd@kmtg.com">rakroyd@kmtg.com</a></p> <p>Phillip Williams of Westlands Water District <a href="mailto:pwilliams@westlandswater.org">pwilliams@westlandswater.org</a></p>
<p>17 18 19 20 21 22</p>	<p>South Delta Water Agency John Herrick Law Offices of John Herrick 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 Email: <a href="mailto:Jherrlaw@aol.com">Jherrlaw@aol.com</a></p>	<p>Central Delta Water Agency Jennifer Spaletta Law PC P.O. Box 2660 Lodi, CA 95241 <a href="mailto:jennifer@spalettalaw.com">jennifer@spalettalaw.com</a></p> <p>Dante Nomellini and Dante Nomellini, Jr. NOMELLINI, GRILLI &amp; MCDANIEL <a href="mailto:ngmplcs@pacbell.net">ngmplcs@pacbell.net</a> <a href="mailto:dantejr@pacbell.net">dantejr@pacbell.net</a></p>
<p>23 24 25 26 27 28</p>	<p>City and County of San Francisco Jonathan Knapp Office of the City Attorney 1390 Market Street, Suite 418 San Francisco, CA 94102 <a href="mailto:jonathan.knapp@sfgov.org">jonathan.knapp@sfgov.org</a></p>	<p>San Joaquin Tributaries Authority Valerie C. Kincaid O'Laughlin &amp; Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95816 <a href="mailto:vkincaid@olaughlinparis.com">vkincaid@olaughlinparis.com</a></p>

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Byron-Bethany Irrigaton District Daniel Kelly Somach Simmons & Dunn 500 Capitol Mall, Suite 1000 Sacramento, CA 95814 <a href="mailto:dkelly@somachlaw.com">dkelly@somachlaw.com</a>	California Department of Water Resources Robin McGinnis, Attorney P.O. Boc 942836 Sacramento, CA 94236-0001 <a href="mailto:robin.mcginnis@water.ca.gov">robin.mcginnis@water.ca.gov</a>
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**BBID**  
**EXHIBIT 202**

NOTICE OF APPROPRIATION OF WATER.

NOTICE IS HEREBY GIVEN, that BYRON-BETHANY IRRIGATION COMPANY, a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in Contra Costa County, State aforesaid, does hereby claim the water flowing in Old River, at the point where the West bank of said Old River intersects the South bank of the branch or channel making South from said Old River and designated as "ITALIAN SLOUGH", and which said point is near to the center of Section Seven (7), Township One (1) South, Range Four (4) East Mount Diablo Base and Meridian in said Contra-Costa County.

That said corporation claims and intends to use the water there flowing to the extent of 40,000 inches measured under a four-inch pressure.

That the purpose for which said corporation claims said water is to furnish water to its shareholders for irrigation and domestic purposes, and the place where it is intended to use said water is upon the lands lying in the Easterly portions of Contra Costa and Alameda Counties and the Southwesterly portion of San Joaquin County.

That the means by which it is intended to divert said water and the size of the diverting agency is as follows:

FIRST, through and along Italian Slough Southerly for about two miles to a point on the Southerly Section line of Section 13, in Township One South, Range Three East Mount Diablo Base and Meridian, and distant thereon 1450 feet Westerly from the Southeast corner of said Section 13, and which said Italian Slough is about 200 feet wide and 8 feet deep at its confluence with said Old River.

Thence Westerly through and along an artificial channel 200 feet wide and 8 feet deep, now existing, 3350 feet to a point 480 feet East of the Southwest corner of said Section 13.

SECOND; thence Southeasterly 3600 feet through and along an artificial canal or channel now existing, to the point of intersection of said canal with a creek known as Bruns Creek and the Segregation line, and which said point is in the Southwest quarter of Section 24, Township One South, Range Three East Mount Diablo Base and Meridian, said artificial channel or canal which is about 25 feet wide and 6 feet deep to be enlarged to 46 feet wide at the top, 30 feet wide at the bottom and 8 feet deep.

THIRD; thence through and by a canal or channel 50 feet wide at the top, 30 feet wide at the bottom and about 10 feet deep to be cut, and following Southwesterly up and along said Bruns Creek 2600 feet to a point near the Southwest corner of the Southwest quarter of said Section 24, and at such last named point by pumps and other apparatus and appliance to lift the water into several ditches or flumes or other conveyors for distribution to the main and other laterals for use on adjacent lands.

IN WITNESS WHEREOF, said corporation has caused its corporate name to be hereunto subscribed by its President, and its corporate seal to be hereunto affixed by its Secretary, the 18th day of May, 1914.

BYRON-BETHANY IRRIGATION COMPANY

By Volney Taylor President

By R. P. Houston Secretary.

NOTICE OF APPROPRIATION OF WATER.

NOTICE IS HEREBY GIVEN, that BYRON-BETHANY IRRIGATION COMPANY, a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in Contra Costa County, State aforesaid, does hereby claim the water flowing in Old River, at the point where the West bank of said Old River intersects the South bank of the branch or channel making South from said Old River and designated as "ITALIAN SLOUGH", and which said point is near to the center of Section Seven (7), Township One (1) South, Range Four (4) East Mount Diablo Base and Meridian in said Contra Costa County.

That said corporation claims and intends to use the water there flowing to the extent of 40,000 inches measured under a four-inch pressure.

That the purpose for which said corporation claims said water is to furnish water to its shareholders for irrigation and domestic purposes, and the place where it is intended to use said water is upon the lands lying in the Easterly portions of Contra Costa and Alameda Counties and the Southwesterly portion of San Joaquin County.

That the means by which it is intended to divert said water and the size of the diverting agency is as follows:

FIRST, through and along Italian Slough Southerly for about two miles to a point on the Southerly Section line of Section 13, in Township One South, Range Three East Mount Diablo Base and Meridian, and distant thereon 1450 feet Westerly from the Southeast corner of said Section 13, and which said Italian Slough is about 200 feet wide and 8 feet deep at its confluence with said Old River. Thence Westerly through and along an artificial channel 200 feet wide and 8 feet deep, now existing, 3350 feet to a point 480 feet East of the Southwest corner of said Section 13.

SECOND; thence Southeasterly 3600 feet through and along an artificial canal or channel now existing, to the point of intersection of said canal with a creek known as Bruns Creek and the Segregation line, and which said point is in the Southwest quarter of Section 24, Township One South, Range Three East Mount Diablo Base and Meridian, said artificial channel or canal which is about 25 feet wide and 6 feet deep to be enlarged to 46 feet wide at the top, 30 feet wide at the bottom and 8 feet deep.

State of California, )  
COUNTY OF Contra Costa ) ss.

On this 19th day of May in the year one thousand, nine hundred and Fourteen A. D.

before me Alfred L. Bove, a Notary Public in and for said County, personally appeared

Volney Taylor known to me to be the

President, and R. R. Houston known to me to be the

Secretary of the Corporation that executed the within instrument, known to me to be the persons who executed the within instrument on behalf of the corporation within named, and acknowledged to me that such Corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in said County, the day and year in this certificate first above written.



My Commission Expires Sept 14, 1910

Stamp Co. (Inc.) Los Angeles

Notary Public in and for the County of Contra Costa State of California

AFFIDAVIT OF POSTING OF NOTICE OF APPROPRIATION OF WATER.

STATE OF CALIFORNIA, )  
COUNTY OF CONTRA COSTA. ) SS:

R. R. Houston

being duly sworn, deposes and says:

That on May 18th, 1914 he posted a full, true and correct copy of the attached "NOTICE OF APPROPRIATION OF WATER" at the point where the West bank of Old River intersects the South bank of the branch or channel making South from said Old River, and designated as "Italian Slough", and which said point where said notice was posted is near to the center of Section 7, Township One South, Range 4 East Mount Diablo Base and Meridian, in Contra Costa County, State of California, by then and there affixing and fastening such copy of said "Notice of Appropriation of Water" to and upon a board firmly fixed in the ground at said above designated point;

That on May 18th, 1914, he posted a full, true and correct copy of the attached "NOTICE OF APPROPRIATION OF WATER" at the point of intersection of the East bank of "Italian Slough" at its terminus with the Eastern extremity of the South embankment of an artificial canal or channel 200 feet wide extending Westerly on the Southerly section line of Section 13 in Township One South, Range 3 East Mount Diablo Base and Meridian, in Contra Costa County, State of California, and which point is distant on such section line 1450 feet Westerly thereon from the Southeast corner of said Section 13, by then and there affixing and fastening such copy of said "Notice of Appropriation of Water" to and upon a board firmly fixed in the ground at said last above designated point;

That on May 18th, 1914, he posted a full, true and correct copy of the attached "NOTICE OF APPROPRIATION OF WATER" at the point of intersection of the South bank of the canal or channel 200 feet wide running East and West on the Southerly section line of Section 13, Township One South, Range 3 East, Mount Diablo Base and Meridian, in Contra Costa County, State of California, with the East bank of the canal or channel 25 feet wide extending Southeasterly, the said point of intersection being 480 feet East of the Southwest corner of said Section 13, by then and there affixing and fastening such copy of said "Notice of Appropriation of Water" to and upon a board firmly fixed in the ground at said last above designated point.

R. R. Houston

Subscribed and sworn to before me,

23<sup>rd</sup> day of May, 1914.

[Signature]  
Notary Public, in and for the County of Contra Costa, State of California.

My Commission Expires Sept. 18, 1916



NOTICE OF APPROPRIATION OF WATER

- B Y - ✓

BYRON-BETHANY IRRIGATION COMPANY.

Dated, May 18th, 1914.

*Cary Howard*  
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*Proctor*  
*Proctor*

CARY HOWARD  
ATTORNEY AT LAW

612 BROADWAY, OAKLAND, CAL.

401 UNION SAVINGS BANK BUILDING

**BBID**  
**EXHIBIT 219**



RECEIVED  
JUN 15 2015  
EDWARD G. BROWN JR.  
GOVERNOR  
MATTHEW RODRIGUEZ  
SECRETARY FOR  
CALIFORNIA REGULATION

State Water Resources Control Board

Byron-Bethany  
Irrigation District

June 12, 2015

BYRON-BETHANY IRRIGATION DISTRICT  
C/O RICK GILMORE, GENERAL MANAGER  
7995 BRUNS ROAD  
BYRON, CA 94514

In Regards to Claim of Right(s) [ID (password)]: S021256 (407769)

**NOTICE OF UNAVAILABILITY OF WATER AND NEED FOR IMMEDIATE CURTAILMENT FOR THOSE DIVERTING WATER IN THE SACRAMENTO-SAN JOAQUIN WATERSHEDS AND DELTA WITH A PRE-1914 APPROPRIATIVE CLAIM COMMENCING DURING OR AFTER 1903**

On January 23, 2015 and again on April 2, 2015, the State Water Resources Control Board (State Water Board) issued a Notice of Surface Water Shortage and Potential for Curtailment due to dry conditions throughout the State. On April 1, 2015, the Governor issued an executive order, order B-29-15, continuing the state of emergency, initially enacted on January 17, 2014, due to drinking water shortages, diminished water for agriculture production, degraded habitat for fish and wildlife, increased wildfire risk and the threat of saltwater contamination to fresh water supplies in the Sacramento-San Joaquin Delta (Delta).

On April 23, 2015 and May 1, 2015, the State Water Board issued curtailment notices to all post-1914 appropriative water rights in the Sacramento and San Joaquin River watersheds, inclusive of the Delta, due to insufficient projected water supplies. Based on updated water supply projections provided by the Department of Water Resources in early May, the State Water Board is now notifying pre-1914 claims of right, with a priority date of 1903 and later for the Sacramento-San Joaquin watersheds and the Delta, that, due to ongoing drought conditions, there is insufficient water in the system to service their claims of right.

**Curtailment of Certain Pre-1914 Claims of Right Commenced During or After 1903:**

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. With this notice, the State Water Board is notifying pre-1914 appropriative claims of right with a priority date of 1903 and later within the Sacramento -San Joaquin watersheds and Delta of the need to immediately stop diverting water with the exceptions discussed below. This condition of curtailment will continue until water conditions improve. Even if there is water physically available at your point of diversion, that water is necessary to meet more senior water right holders' needs or the water may be released previously stored water which must continue instream to serve its intended beneficial use. If precipitation occurs in the following weeks or months, you should not commence diversion before being notified by the State Water Board that water is legally available for diversion under your priority of right. Evaluations for additional curtailments of more senior rights will be made every two weeks through September.

FRAN MANDUS, CHIEF | THOMAS HOWARD, EXECUTIVE DIRECTOR

1901 Street, Sacramento, CA 95811 | (916) 445-7000, P.O. Box 100, Sacramento, CA 95832-0100 | [www.sacwaterboards.gov](http://www.sacwaterboards.gov)

**Compliance Certification Required:**

Holders of pre-1914 water right claims with priority dates equal to or later than 1903 are required to document receipt of this notice by completing an online Curtailment Certification Form (Form) within seven days. The Form confirms your cessation of diversion under the specific pre-1914 claim of right. Completion of the Form is mandatory to avoid unnecessary potential enforcement proceedings. You are required to complete the Form for each pre-1914 claim of right identified through this notice at:  
[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/ewrims/curtailment/2015curt\\_form.php](http://www.waterboards.ca.gov/waterrights/water_issues/programs/ewrims/curtailment/2015curt_form.php)

**Exceptions to Curtailment:**

If your diversion is for hydroelectric generation by direct diversion only and all water diverted is returned to the same stream system, you may continue to divert under your pre-1914 claim of right. If you continue to divert under the above circumstances, you must identify that on the Form and provide the information requested. If you have previously collected water to storage in a reservoir covered by a pre-1914 claim of right prior to this curtailment notice, you still may beneficially use that previously stored water. However, you must bypass all inflow into the reservoir at all times during the period this notice remains in effect.

**No Exception for Health and Safety:**

There is no exception to this notice for health and safety needs. However, we are aware that some water users must comply with directives issued by the Division of Drinking Water (DDW), or local health or drinking water regulation to provide continued water service to meet minimum health and safety standards. Should you continue to divert water under a claim of right subject to this notice to meet human health and safety needs, you must complete the Form identifying your health and safety needs, whether there is an applicable DDW, state or local regulation and your attempts at securing an alternate water supply. The State Water Board will carefully analyze the non-exempted continued diversions for minimum health and safety needs on a case-by-case basis.

**Potential Enforcement:**

Those who are found to be diverting water beyond what is legally available to them may be subject to administrative penalties, cease and desist orders, or prosecution in court. If the State Water Board finds following an adjudicative proceeding that a person or entity has diverted or used water unlawfully, the State Water Board may assess penalties of \$1,000 per day of violation and \$2,500 for each acre-foot diverted or used in excess of a valid water right. (See Water Code, §§ 1052, 1055.) Additionally, if the State Water Board issues a Cease and Desist Order against an unauthorized diversion, violation of any such order can result in a fine of \$10,000 per day. (See Water Code, §§ 1831, 1845.)

The State Water Board is encouraging diverters to work together to reach local voluntary agreements that not only provide solutions that help local communities with water shortages, but also prevent injury to other legal users of water and do not cause unreasonable effects on fish and wildlife. If you have any questions, please call our Curtailment Hotline at (916) 341-5342, contact us by email at: [SWRCB-Curtailment-Certification@waterboards.ca.gov](mailto:SWRCB-Curtailment-Certification@waterboards.ca.gov), or review our drought year webpage at: [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/index.shtml#notices](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/index.shtml#notices) The State Water Board also encourages water right holders to assist in the prevention of unlawful diversion of water and in discouraging any waste or unreasonable use of water. To assist the State Water Board, you may file a complaint at:

To Water Right Users in the  
Sacramento-San Joaquin Delta,  
Sacramento & San Joaquin River Watersheds

-3-

June 12, 2015

[http://www.dtsc.ca.gov/database/CalEPA\\_Complaint/index.cfm](http://www.dtsc.ca.gov/database/CalEPA_Complaint/index.cfm)

We recognize the burden the drought creates, and want to assure that others do not illegally benefit from your curtailments.

Sincerely,



Thomas Howard  
Executive Director

**BBID**  
**EXHIBIT 277**



RECEIVED

JUL 22 2015



EDMUND G. BROWN JR.  
GOVERNOR

MATTHEW RODRIGUEZ  
SECRETARY FOR  
ENVIRONMENTAL PROTECTION

State Water Resources Control Board

Byron-Bethany  
Irrigation District

JUL 20 2015

Byron-Bethany Irrigation District  
Attn: Rick Gilmore, General Manager  
7995 Bruns Road  
Byron, CA 94514

CERTIFIED MAIL NO. 7003 1680 0000 2965 9480

Daniel Kelley  
General Counsel, Byron-Bethany Irrigation District  
Somach Simmons & Dunn  
500 Capital Mall, Suite 1000  
Sacramento, CA 95814

CERTIFIED MAIL NO. 7003 1680 0000 2965 9473

Dear Messrs. Gilmore and Kelley:

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

Enclosed is an Administrative Civil Liability (ACL) Complaint relating to your diversions from the intake channel to the Banks Pumping Plant (formerly Italian Slough) after June 12, 2015. This letter serves as notice to Byron-Bethany Irrigation District (BBID) that the State Water Resources Control Board (State Water Board), Division of Water Rights (Division), intends to impose the proposed Administrative Civil Liability.

**You have 20 days from receipt of this notice to act or face additional enforcement without further notice. Therefore, this matter requires your immediate attention.**

**VIOLATION DESCRIPTION**

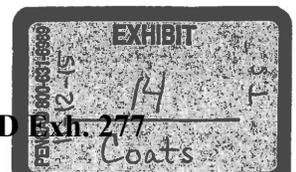
BBID is alleged to have diverted a total of approximately two thousand sixty-seven (2,067) acre-feet over the course of thirteen days, from June 13 through June 25, 2015, during which water was unavailable to serve BBID's water right. The violation is further described in the enclosed ACL Complaint.

**ADMINISTRATIVE CIVIL LIABILITY**

California Water Code, section 1052, prohibits the unauthorized diversion of water. Water Code section 1052 authorizes the State Water Board to administratively impose civil liability for unauthorized diversions of water during periods of drought emergency in an amount not to exceed \$1,000 per day of violation plus \$2,500 per acre-foot diverted without authorization.

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

1001 J Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 100, Sacramento, CA 95812-0100 | www.waterboards.ca.gov



BBID

JUL 20 2015

I am hereby issuing the enclosed ACL Complaint proposing that a liability of \$1,553,250 be imposed for your diversion of water during periods when water supplies were insufficient to fulfill your claimed right. The ACL Complaints provides for a potentially reduced penalty upon showing that water pumped during the time considered under this action was used for health and safety needs, or for critical power generation. **If you fail to respond to the ACL Complaint in one of the manners below within 20 days of receiving this notice, then the State Water Board will issue an ACL Order and seek recovery of this proposed liability amount as authorized by California Water Code section 1055.4.**

If you disagree with the facts or allegations set forth in the ACL Complaint, you may request a hearing before the State Water Board. **Your request for a hearing must be in writing, signed by you or on your behalf, and mailed or hand-delivered to ensure receipt by the State Water Board within 20 days from the date you receive this notice.** You may mail your written hearing request to: State Water Resources Control Board, Division of Water Rights, Attn: Enforcement Section, P.O. Box 2000, Sacramento, CA 95812-2000.

You may hand-deliver your written hearing request to: State Water Resources Control Board, Division of Water Rights, Records Unit, 1001 I Street, 2nd Floor, Sacramento, CA 95814.

If you request a hearing, a hearing will be scheduled before the State Water Board or a designated hearing officer. Prior to the hearing, you will be required to submit any written testimony and other evidence you would like the State Water Board to consider. You will be notified of the hearing date and the submittal deadlines as soon as they are scheduled.

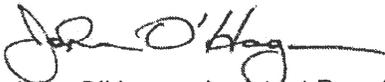
If you fail to come into compliance or request a hearing within 20 days of the date you receive this notice, the State Water Board will adopt the ACL.

#### SUMMARY OF OPTIONS

1. Submit a written request for hearing within 20 days of receiving the enclosed ACL Complaint; or
2. Do nothing, and receive a final ACL Order.

If you have any questions regarding the ACL Complaint, or if you have information that you want to provide in response to this complaint, or information that you believe the State Water Board staff should otherwise consider, please contact Kathy Mrowka, Manager, Enforcement Section at (916) 341-5363 or [Kathy.Mrowka@waterboards.ca.gov](mailto:Kathy.Mrowka@waterboards.ca.gov); or Andrew Tauriainen, Attorney III, Office of Enforcement, at (916) 341-5445 or [Andrew.Tauriainen@waterboards.ca.gov](mailto:Andrew.Tauriainen@waterboards.ca.gov), or send the information directly to them via email.

Sincerely,



John O'Hagan, Assistant Deputy Director  
Division of Water Rights

Enclosures: 1) Administrative Civil Liability Complaint

STATE OF CALIFORNIA  
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY  
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

**ADMINISTRATIVE CIVIL LIABILITY COMPLAINT**

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In the Matter of Unauthorized Diversion by

**BYRON-BETHANY IRRIGATION DISTRICT**

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SOURCE: Intake Channel to the Banks Pumping Plant (formerly Italian Slough)

COUNTY: Contra Costa

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**YOU ARE HEREBY GIVEN NOTICE THAT:**

1. Byron-Bethany Irrigation District (BBID or District) is alleged to have diverted and used water in violation of California Water Code section 1052, subdivision (a), which provides that the diversion or use of water subject to Division 2 of the Water Code other than as authorized in Division 2 is a trespass.
2. Water Code section 1052, subdivision (c), provides that any person or entity committing a trespass during a period for which the Governor has issued a proclamation of a state of drought emergency may be liable in an amount not to exceed the sum of one thousand dollars (\$1,000) for each day the trespass occurs plus two thousand five hundred dollars (\$2,500) for each acre-foot of water diverted or used in excess of that diverter's rights. Water Code section 1052, subdivision (d)(2), provides that civil liability may be imposed administratively by the State Water Resources Control Board (State Water Board or Board) pursuant to Water Code section 1055.
3. Water Code section 1055, subdivision (a), provides that the Executive Director of the State Water Board may issue a complaint to any person or entity on whom Administrative Civil Liability (ACL) may be imposed. On June 5, 2012, the Executive Director delegated this authority to the Deputy Director for Water Rights. State Water Board Resolution 2012-0029 authorizes the Deputy Director for Water Rights to issue an order imposing an ACL when a complaint has been issued and no hearing has been requested within 20 days of receipt of the complaint. The Deputy Director for Water Rights has redelegated this authority to the Assistant Deputy Director for Water Rights pursuant to State Water Board Resolution 2012-0029.

**ALLEGATIONS**

4. On June 30, 2010, BBID submitted an Initial Statement of Water Diversion and Use (Statement), which the State Water Board, Division of Water Rights (Division) designated as Statement 021256 (S021256). Under S021256, BBID claims a pre-1914 appropriative water right to the Intake Channel to the Banks Pumping Plant, formerly Italian Slough, in Contra Costa County. The Statement also indicates that BBID diverted approximately 26,179 acre-feet (af) in 2009 for municipal and industrial and agricultural use within its boundaries.
5. On July 1, 2013, BBID submitted Supplemental Statements for S021256, for the years 2010, 2011 and 2012. BBID's Supplemental Statements each indicates that the District first put water to use in 1917, and that the purpose of use for the District's diversions is irrigation of 12,500 acres. The 2010 Supplement Statement indicates that BBID diverted 25,269 af and applied

- approximately 22,302 af to beneficial use. The 2011 Supplemental Statement indicates that BBID diverted 22,344 af and applied 19,779 af to beneficial use. The 2012 Supplemental Statement indicates that BBID diverted 32,167 af and applied 28,345 af to beneficial use.
6. BBID does not hold or claim any other appropriative or riparian water rights on record with the State Water Board, although S021256 indicates that BBID holds Contract No. 14-06-200-785-LTR1 with the United States Bureau of Reclamation (Reclamation). In 2014 and 2015, Reclamation's agricultural contractors in the Delta were allocated zero percent of their contract quantity (available at <http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=49115> [last accessed June 30, 2015]). BBID confirmed in a public statement dated June 12, 2015, that it had received zero water supply from Reclamation in both 2014 and 2015 (available at <http://bbid.org/wp-content/uploads/2015/06/BBID-Curtailment-Response-FINAL1.pdf> [last accessed June 30, 2015].)
  7. On January 17, 2014, Governor Edmund G. Brown Jr. issued Proclamation No. 1-17-2014, declaring a State of Emergency to exist in California due to severe drought conditions.
  8. Also on January 17, 2014, the State Water Board issued a "Notice of Surface Water Shortage and Potential Curtailment of Water Right Diversions" (2014 Shortage Notice). The 2014 Shortage Notice alerts water right holders in critically dry watersheds that water may become unavailable to satisfy beneficial uses at junior priorities.
  9. On April 25, 2014, Governor Brown issued a Proclamation of a Continued State of Emergency due to drought conditions, to strengthen the state's ability to manage water and habitat effectively in drought conditions.
  10. On May 27, 2014, the State Water Board issued a "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the Sacramento and San Joaquin River Watershed with a post-1914 Appropriative Right" (2014 Unavailability Notice), which notifies all holders of post-1914 appropriative water rights within the Sacramento and San Joaquin River watersheds of the lack of availability of water to serve their post-1914 water rights, with some minor exceptions for non-consumptive diversions. The 2014 Unavailability Notice did not apply to pre-1914 appropriative rights such as that claimed by BBID. The State Water Board notified the most senior right holders in stages as water became available to serve their rights, and by November 19, 2014, had notified all right holders of availability for all diversions in the Sacramento and San Joaquin River watersheds.
  11. On January 23, 2015, the State Water Board issued a "Notice of Surface Water Shortage and Potential for Curtailment of Water Right Diversions for 2015" (2015 Shortage Notice). The 2015 Shortage Notice alerted water right holders in critically dry watersheds that water may become unavailable to satisfy beneficial uses at junior priorities.
  12. On February 4, 2015, the State Water Board issued Order WR 2015-0002-DWR, requiring pre-1914 and riparian water right claimants representing the top 90 percent of such claimants by volume in the Sacramento and San Joaquin River watersheds and the Delta to submit information relating to their claimed water right, the monthly amounts of water diverted and the basis of right claimed for diversions in 2014, and monthly diversion information and anticipated monthly diversion information for each month starting with February, 2015, to be submitted by the 5<sup>th</sup> of each succeeding month until the drought ends.
  13. BBID is subject to Order WR 2015-0002-DWR, and in response submitted information indicating that its predecessor, the Byron-Bethany Irrigation Company, recorded notice of an appropriation of water on or around May 18, 1914. Thus, BBID claims that its pre-1914 water right has a

priority date of May 18, 1914.<sup>1</sup>

14. BBID also submitted water diversion and use information for 2014, projected monthly diversions for 2015, and actual monthly diversions through May, 2015. BBID reports that it diverted 30,204 af in 2014 and projected diversions of 25,452 af in 2015. BBID's reported actual monthly diversion amounts for January through May, 2015, are generally similar to reported diversions for the same months in prior years where such information is available. BBID's reported projected diversions are similar to the reported actual diversions for the same months in prior years where such information is available. From August 1 to October 31, 2014, BBID reports it pumped 1,573 af of water under transfer that was approved by State Water Board Order dated August 27, 2014.
15. On April 1, 2015, Governor Brown issued Executive Order B-29-15 (Executive Order) to strengthen the state's ability to manage water and habitat effectively in drought conditions and called on all Californians to redouble their efforts to conserve water. The Executive Order finds that the continuous severe drought conditions present urgent challenges across the state including water shortages for municipal water use and for agricultural production, increased wildfire activity, degraded habitat for fish and wildlife, threat of saltwater contamination, and additional water scarcity if drought conditions continue. The Executive Order confirms that the orders and provisions in the Governor's previous drought proclamations and orders, the January 17, 2014, Proclamation, April 25, 2015, Proclamation, and Executive Orders B-26-14 and B-28-14, remain in full force and effect. On April 2, 2015, the State Water Board issued another notice warning that notices of unavailability of water were likely to be issued soon.
16. On April 23, 2015, the State Water Board issued a "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the San Joaquin River Watershed with a Post-1914 Appropriative Right" (April 23 Unavailability Notice), which notifies all holders of post-1914 appropriative water rights within the San Joaquin River watershed of the lack of availability of water to serve their post-1914 water rights, with some minor exceptions for non-consumptive diversions. The State Water Board issued a similar notice for post-1914 appropriative water rights within the Sacramento River watershed on May 1, 2015 (May 1 Unavailability Notice). The April 23 and May 1 Unavailability Notices do not apply to pre-1914 appropriative rights such as that claimed by BBID.
17. On June 12, 2015, the State Water Board issued a "Notice of Unavailability of Water and Need for Immediate Curtailment for Those Diverting Water in the Sacramento-San Joaquin Watersheds and Delta with a Pre-1914 Appropriative Claim Commencing During or After 1903" (June 12 Unavailability Notice), which notifies all holders of pre-1914 appropriative water rights with a priority date of 1903 and later within the Sacramento and San Joaquin River watersheds of the lack of availability of water to serve their rights, with some minor exceptions for non-consumptive uses.
18. Drought management of water rights is necessary to ensure that water to which senior water right holders are entitled is actually available to them, which requires that some water remain in most streams to satisfy senior demands at the furthest downstream point of diversion of these senior water rights. The June 12 Unavailability Notice reflects the State Water Board's determination that the existing water available in the Sacramento-San Joaquin watersheds and the Delta is insufficient to meet the demands of diverters with claims of pre-1914 appropriative rights with a priority date of 1903 and later. Continued diversion when there is no water available under the priority of the right constitutes unauthorized water diversion and use. Unauthorized diversion is subject to enforcement. (Wat. Code § 1052.)

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<sup>1</sup> The term "pre-1914" appropriative water right means those appropriative rights commenced prior to December 19, 1914, the effective date of the Water Commission Act. Therefore, it is possible to have a "pre-1914" appropriative water right with a priority date in 1914.

## Byron-Bethany Irrigation District

19. The State Water Board determines the availability of water for water rights of varying priorities in any watershed by comparing the current and projected available water supply with the total water right diversion demand.
20. To determine water availability, the Board relies upon the full natural flows of watersheds calculated by the Department of Water Resources (DWR) for certain watersheds in its Bulletin 120 and in subsequent monthly updates. "Full natural flow," or "unimpaired runoff," represents the natural water production of a river basin, unaltered by upstream diversions, storage, storage releases, or by export or import of water to or from other watersheds. The full natural flow amount is different than the measured stream flows at the given measurement points because the measured flows may be higher or lower due to upstream operations. Forecasted flow data is uncertain, so DWR provides the data in the form of "levels of exceedance" or simply "exceedance" to show the statistical probability that the forecasted supply will occur. The exceedance is simply the percent of the time that the actual flow is expected to exceed the projected flow. The 90 percent exceedance hydrology assumes inflows from rainfall and snowmelt at levels that are likely to be met or exceeded by actual flows with a 90 percent probability, or in other words, there is a ten percent or less chance of actual conditions turning out to be this dry or drier. In April and early May, the State Water Board uses the 90% and 99% exceedance amounts for its analyses due to low flow conditions. DWR's daily natural flow calculations are also used in the analysis.
21. To determine water demand, the State Water Board relies on information supplied by water right holders on annual or triennial reports of water diversion and use required to be true and accurate to the best of the knowledge of the diverters. The Board also incorporates 2014 diversion data submitted pursuant to Order WR 2015-0002. All reported monthly water diversion data is compiled by watershed, type of right and priority dates. The Board performs quality control checks and removes obvious errors, excess reporting, removes demand for direct diversion for power, and makes additional changes based on stakeholders' input. The corrected demand data includes the 2014 reported data for 90% of the watershed demand plus, for the remaining diverters, an averaged diversion amount for 2010 through 2013. These monthly diversion demands are grouped into water right types (riparian, pre-1914 and post-1914 rights).
22. The State Water Board consistently adjusts the water availability and demand analyses based on new information obtained from stakeholders, or adjustments to projected flows from the DWR. State Water Board staff reviews this information and provides revisions to its data set and graphs that are all shown on the Watershed Analysis website ([http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/analysis/](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/analysis/)).
23. The State Water Board's Watershed Analysis website provides updated graphical summations and spreadsheets containing supporting analysis of the availability and demand analyses. The graphical summations show priorities with monthly demands for the total riparian demand at bottom, the pre-1914 demands added to riparian and depicted above the riparian demand. The monthly amounts are averaged into cubic feet per second for graphical purposes. See, for example, the combined Sacramento/San Joaquin River Basin Senior Supply/Demand Analysis ([http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/analysis/docs/sacsjombined.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/analysis/docs/sacsjombined.pdf)). The Curtailment Analysis website also provides graphical summations of the San Joaquin River Basin Senior Supply/Demand Analysis with Proportional Delta Demand ([http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/analysis/docs/siprorated.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/analysis/docs/siprorated.pdf)) and the Sacramento River Basin Senior Supply/Demand Analysis with Proportional Delta Demand ([http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/analysis/docs/sacpro rated.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/analysis/docs/sacpro rated.pdf)).
24. This analysis shows that by June 12, 2015, available supply was insufficient to meet the demands of appropriative rights with priority dates of 1903 and later throughout the Sacramento and San Joaquin River watersheds and the Delta.

25. The June 12 Unavailability Notice applies to S021256 because BBID claims a priority date of May 18, 1914. BBID received an electronic copy of the June 12 Unavailability Notice on June 12, 2015, via the Board's "Drought Updates" Lyriss email list system, because Rick Gilmore, BBID's General Manager is a subscriber to that system (via email address [r.gilmore@bbid.org](mailto:r.gilmore@bbid.org)). Moreover, BBID issued a public statement on June 12, 2015, in response to the June 12 Unavailability Notice (available at <http://bbid.org/wp-content/uploads/2015/06/BBID-Curtailment-Response-FINAL1.pdf> [last accessed June 25, 2015].) BBID received a paper copy of the June 12 Unavailability Notice no later than June 15, 2015.
26. BBID's diversions are recorded by DWR and posted to the California Data Exchange Center (CDEC) (<http://cdec.water.ca.gov/cgi-progs/queryDaily?BBID>) also available at <http://www.water.ca.gov/swp/operationscontrol/docs/delta/DeltaHydrology.pdf> ). CDEC reports that BBID has diverted water each day since the June 12 Unavailability Notice:
- | Date       | Avg Diversion Rate (cfs) | Amount Diverted (af) | Date       | Avg Diversion Rate (cfs) | Amount Diverted (af) |
|------------|--------------------------|----------------------|------------|--------------------------|----------------------|
| 06/13/2015 | 91                       | 180                  | 06/20/2015 | 96                       | 190                  |
| 06/14/2015 | 122                      | 242                  | 06/21/2015 | 99                       | 196                  |
| 06/15/2015 | 79                       | 156                  | 06/22/2015 | 62                       | 123                  |
| 06/16/2015 | 83                       | 164                  | 06/23/2015 | 61                       | 121                  |
| 06/17/2015 | 78                       | 154                  | 06/24/2015 | 67                       | 132                  |
| 06/18/2015 | 91                       | 180                  | 06/25/2015 | 36                       | 71                   |
| 06/19/2015 | 80                       | 158                  | 06/26/2015 | 0                        | 0                    |
27. The daily diversion rates through June 24 are comparable to the District's average daily diversion rates reported for June 2014 (4,842 af/30 days/1.9835=81.4 cfs), and those BBID reported as anticipated for June 2015. This daily rate is in excess of the basic minimum health and safety needs of Mountain House Community Service District. This indicates that BBID has continued its normal diversions following the June 12 Unavailability Notice.
28. BBID diverted a total of approximately two thousand sixty-seven (2,067) acre-feet over the course of thirteen days following the June 12 Unavailability Notice, specifically from June 13 through June 25, 2015.
29. On July 15, 2015, the State Water Board issued a Clarification to the Unavailability Notices indicating that, to the extent that any of the notices described above contain language that may be construed as an order requiring you to curtail diversions under your affected water right, that language has been rescinded. Similarly, any language requiring affected water right holders to submit curtailment certification forms has been rescinded.
30. Diversion or use of water by an appropriative water right holder when there is insufficient water supply available for that water right is an unauthorized diversion or use of water subject to Division 2 of the Water Code. Water Code section 1052, subdivision (a) provides that unauthorized diversion or use of water is a trespass.
31. This enforcement action is based on lack of available water supply under the priority of the right. The Unavailability Notices were issued for the purpose of advising the public and water diverters of the lack of available water under the priority of the rights identified in each notice; the notices are not the basis for this enforcement action.

#### PROPOSED CIVIL LIABILITY

32. Water Code section 1052 provides that the maximum civil liability that can be imposed by the State Water Board in this matter for the unauthorized diversion and use of the water during a

- drought period is \$1,000 for each day of trespass plus \$2,500 for each acre-foot of water diverted or used in excess of that diverter's water rights.
33. Evidence demonstrates that BBID's unauthorized diversions began on June 13, 2015, and continued until June 25, 2015, for a total of thirteen (13) days. Over that period, BBID diverted approximately two thousand sixty-seven (2,067) acre-feet of water in excess of that available to serve its claimed water right.
  34. Therefore, the maximum civil liability for the alleged violations is **\$5,180,500** [13 days at \$1,000 per day plus 2,067 acre-feet at \$2,500 per acre-foot].
  35. In determining the amount of civil liability, California Water Code section 1055.3 requires that the State Water Board consider all relevant circumstances, including, but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, and any corrective action taken by the violator.
  36. In this case, BBID has made unauthorized diversions of water from the Intake Channel to the Banks Pumping Plant (formerly Italian Slough) during the most extreme drought in decades, when there was insufficient water supply available for BBID's claimed water right. BBID was aware that the State Water Board had determined that there was insufficient water supply available for BBID's claimed water right. These unauthorized diversions have reduced or threatened to reduce the amount of water available for downstream water right holders during an extreme drought emergency. Moreover, BBID's diversions likely reduced the water available for instream resources and riparian habitat within the Delta during an extreme drought emergency.
  37. BBID received an economic advantage over other legitimate water diverters in the area by foregoing the costs of buying replacement water during the violation period. During 2015, irrigation districts north of the Delta have paid at least \$250 per acre-foot of replacement water. Thus, by illegally diverting 2,067 acre-feet of water from June 13 through June 25, BBID avoided purchased water costs of at least \$516,750.
  38. The Division estimates that its staff cost to investigate the unauthorized diversion issues and develop the enforcement documents to be \$3,000.
  39. BBID is known to be serving water to Mountain House Community Service District and to power generation facilities that may be deemed critical energy suppliers. BBID and Mountain House Community Service District took corrective actions to secure water available via contract and transfer. Although these supplies were not provided during the violation period identified above, they are recognized as progressive correction actions to prevent unauthorized diversions. Also taken into consideration is the fact that BBID has stopped its diversions from June 26.
  40. Having taken into consideration the factors described above, the Assistant Deputy Director for Water Rights recommends an ACL for the unauthorized diversion of water in the amount of **\$1,553,250**. The recommended penalty is based on the circumstances known to this time, BBID's continued diversions despite lack of availability of water to serve its right during extreme ongoing drought conditions, and to provide a strong disincentive for continued unauthorized diversions by BBID and any similarly-situated parties. The Prosecution Team will consider adjustment of the recommended penalty if BBID provides evidence of the amounts of water pumped that were for health and safety needs or critical power generation.
  41. Should the matter go to hearing, the State Water Board may consider a different liability based on the evidence received, including additional staff costs incurred, up to the maximum amount provided by law. It is estimated that if this this matter goes to hearing, additional staff costs incurred for the prosecution staff would be approximately \$10,000.

**RIGHT TO HEARING**

42. BBID may request a hearing on this matter before the State Water Board. Any such request for hearing must be in writing and received or postmarked within 20 days of the date this notice is received. (California Water Code, § 1055, subd. (b).)
43. If BBID requests a hearing, BBID will have an opportunity to be heard and to contest the allegations in this Complaint and the imposition of an ACL by the State Water Board. If a hearing is requested, separate notice setting the time and place for the hearing will be mailed not less than 10 days before the hearing date.
44. If BBID requests a hearing, the State Water Board will consider at the hearing whether to impose the civil liability, and, if so, whether to adjust the proposed liability within the amount authorized by statute. Based on the evidence received at the hearing, the State Water Board may take any appropriate action in accordance with sections 100, 275, and 1050 et seq. of the California Water Code and its responsibilities under the public trust doctrine. Any State Water Board order imposing an ACL shall become final and effective upon issuance.
45. If BBID does not wish to request a hearing, please remit a cashier's check or money order within 20 days of the date of this Complaint for the amount of the ACL set forth above to:  
  
State Water Resources Control Board  
Division of Water Rights  
Enforcement Section  
P.O. Box 2000  
Sacramento, CA 95812-2000
46. If BBID does not request a hearing and does not remit the ACL amount, the State Water Board may seek recovery of the ACL amount as authorized by Water Code section 1055.4.

STATE WATER RESOURCES CONTROL BOARD

  
John O'Hagan, Assistant Deputy Director  
Division of Water Rights

Dated: JUL 20 2015

**BBID**  
**EXHIBIT 280**

## Tauriainen, Andrew@Waterboards

---

**From:** Spivy-Weber, Frances@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=SPIVY-WEBER, FRANCE23EEB69A-0B17-49ED-B4D9-ED669E28F3BFBAE>  
**Sent:** Wednesday, April 01, 2015 1:34 PM  
**To:** Howard, Tom  
**Cc:** O'Hagan, John@Waterboards; Evoy, Barbara@Waterboards; Trgovcich, Caren@Waterboards; Burns, Gordon@EPA  
**Subject:** Re: Water Rights Curtailment Letter

Good letter, good to give a heads up. Agree that GO should be looped in. Fran

Sent from my iPad

> On Apr 1, 2015, at 1:21 PM, Howard, Tom <Tom.Howard@waterboards.ca.gov> wrote:

>

> FYI, I would like to post this about noon tomorrow. We sent a less ominous letter in early February but it seems appropriate to continue to warn people. Let me know if you have any questions or comments.

>

> -----Original Message-----

> From: O'Hagan, John@Waterboards

> Sent: Wednesday, April 01, 2015 1:17 PM

> To: Trgovcich, Caren@Waterboards; Howard, Tom

> Cc: Evoy, Barbara@Waterboards; Mrowka, Kathy@Waterboards; Coats, Brian@Waterboards

> Subject: FW: Water Rights Curtailment Letter

>

> Tom and Caren,

> Here is letter. Let me know and we can post today on Drought Lyris.

>

> -----Original Message-----

> From: Hensley, Cindy D.@Waterboards

> Sent: Wednesday, April 01, 2015 1:11 PM

> To: O'Hagan, John@Waterboards; Evoy, Barbara@Waterboards

> Subject: RE: Water Rights Curtailment Letter

>

> John and Barbara,

> Here you go,

>

> Cindy D. Hensley

> Executive Assistant

> Division of Water Rights

> (916) 341-5308

>

>

> -----Original Message-----

> From: O'Hagan, John@Waterboards

> Sent: Wednesday, April 01, 2015 1:03 PM

> To: Hensley, Cindy D.@Waterboards

> Subject: RE: Water Rights Curtailment Letter

>  
> Add date.  
>  
> -----Original Message-----  
> From: Hensley, Cindy D.@Waterboards  
> Sent: Wednesday, April 01, 2015 12:57 PM  
> To: O'Hagan, John@Waterboards  
> Subject: RE: Water Rights Curtailment Letter  
>  
> John,  
> I did not change the format or add a date. Please let me know if you need me to do that.  
>  
> Cindy D. Hensley  
> Executive Assistant  
> Division of Water Rights  
> (916) 341-5308  
>  
>  
> -----Original Message-----  
> From: O'Hagan, John@Waterboards  
> Sent: Wednesday, April 01, 2015 12:54 PM  
> To: Hensley, Cindy D.@Waterboards  
> Cc: Evoy, Barbara@Waterboards  
> Subject: FW: Water Rights Curtailment Letter  
>  
> Cindy,  
> Can you put this on SWRCB Executive letterhead. Return to Barbara and I.  
>  
> -----Original Message-----  
> From: O'Hagan, John@Waterboards  
> Sent: Wednesday, April 01, 2015 9:10 AM  
> To: Trgovcich, Caren@Waterboards; Evoy, Barbara@Waterboards; Howard, Tom  
> Cc: Mrowka, Kathy@Waterboards; Coats, Brian@Waterboards  
> Subject: RE: Water Rights Curtailment Letter  
>  
> Barbara, Caren and Tom,  
> Here is clean version. I assume this will be sent via lyris.  
>  
> -----Original Message-----  
> From: Trgovcich, Caren@Waterboards  
> Sent: Wednesday, April 01, 2015 7:06 AM  
> To: O'Hagan, John@Waterboards; Evoy, Barbara@Waterboards; Kostyrko, George@Waterboards  
> Cc: Mrowka, Kathy@Waterboards; Coats, Brian@Waterboards  
> Subject: RE: Water Rights Curtailment Letter  
>  
> Agreed..,  
>  
> George - can you please provide us with a status on the web page as soon as you can?  
>  
> -----Original Message-----  
> From: O'Hagan, John@Waterboards  
> Sent: Wednesday, April 01, 2015 7:00 AM

> To: Trgovcich, Caren@Waterboards; Evoy, Barbara@Waterboards  
> Cc: Mrowka, Kathy@Waterboards; Coats, Brian@Waterboards  
> Subject: RE: Water Rights Curtailment Letter

>

> Caren and Barbara,

> I edited the letter slightly to reflect the Statewide Notice letter date. I also edited the letter from "in the coming months" to "soon".

>

> I assume this is to be posted via lyris.

>

> -----Original Message-----

> From: Trgovcich, Caren@Waterboards

> Sent: Tuesday, March 31, 2015 7:03 PM

> To: Howard, Tom; Marcus, Felicia@Waterboards

> Cc: Evoy, Barbara@Waterboards; O'Hagan, John@Waterboards

> Subject: RE: Water Rights Curtailment Letter

>

> OK...I made a couple of edits to reflect continuing dry conditions. Barbara and John - you can take it from here.

>

---

> From: Howard, Tom

> Sent: Tuesday, March 31, 2015 6:54 PM

> To: Trgovcich, Caren@Waterboards; Marcus, Felicia@Waterboards

> Cc: Evoy, Barbara@Waterboards; O'Hagan, John@Waterboards

> Subject: Re: Water Rights Curtailment Letter

>

> Yes, something like this. We need to qualify that if dry conditions persist. Let's not caution riparians unless john thinks it will happen. I assume we will target our watersheds.

>

> Please try to get me a final draft tomorrow. I want to run by Gordon, et al.

>

> Sent from my iPad

>

>> On Mar 31, 2015, at 6:48 PM, Trgovcich, Caren@Waterboards <Caren.Trgovcich@waterboards.ca.gov> wrote:

>>

>> Tom and Barbara - I took a stab at the letter that would be sent. It will need a bit of work since I did this pretty quick.

>> Tom - please let us know if this is along the lines of what you were looking for.

>>

>> Barbara - based on Tom's feedback, please revise...I am going to be pretty tied up tomorrow. Thanks!!

>>

>> CT

>> <CURTAILMENT OF WATER RIGHT DIVERSIONS ct.docx>

> <Curtailment of Water.docx>

**BBID**  
**EXHIBIT 281**

## Tauriainen, Andrew@Waterboards

---

**From:** O'Hagan, John@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=O'HAGAN, JOHN@WATER7B72A79A-DD76-4B3C-B470-A3BF3B5BCDD7939>  
**Sent:** Thursday, April 02, 2015 9:36 AM  
**To:** Dadamo, Dorene@Waterboards; Howard, Tom  
**Cc:** Evoy, Barbara@Waterboards; Trgovcich, Caren@Waterboards; Mrowka, Kathy@Waterboards; Coats, Brian@Waterboards  
**Subject:** RE: Water Rights Curtailment Letter

Dee Dee and Tom,

There is an increases in flows as you move downstream on the San Joaquin River. Most of this increased flows are associated with fishery or Delta bypass and/or releases requirements on Merced ID, Turlock Modesto IDs and the Bureau at New Melones. We are using the FNF from Upper San Joaquin above Friant, and at New Melones, New Don Pedro and New Exchequer on the Stanislaus, Tuolumne and Merced rivers, respectively. Contributions from Fresno and other tributaries are insignificant or zero.

The following is USGS flow data for today along the San Joaquin as you move downstream. As evident, the changes in flow are mostly reflective of the contributions we are considering but there be additional drainage returns from day to day. Today ~130 cfs above Vernalis.

Below Friant- 195 cfs  
San Mateo Rd. above Mendota- 0 cfs  
Below Mendota- 141 cfs (+141 cfs maybe Sacramento River Exchange?)  
Fremont Ford Bridge- 79 cfs (-62 cfs)  
Above Newman- 111 cfs (+ 32 cfs)  
Below Newman- 196 cfs Merced River ~ 85 cfs Note: 3/27/15 Exchequer Inflow- 246 Outflow- 207 cfs Storage Change-39 AFA  
Crows Landing - 217 cfs (+21 cfs)  
Tuolumne R. at Modesto- 178 cfs Below LaGrange Dam- 171 cfs New Don Pedro Storage Change- -1757 AF  
Stanislaus R. at Ripon - 568 cfs Note: Release from New Melones- 1495 cfs, Inflow- 205 cfs, FNF- 392 cfs  
Vernalis- 805 cfs 70% from Stanislaus.

I believe Jeanie's clients are above Vernalis and Stanislaus confluence.

Information from: <http://ca.water.usgs.gov/data/waterconditionsmap.html>.

-----Original Message-----

**From:** Dadamo, Dorene@Waterboards  
**Sent:** Thursday, April 02, 2015 8:17 AM  
**To:** Howard, Tom  
**Cc:** O'Hagan, John@Waterboards; Marcus, Felicia@Waterboards; Evoy, Barbara@Waterboards; Trgovcich, Caren@Waterboards  
**Subject:** Re: Water Rights Curtailment Letter

I should have been more clear-- This was a discussion related to measurement of supply throughout the watershed, not demand.

On Apr 2, 2015, at 8:12 AM, Howard, Tom <Tom.Howard@waterboards.ca.gov> wrote:

DeeDee,

We just issued an order and received responses from the top 90 percent of valley water users asking for their most accurate, up-to-date information. But we will continue to improve our data by working with the water users.

-----Original Message-----

From: Dadamo, Dorene@Waterboards  
Sent: Wednesday, April 01, 2015 10:29 PM  
To: Howard, Tom; O'Hagan, John@Waterboards  
Cc: Marcus, Felicia@Waterboards; Evoy, Barbara@Waterboards; Trgovcich, Caren@Waterboards  
Subject: Re: Water Rights Curtailment Letter

Letter looks good.

I had an interesting meeting with Jeanne Zolezzi regarding curtailment and measurement issues. She indicated many water districts have more accurate info than we have. I imagine this will come up in tomorrow's meeting as well. Please let me know what steps we are taking to incorporate information from others (where appropriate) in order to help ensure accuracy with our supply/demand curves.

Thanks

Dorene D'Adamo  
State Water Resources Control Board  
(916)341-5607  
dorene.dadamo@waterboards.ca.gov

> On 4/1/15, 1:21 PM, "Howard, Tom" <Tom.Howard@waterboards.ca.gov> wrote:

>

> FYI, I would like to post this about noon tomorrow. We sent a less  
> ominous letter in early February but it seems appropriate to continue  
> to warn people. Let me know if you have any questions or comments.

>

> -----Original Message-----

> From: O'Hagan, John@Waterboards  
> Sent: Wednesday, April 01, 2015 1:17 PM  
> To: Trgovcich, Caren@Waterboards; Howard, Tom  
> Cc: Evoy, Barbara@Waterboards; Mrowka, Kathy@Waterboards; Coats,  
> Brian@Waterboards  
> Subject: FW: Water Rights Curtailment Letter

>

> Tom and Caren,  
> Here is letter. Let me know and we can post today on Drought Lyris.

>

> -----Original Message-----

> From: Hensley, Cindy D.@Waterboards  
> Sent: Wednesday, April 01, 2015 1:11 PM  
> To: O'Hagan, John@Waterboards; Evoy, Barbara@Waterboards  
> Subject: RE: Water Rights Curtailment Letter

>  
> John and Barbara,  
> Here you go,  
>  
> Cindy D. Hensley  
> Executive Assistant  
> Division of Water Rights  
> (916) 341-5308

>  
>  
> -----Original Message-----  
> From: O'Hagan, John@Waterboards  
> Sent: Wednesday, April 01, 2015 1:03 PM  
> To: Hensley, Cindy D.@Waterboards  
> Subject: RE: Water Rights Curtailment Letter

>  
> Add date.  
>  
> -----Original Message-----  
> From: Hensley, Cindy D.@Waterboards  
> Sent: Wednesday, April 01, 2015 12:57 PM  
> To: O'Hagan, John@Waterboards  
> Subject: RE: Water Rights Curtailment Letter

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> John,  
> I did not change the format or add a date. Please let me know if you  
> need me to do that.  
>  
> Cindy D. Hensley  
> Executive Assistant  
> Division of Water Rights  
> (916) 341-5308

>  
>  
> -----Original Message-----  
> From: O'Hagan, John@Waterboards  
> Sent: Wednesday, April 01, 2015 12:54 PM  
> To: Hensley, Cindy D.@Waterboards  
> Cc: Evoy, Barbara@Waterboards  
> Subject: FW: Water Rights Curtailment Letter

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> Can you put this on SWRCB Executive letterhead. Return to Barbara and I.  
>  
> -----Original Message-----  
> From: O'Hagan, John@Waterboards  
> Sent: Wednesday, April 01, 2015 9:10 AM  
> To: Trgovcich, Caren@Waterboards; Evoy, Barbara@Waterboards; Howard,

> Tom  
> Cc: Mrowka, Kathy@Waterboards; Coats, Brian@Waterboards  
> Subject: RE: Water Rights Curtailment Letter  
>  
> Barbara, Caren and Tom,  
> Here is clean version. I assume this will be sent via lyrics.  
>  
> -----Original Message-----  
> From: Trgovcich, Caren@Waterboards  
> Sent: Wednesday, April 01, 2015 7:06 AM  
> To: O'Hagan, John@Waterboards; Evoy, Barbara@Waterboards; Kostyrko,  
> George@Waterboards  
> Cc: Mrowka, Kathy@Waterboards; Coats, Brian@Waterboards  
> Subject: RE: Water Rights Curtailment Letter  
>  
> Agreed..,  
>  
> George - can you please provide us with a status on the web page as  
> soon as you can?  
>  
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> From: O'Hagan, John@Waterboards  
> Sent: Wednesday, April 01, 2015 7:00 AM  
> To: Trgovcich, Caren@Waterboards; Evoy, Barbara@Waterboards  
> Cc: Mrowka, Kathy@Waterboards; Coats, Brian@Waterboards  
> Subject: RE: Water Rights Curtailment Letter  
>  
> Caren and Barbara,  
> I edited the letter slightly to reflect the Statewide Notice letter date.  
> I also edited the letter from "in the coming months" to "soon".  
>  
> I assume this is to be posted via lyrics.  
>  
> -----Original Message-----  
> From: Trgovcich, Caren@Waterboards  
> Sent: Tuesday, March 31, 2015 7:03 PM  
> To: Howard, Tom; Marcus, Felicia@Waterboards  
> Cc: Evoy, Barbara@Waterboards; O'Hagan, John@Waterboards  
> Subject: RE: Water Rights Curtailment Letter  
>  
> OK...I made a couple of edits to reflect continuing dry conditions.  
> Barbara and John - you can take it from here.  
>  
> \_\_\_\_\_  
> From: Howard, Tom  
> Sent: Tuesday, March 31, 2015 6:54 PM  
> To: Trgovcich, Caren@Waterboards; Marcus, Felicia@Waterboards  
> Cc: Evoy, Barbara@Waterboards; O'Hagan, John@Waterboards  
> Subject: Re: Water Rights Curtailment Letter  
>  
> Yes, something like this. We need to qualify that if dry conditions  
> persist. Let's not caution riparians unless John thinks it will  
> happen. I assume we will target our watersheds.

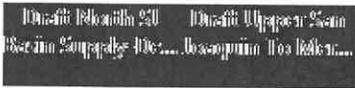
>  
> Please try to get me a final draft tomorrow. I want to run by Gordon,  
> et al.  
>  
> Sent from my iPad  
>  
>> On Mar 31, 2015, at 6:48 PM, Trgovcich, Caren@Waterboards  
>> <Caren.Trgovcich@waterboards.ca.gov> wrote:  
>>  
>> Tom and Barbara - I took a stab at the letter that would be sent. It  
>> will need a bit of work since I did this pretty quick.  
>> Tom - please let us know if this is along the lines of what you were  
>> looking for.  
>>  
>> Barbara - based on Tom's feedback, please revise...I am going to be  
>> pretty tied up tomorrow. Thanks!!  
>>  
>> CT  
>> <CURTAILMENT OF WATER RIGHT DIVERSIONS ct.docx>

**BBID**  
**EXHIBIT 282**

**Tauriainen, Andrew@Waterboards**

---

**From:** Mrowka, Kathy@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=MROWKA, KATHY@WATERD1188F18-E359-4DA8-A3F2-FC48F57B907E63A>  
**Sent:** Tuesday, May 19, 2015 8:34 AM  
**To:** Coats, Brian@Waterboards; Evoy, Barbara@Waterboards; Trgovcich, Caren@Waterboards; Dadamo, Dorene@Waterboards; Rizzardo, David@DWR; Nemeth, Stephen@DWR; O'Hagan, John@Waterboards; JZOLEZZI@herumcrabtree.com; Herrick, John @aol.com; Jennifer Spaletta (jennifer@spallettalaw.com); Dante Nomellini, Jr. (dantejr@pacbell.net); George, Michael@Waterboards; pminasian@minasianlaw.com; jbuckman@friantwater.org  
**Subject:** San Joaquin River Stakeholder Meeting - Senior Rights



Hi -

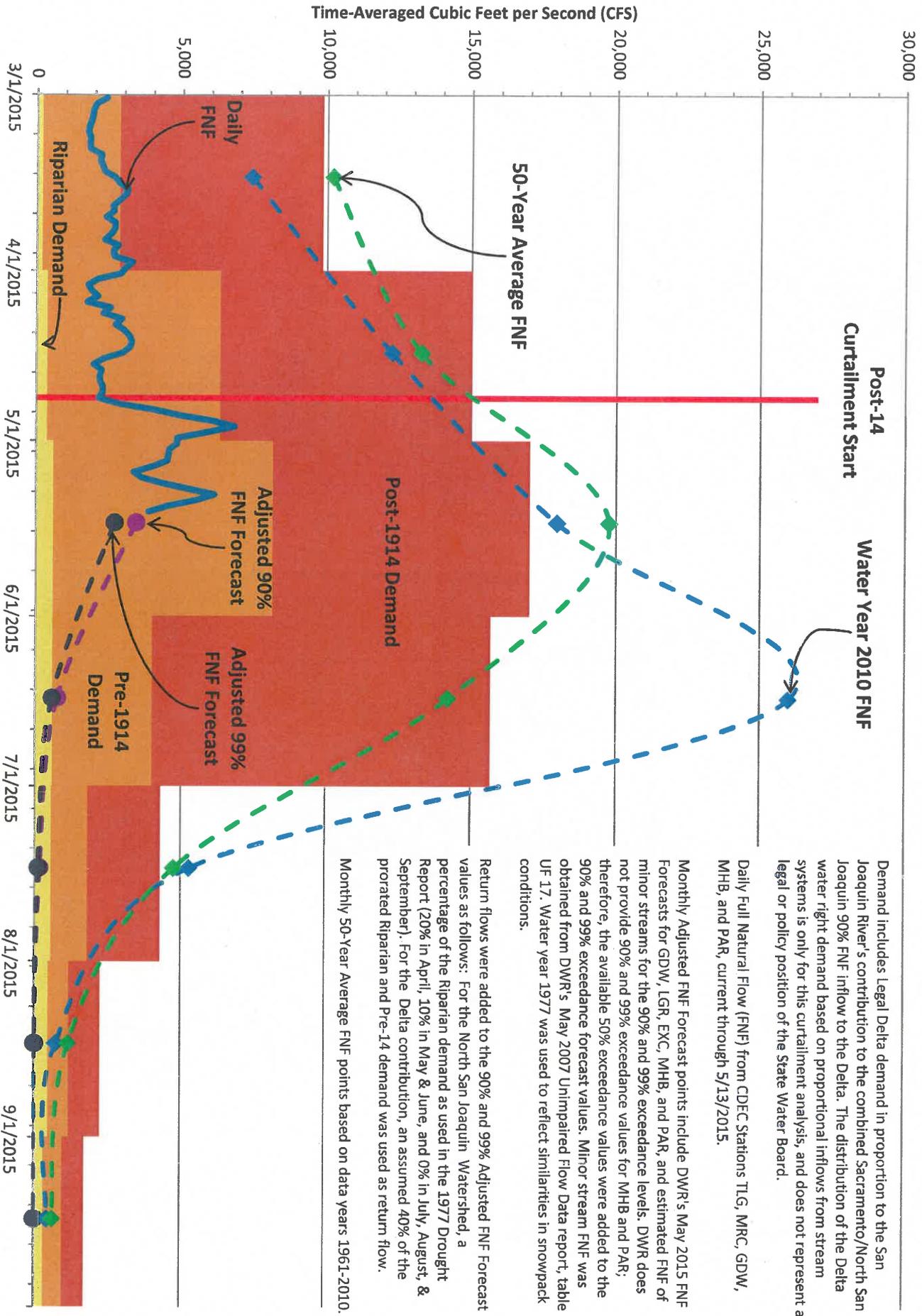
During the stakeholder meeting on curtailment of San Joaquin River pre-1914 rights, the parties asked that we run a separate model run with the upper San Joaquin assumed to have no hydraulic connectivity to the San Joaquin River at Merced. The graph (see Draft Upper San Joaquin to Merced graph) includes all rainfall events through 5-13. We also completed a North SJ Basin River supply graph (Draft North SJ Basin graph) which includes all rainfall events through 5-13. This graph includes the Stanislaus, Tuolumne, Merced, Mokelumne and Cosumnes Rivers and cuts off at the lowermost point where all these sources have joined the San Joaquin River. Page 2 of this document shows the analysis area considered.

Katherine Mrowka, Manager  
Enforcement Section  
Water Rights  
P.O. Box 2000  
Sacramento, CA 95814

916-341-5363



# 2015 North San Joaquin River Basin Supply/Demand



Demand includes legal Delta demand in proportion to the San Joaquin River's contribution to the combined Sacramento/North San Joaquin 90% FNF inflow to the Delta. The distribution of the Delta water right demand based on proportional inflows from stream systems is only for this curtailment analysis, and does not represent a legal or policy position of the State Water Board.

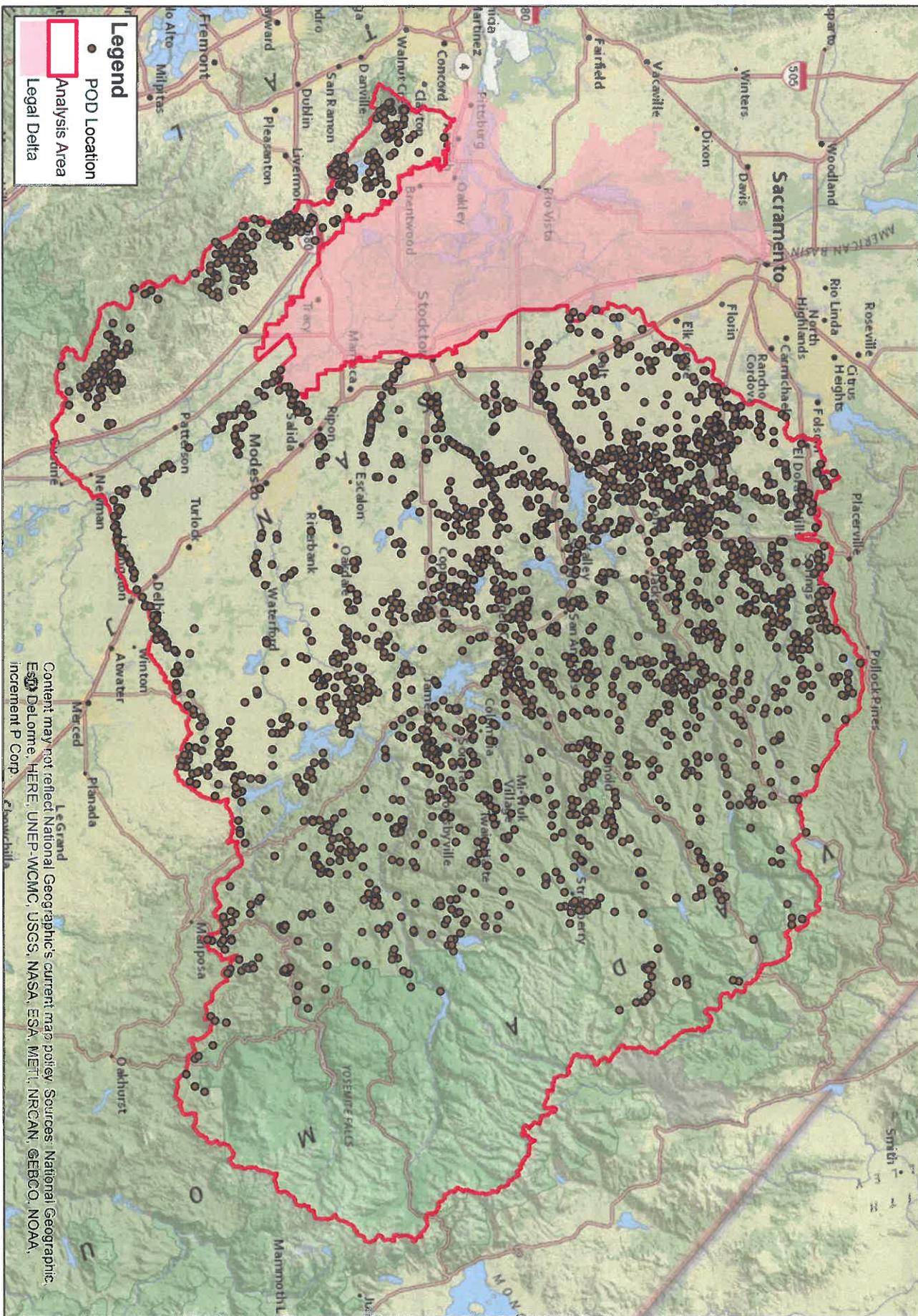
Daily Full Natural Flow (FNF) from CDEC Stations TLG, MRC, GDW, MHB, and PAR, current through 5/13/2015.

Monthly Adjusted FNF Forecast points include DWR's May 2015 FNF Forecasts for GDW, LGR, EXC, MHB, and PAR, and estimated FNF of minor streams for the 90% and 99% exceedance levels. DWR does not provide 90% and 99% exceedance values for MHB and PAR; therefore, the available 50% exceedance values were added to the 90% and 99% exceedance forecast values. Minor stream FNF was obtained from DWR's May 2007 Unimpaired Flow Data report, table UF 17. Water year 1977 was used to reflect similarities in snowpack conditions.

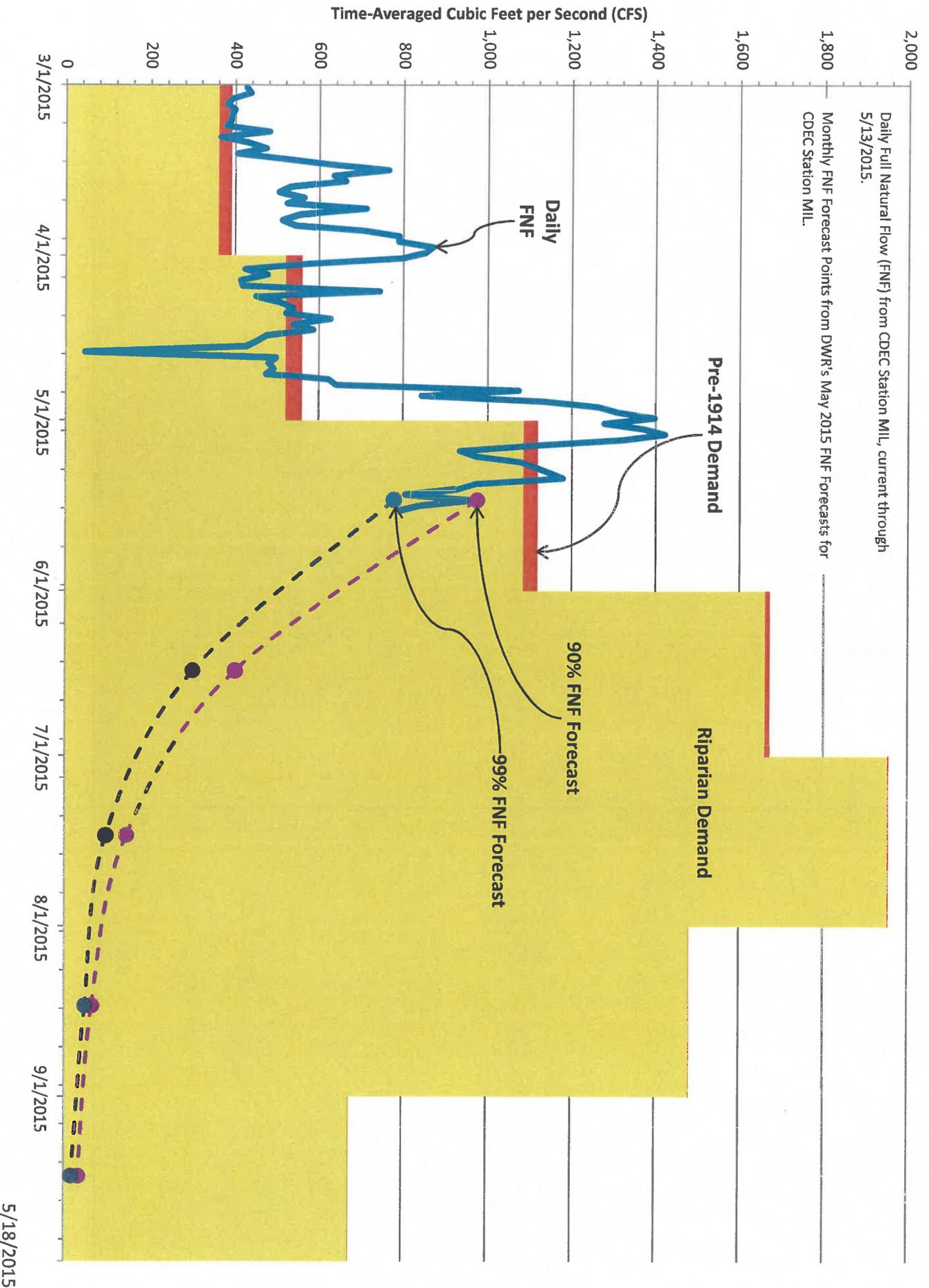
Return flows were added to the 90% and 99% Adjusted FNF Forecast values as follows: For the North San Joaquin Watershed, a percentage of the Riparian demand as used in the 1977 Drought Report (20% in April, 10% in May & June, and 0% in July, August, & September). For the Delta contribution, an assumed 40% of the prorated Riparian and Pre-14 demand was used as return flow.

Monthly 50-Year Average FNF points based on data years 1961-2010.

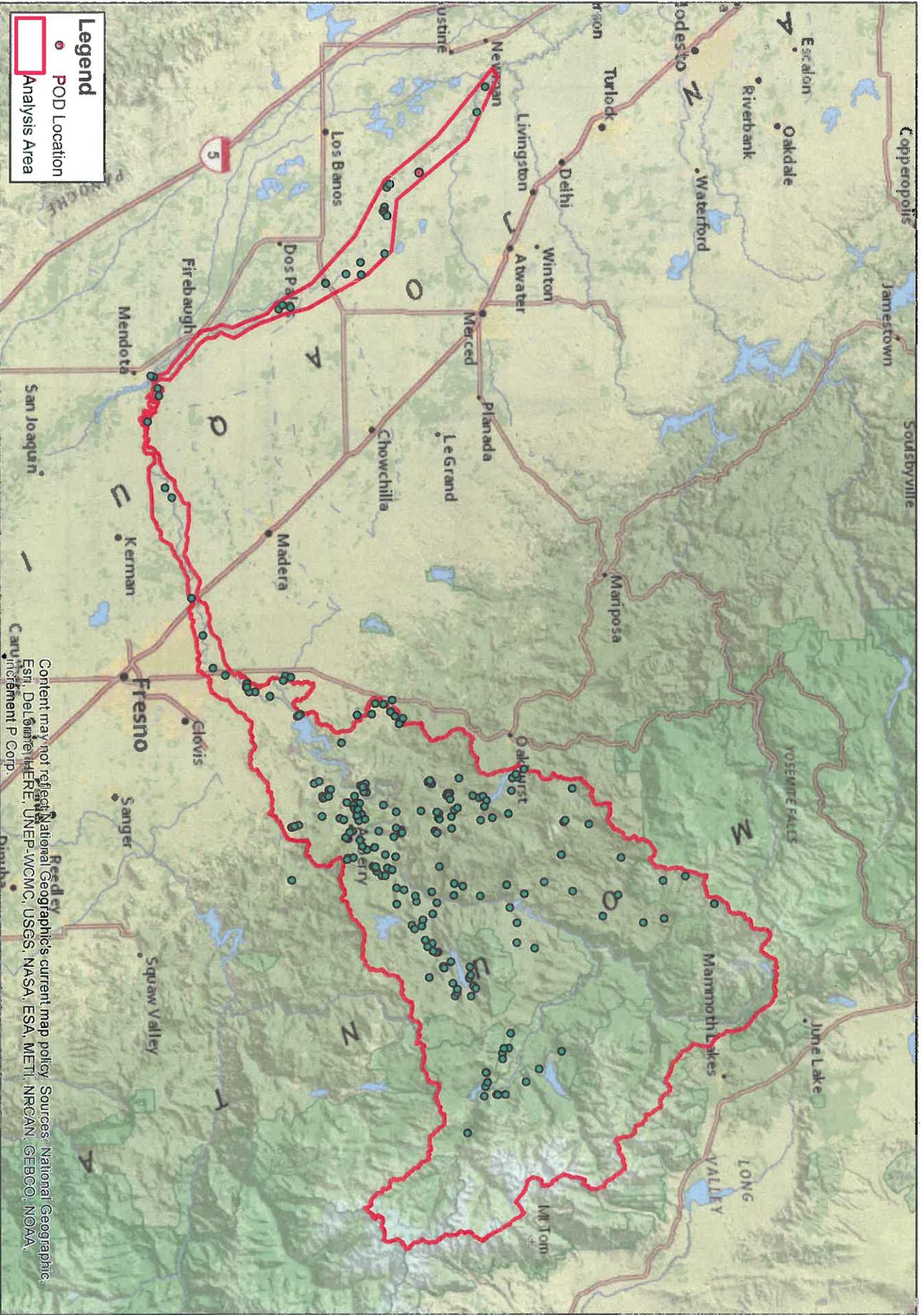
# POD LOCATIONS OF WATER RIGHTS USED IN NORTH SAN JOAQUIN RIVER BASIN SUPPLY/DEMAND ANALYSIS



# 2015 Upper San Joaquin River To Merced River Senior Supply/Demand



# POD LOCATIONS OF WATER RIGHTS USED IN UPPER SAN JOAQUIN RIVER TO MERCED RIVER SUPPLY/DEMAND ANALYSIS



Content may not reflect National Geographic's current map policy. Sources: National Geographic, Esri, DeLorme, HERE, UNEP-WCMC, USGS, NASA, ESA, METI, NRCAN, GEBCO, NOAA, Swatch, etc.

**BBID**  
**EXHIBIT 283**

## Tauriainen, Andrew@Waterboards

---

**From:** Evoy, Barbara@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=EVOY, BARBARA@WATER0C556DE1-8FEA-4DD1-91A5-2BBA7A82D039430>  
**Sent:** Wednesday, June 17, 2015 5:00 PM  
**To:** Mrowka, Kathy@Waterboards  
**Cc:** O'Hagan, John@Waterboards  
**Subject:** RE: Questions to SWRCB on curtailments from June 17th drought call  
**Attachments:** image001.png; image002.jpg

Thanks for going and the followup.

---

**From:** Mrowka, Kathy@Waterboards  
**Sent:** Wednesday, June 17, 2015 4:38 PM  
**To:** Agustinez, Anecita S.@DWR; reno@stewartspoint.org; Marcus, Felicia@Waterboards; Kapahi, Gita@Waterboards  
**Cc:** Teresa Romero; Nina Hapner; Heather.Hostler@gov.ca.gov; Cynthia Gomez (Cynthia.Gomez@GOV.CA.GOV); O'Hagan, John@Waterboards; Evoy, Barbara@Waterboards  
**Subject:** RE: Questions to SWRCB on curtailments from June 17th drought call

Hi –

Thank you for the opportunity to discuss curtailments today. During our conversation, I agreed to provide advance notice of curtailments to the tribes. The advance notice is generally a courtesy call or email sent about four hours ahead of the curtailment notice. If you have an email list of tribal contacts that you would like to have receive the advance notice, it would be very helpful to me. Please indicate what watersheds each contact is interested in (such as Eel River or Russian River). Alternatively, if you have the phone numbers we would appreciate those. Many of our water right holders do not have emails or phone numbers on file.

1. Regarding the Russian River system:

Previous Actions: Russian River (May 27 through November 14, 2014) holders of post-1914 appropriative water rights within the Russian River watershed upstream of the confluence of Dry Creek with a priority date of February 19, 1954 or later (Application A015743 or higher) were subject to the 2014 curtailment.

Current Conditions: This year, the river is in better condition than it was in last year. However, we are monitoring conditions to evaluate whether water supply will continue to exceed water demands. We have not yet issued any curtailment notices.

Informational Items: The State Water Board sent advisory letters on January 23, 2015 and April 2, 2015 to advise water right holders that if hydrologic conditions do not significantly improve in the next several months, the State Water Board will once again begin notifying water right holders in critically dry watersheds of the requirement to limit or stop diversions of water under their water right, based on their priority. These letters were advisory only and did not implement a curtailment.

2. Exemptions from curtailment:

Considerations: Notices of Curtailments based on water right priority do not have an exemption for health and safety needs. The State Water Board, however, will not prevent use of a water supply necessary for emergency human health and safety needs, if the affected water right is your sole source of water and you have no access to an alternative supply and you maximize water conservation.

What Action Must You Take: Persons receiving a curtailment notice must cease diversion of water under the affected water right and use alternate supplies, if available, and file the electronic curtailment certification form within 7 days. If the curtailed water right is the sole source, and you intend to continue to divert, you must complete the health and safety portion of the Form to inform the State Water Board that diversions are continuing for health and safety needs. It is a simple, check box type form. A copy of the form is attached. We can use our enforcement discretion once we are informed of the need for emergency health and safety needs.

3. Gualala River:

Current Conditions: We are not currently monitoring the Gualala River (or its tributaries) for curtailment.

Early Notification: I will make a personal effort to provide early notification of any curtailments on the Gualala River, should the situation change.

4. State Water Board Representative:

I would be happy to assist you with any information you need regarding the curtailment process. If you have particular river systems that you are concerned about, please let me know.

Katherine Mrowka, Manager  
Enforcement Section  
Water Rights  
P.O. Box 2000  
Sacramento, CA 95814

916-341-5363



---

**From:** Agustinez, Anecita [S.@DWR](mailto:S.@DWR)  
**Sent:** Wednesday, June 17, 2015 11:44 AM  
**To:** [reno@stewartspoint.org](mailto:reno@stewartspoint.org); Mrowka, Kathy@Waterboards; Marcus, Felicia@Waterboards; Kapahi, Gita@Waterboards  
**Cc:** Teresa Romero; Nina Hapner; [Heather.Hostler@gov.ca.gov](mailto:Heather.Hostler@gov.ca.gov); Cynthia Gomez ([Cynthia.Gomez@GOV.CA.GOV](mailto:Cynthia.Gomez@GOV.CA.GOV))  
**Subject:** RE: Questions to SWRCB on curtailments from June 17th drought call

Thank you Chairman Franklin for your questions below. Your questions have been forwarded to the SWRCB for their response.

I am happy to assist in any further follow up needed.

`Anecita

Anecita Agustinez  
Tribal Policy Advisor  
Department of Water Resources  
1416 Ninth Street Room 1155-C  
Sacramento CA 94236  
Tel (916) 653-8726

**BBID**  
**EXHIBIT 284**

**Tauriainen, Andrew@Waterboards**

---

**From:** Trgovcich, Caren@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=TRGOVCICH, CAREN@WAD13D986A-FCE1-4A68-9A4F-D972A19543D164F>  
**Sent:** Thursday, June 25, 2015 10:48 PM  
**To:** Dadamo, Dorene@Waterboards  
**Cc:** Kauba, Amy@Waterboards; O'Hagan, John@Waterboards  
**Subject:** Re: curtailments

I am copying John so that he can send you a link to information on our website where this is already described or if that does not exist, to let you know if there are any changes. I am heading back from Pasadena now and will not be in the office tomorrow.

Sent from my iPhone

> On Jun 25, 2015, at 9:23 PM, Dadamo, Dorene@Waterboards <Dorene.Dadamo@waterboards.ca.gov> wrote:

>

> Amy- please locate the link to the press statement Caren references,  
> below, along with a link to the Q&A on curtailments.

>

> Caren- I will send the links out to those that have made inquiries,  
> along with the description you provided on process:

>

> In the event that the Board determines an unauthorized diversion is  
> occurring, the next step would be for the board to issue a draft CDO  
> and ACL Complaint. Recipients would have 20 days to request a hearing  
> or comply with the draft CDO and pay the penalty. The penalties would  
> start accruing when the order becomes final. A final order would be  
> issued either after the 20 day period has elapsed and no hearing is  
> requested or, if a hearing is requested, after a hearing is held and  
> the Board makes a decision.

>

>

>

>

>

>

> Dorene D'Adamo  
> State Water Resources Control Board  
> (916)341-5607  
> dorene.dadamo@waterboards.ca.gov

>

>

>

>

> On 6/25/15, 8:37 AM, "Trgovcich, Caren@Waterboards"  
> <Caren.Trgovcich@waterboards.ca.gov> wrote:

>

>> The next step, if we would that an unauthorized diversion is

>> occurring would be to issue a draft CDO and ACL Complaint and the  
>> recipients would have 20 days to request a hearing or comply with the  
>> draft CDO and pay the penalty. The penalties would start accruing  
>> when the order becomes final. A final order would be issued either  
>> after the 20 day period has elapsed and no hearing is requested or,  
>> if a hearing is requested, after a hearing is held and the Board makes a decision.

>>

>> -----Original Message-----

>> From: Dadamo, Dorene@Waterboards  
>> Sent: Thursday, June 25, 2015 8:28 AM  
>> To: Trgovcich, Caren@Waterboards  
>> Cc: Howard, Tom  
>> Subject: Re: We were just kidding- curtailment

>>

>> I realize that. I'm referring to any future curtailment order that we  
>> may issue and the need for the recipients of the notice to comply now  
>> in order to avoid accrued penalties-- if in fact that is what would happen.

>>

>> Sent from my iPhone

>>

>> On Jun 25, 2015, at 8:14 AM, Trgovcich, Caren@Waterboards

>> <Caren.Trgovcich@waterboards.ca.gov> wrote:

>>

>> We are not issuing curtailment orders. That provision of the  
>> regulation, adopted last year, was not extended when the regulation  
>> was re-adopted earlier this year for general application. A  
>> curtailment order is available for the 3 minimum fish flow tributaries.

>>

>> -----Original Message-----

>> From: Dadamo, Dorene@Waterboards  
>> Sent: Thursday, June 25, 2015 7:39 AM  
>> To: Trgovcich, Caren@Waterboards  
>> Cc: Howard, Tom  
>> Subject: Re: We were just kidding- curtailment

>>

>> Why don't we make it clear that if a curtailment order is issued, the  
>> penalties start accruing on the date stated in the curtailment notice?

>>

>> Sent from my iPhone

>>

>> On Jun 25, 2015, at 7:22 AM, Trgovcich, Caren@Waterboards

>> <Caren.Trgovcich@waterboards.ca.gov> wrote:

>>

>> DeeDee - the statement below was issued to the media yesterday afternoon.

>> Because of the litigation, the AG's office wanted to be very careful  
>> about what the message said and in what context it was provided. We  
>> will put a closed session on the next agenda to discuss the litigation.

>>

>> CT

>>

>> Statement in response to concerns raised about State Water Board  
>> Actions related to most recent curtailment notices

>>

>> An email notice will be going out soon to water right holders who  
>> have received notices of curtailment and have not yet responded with  
>> curtailment certification forms. The information provided on the  
>> form is important to help the State Water Board effectively protect  
>> senior water rights and administer the state's water right priority  
>> system during a drought. Based on the answers provided on the form,  
>> the State Water Board may not need to inspect a particular diverter.  
>> Also, if a diverter identifies that the curtailed water right is the  
>> sole source of water for health and safety needs, the State Water  
>> Board can assist the diverter in finding alternative water supplies,  
>> or determine that enforcement discretion is warranted. A copy of the  
>> letter will also be posted at this location as soon as it is available.

>>

>> Also, there appears to be some confusion about what the Board's  
>> recent notices of water unavailability (curtailment notices) are and require.  
>> This confusion is based on misunderstandings of recent state court  
>> filings in response to requests by Central Valley irrigation  
>> districts for local courts to stop the State Water Board's  
>> curtailment notifications of senior water right holders as of June 12.

>>

>> What is a Curtailment?

>> It is not always clear to diverters whether water flowing in a stream  
>> is necessary to support senior water users downstream, is a release  
>> of stored water for downstream purposes, or is actually available for  
>> diversion. Accordingly, the State Water Board, which has that  
>> information, informs holders of water rights with certain priority  
>> dates through a curtailment notice that water supplies are so low  
>> that there is not enough water available for them to divert under those rights.

>>

>> A curtailment notice, provided by the State Water Board's Division of  
>> Water Rights, lets water right holders receiving it know that if  
>> diversions are not stopped under those rights, the water right holder  
>> may be subject to enforcement for an unauthorized diversion of water.  
>> This notice is not an order. An enforceable order would follow an  
>> evidentiary hearing, if requested by the diverter, at which the State  
>> Water Board would determine whether an unauthorized diversion or  
>> threat of unauthorized diversion was occurring.

>>

>> The State Water Board is currently in the field to determine if  
>> unauthorized diversions are actually taking place. These inspections  
>> are based on all information available to the Board.

>>

>> Unauthorized diversions are subject to enhanced penalties pursuant to  
>> the  
>> 2014 emergency legislation to protect water supplies during the  
>> drought emergency. Under Water Code section 1052, diversions when no  
>> water is available under a water right constitutes an unauthorized  
>> diversion and a trespass.

>>

>> Under Water Code section 1052, unauthorized diversions are subject to  
>> penalties by the Board or a court. Violations are subject to fines

>> up to  
>> \$1,000 per day and \$2,500 per acre-foot of water unlawfully diverted,  
>> cease and desist orders, or prosecution in court.  
>>  
>> For more information on the curtailment process please visit  
>> [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/droug](http://www.waterboards.ca.gov/waterrights/water_issues/programs/droug)  
>> [ht/fa\\_q.shtml#curtailment](http://www.waterboards.ca.gov/waterrights/water_issues/programs/droug/ht/fa_q.shtml#curtailment), or this curtailment fact sheet  
>>  
>> -----Original Message-----  
>> From: Dadamo, Dorene@Waterboards  
>> Sent: Wednesday, June 24, 2015 11:03 PM  
>> To: Howard, Tom  
>> Cc: Trgovcich, Caren@Waterboards  
>> Subject: We were just kidding- curtailment  
>>  
>> I've received several messages about the AG's statement. I'd like to  
>> see what we are saying on messaging. Also, I'd like to request a  
>> closed session to discuss.  
>>  
>>  
>> <http://www.mantecabulletin.com/m/section/1/article/125337/>  
>

**BBID**  
**EXHIBIT 285**

## Tauriainen, Andrew@Waterboards

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**From:** O'Hagan, John@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=O'HAGAN, JOHN@WATER7B72A79A-DD76-4B3C-B470-A3BF3B5BCDD7939>  
**Sent:** Friday, July 17, 2015 10:46 AM  
**To:** Evoy, Barbara@Waterboards; Trgovcich, Caren@Waterboards  
**Cc:** Tauriainen, Andrew@Waterboards; Mrowka, Kathy@Waterboards; Coats, Brian@Waterboards  
**Subject:** RE: Proposed Enforcement Action and Schedule

Monday is correct.

FYI- Staff has informed me that the liability amount will be increased to \$1,553,250 due to a recalculation of penalty using standard practices. We will inform George once we get revision.

---

**From:** Evoy, Barbara@Waterboards  
**Sent:** Friday, July 17, 2015 10:35 AM  
**To:** O'Hagan, John@Waterboards  
**Subject:** Fwd: Proposed Enforcement Action and Schedule

Sent from my iPhone

Begin forwarded message:

**From:** "Trgovcich, Caren@Waterboards" <[Caren.Trgovcich@waterboards.ca.gov](mailto:Caren.Trgovcich@waterboards.ca.gov)>  
**Date:** July 17, 2015 at 10:09:32 AM PDT  
**To:** "Doduc, Tam@Waterboards" <[Tam.Doduc@waterboards.ca.gov](mailto:Tam.Doduc@waterboards.ca.gov)>, "Howard, Tom" <[Tom.Howard@waterboards.ca.gov](mailto:Tom.Howard@waterboards.ca.gov)>, "Evoy, Barbara@Waterboards" <[Barbara.Evoy@waterboards.ca.gov](mailto:Barbara.Evoy@waterboards.ca.gov)>  
**Subject:** RE: Proposed Enforcement Action and Schedule

No...that is scheduled for Monday

---

**From:** Doduc, Tam@Waterboards  
**Sent:** Friday, July 17, 2015 9:59 AM  
**To:** Howard, Tom; Trgovcich, Caren@Waterboards; Evoy, Barbara@Waterboards  
**Subject:** Re: Proposed Enforcement Action and Schedule

Thanks for info. Has BBID ACL gone out?

-----  
Tam M. Doduc, P.E.  
California State Water Board  
(916) 341-5602

For tips on what you can do to save water, visit <http://saveourwater.com/>

On Jul 16, 2015, at 1:32 PM, Howard, Tom <[Tom.Howard@waterboards.ca.gov](mailto:Tom.Howard@waterboards.ca.gov)> wrote:

FYI

Sent from my iPhone

Begin forwarded message:

**From:** "O'Hagan, John@Waterboards"  
<[John.O'Hagan@waterboards.ca.gov](mailto:John.O'Hagan@waterboards.ca.gov)>  
**Date:** July 15, 2015 at 12:36:25 PM PDT  
**To:** "Howard, Tom" <[Tom.Howard@waterboards.ca.gov](mailto:Tom.Howard@waterboards.ca.gov)>, "Trgovcich, Caren@Waterboards" <[Caren.Trgovcich@waterboards.ca.gov](mailto:Caren.Trgovcich@waterboards.ca.gov)>, "Evoy, Barbara@Waterboards" <[Barbara.Evoy@waterboards.ca.gov](mailto:Barbara.Evoy@waterboards.ca.gov)>  
**Cc:** "Tauriainen, Andrew@Waterboards"  
<[Andrew.Tauriainen@waterboards.ca.gov](mailto:Andrew.Tauriainen@waterboards.ca.gov)>, "Mrowka, Kathy@Waterboards" <[Kathy.Mrowka@waterboards.ca.gov](mailto:Kathy.Mrowka@waterboards.ca.gov)>  
**Subject: Proposed Enforcement Action and Schedule**

Tom, Care and Barbara,

As required under the Delegation and Redelegation Policy, I am informing you that I plan to sign the following enforcement actions on the following schedule, unless new information suggests otherwise:

West Side Irrigation District- Wednesday 7/15

A Notice of draft Cease and Desist Order (CDO) to West Side Irrigation District alleging unauthorized and threatened continued unauthorized diversions of water under a post-1914 right after being notified by the State Water Board on May 1, 2015 that water is not available under its priority of right. The draft CDO requires West Side to immediately cease diversions until either City of Tracy or West Side can demonstrate a right to divert treated wastewater and a waste water change petition is approved for this diversion of the City of Tracy's wastewater by West Side; or the State Water Board determines there is sufficient water in the watershed to support the diversions at the priority of West Side's license. A copy of the draft CDO is attached.

Hodgetts CDO- Thursday, July 16

A Notice of draft CDO that requires Mr. Hodges to: (1) immediately cease and desist any unauthorized diversions from Hayfork Creek, (2) disconnect the overhead fill station from the Hayfork Creek diversion point, and render the facility incapable of accessing Hayfork Creek water for any bulk water sales, (3) file a Statement within 30 days for past diversion from Hayfork Creek, (4) install a measuring device and maintain records of any continued diversions and use of water from Hayfork Creek, (5) provide written authorization from the Trinity County Water District prior to any truck hauling of its water off the Hodgetts' parcel, and (6) submit photographic evidence and records to the State Water Board of compliance with the CDO. Mr. Hodgetts owns a parcel that is riparian to Hayfork Creek in Trinity County from which he conducts a bulk water hauling business for which the Division has received 3 complaints in the last few years about illegal trucking of water. Division staff conducted an investigation of the allegations in

October and their findings support a continued threat of unauthorized diversion and use of water from Hayfork Creek.

Byron Bethany Irrigation District (BBID)- Friday, July 17

An ACL Complaint against BBID for unauthorized diversion and use of water following the State Water Board's June 12 notice that water was no longer available under its pre-1914 right. Allegations include: BBID claims a pre-1914 appropriative water right with a priority of 1914 to divert water from the Intake Channel to the Banks Pumping Plant, formerly Italian Slough, in Contra Costa County. BBID diverted approximately 26,179 acre-feet (af) in 2009 for municipal and industrial and agricultural use within its boundaries. Records of BBID's diversions are available on DWR's CDEC website and show continued diversions from June 13 through June 25 when it diverted 2,067 acre-feet of water. A maximum liability of \$5,180,500 can be considered. BBID is known to be serving water to Mountain House Community Service District and to power generation facilities that may be deemed critical energy suppliers. BBID and Mountain House Community Service District have taken corrective actions to secure water via contract and transfer. BBID also stopped its unauthorized diversions on June 26 per CDEC. In recognition of progressive correction actions to prevent unauthorized diversions and other factors such as the avoided costs if the water had been purchased and staff costs, I propose a penalty of \$1 million. The Prosecution Team will also consider adjustment of the recommended penalty if BBID provides evidence of the amounts of water pumped that were for health and safety needs or critical power generation.

John O'Hagan  
Assistant Deputy Director, Water Rights  
State Water Resources Control Board  
916-341-5368

<image002.jpg>

<Draft CDO - West Side Irrigation District 20150708.doc>

<BBID ACLC 20150708.doc>

<CDO Hodgetts\_ 7-8-2015 SA.DOC>

**BBID**  
**EXHIBIT 286**

## Tauriainen, Andrew@Waterboards

---

**From:** Barnum, Alex@EPA </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=BARNUM, ALEX@521BB59E-FC2E-4308-A9B5-B95D699E1E5E45E>  
**Sent:** Thursday, September 17, 2015 2:54 PM  
**To:** Trgovcich, Caren@Waterboards; Moran, Timothy@Waterboards  
**Cc:** Evoy, Barbara@Waterboards; O'Hagan, John@Waterboards  
**Subject:** RE: Water Availability Notification  
**Attachments:** draft curtailment lifting press release 9 15 15 (3) ct ab.docx

Try this. It's more explicit that the reason is reduced demand.

---

**From:** Trgovcich, Caren@Waterboards  
**Sent:** Thursday, September 17, 2015 2:12 PM  
**To:** Barnum, Alex@EPA; Moran, Timothy@Waterboards  
**Cc:** Evoy, Barbara@Waterboards; O'Hagan, John@Waterboards  
**Subject:** FW: Water Availability Notification

What do you think? I frankly am uncomfortable saying that we expect (or hope) that water will remain available through the remainder of the season. We could add a "due to reduced diversion" in the first paragraph, but it is already in the title of the lyrics announcement.

---

**From:** Marcus, Felicia@Waterboards  
**Sent:** Thursday, September 17, 2015 2:06 PM  
**To:** Trgovcich, Caren@Waterboards  
**Cc:** Marcus, Felicia@Waterboards; Evoy, Barbara@Waterboards; O'Hagan, John@Waterboards  
**Subject:** Re: Water Availability Notification

Great to hear. I think you could be more explicit and that would be helpful to water rights holders and media.

Sent from my iPad

On Sep 17, 2015, at 1:59 PM, "Trgovcich, Caren@Waterboards" <[Caren.Trgovcich@waterboards.ca.gov](mailto:Caren.Trgovcich@waterboards.ca.gov)> wrote:

Principally decreased demand which is mentioned in the third paragraph. Our hope is that water will remain available, but that is why we added the paragraph that we are watching conditions and will notify right holders if anything changes.

---

**From:** Marcus, Felicia@Waterboards  
**Sent:** Thursday, September 17, 2015 1:37 PM  
**To:** Trgovcich, Caren@Waterboards  
**Cc:** Evoy, Barbara@Waterboards; O'Hagan, John@Waterboards  
**Subject:** Re: Water Availability Notification

Hi, is this because of rain or decreased demand? Is it likely to remain lifted or may it be re curtailed? I think that should be clear in the announcement.

Sent from my iPad

On Sep 17, 2015, at 1:33 PM, "Trgovcich, Caren@Waterboards" <[Caren.Trgovcich@waterboards.ca.gov](mailto:Caren.Trgovcich@waterboards.ca.gov)> wrote:

FYI – later today or tomorrow, we plan to distribute the attached lyris announcement and an accompanying press release announcing that there is now sufficient water available to meet the demand of pre-1914 water right holders with a priority date of 1903 or later in the Sacramento and Feather River watersheds and the Delta. These water right holders were notified on June 12th that our analysis showed that there was insufficient water available to support their priority of right. Please let Tom or I know if you have any questions.

*Caren Trgovcich*  
*Chief Deputy Director*  
*State Water Board*  
*(916) 341-5727*  
[ctrgovcich@waterboards.ca.gov](mailto:ctrgovcich@waterboards.ca.gov)

<Sacramento Pre-1914 Release - Lyris Draft (3) (4) ct.docx>

**BBID**  
**EXHIBIT 296**



# STATE WATER RESOURCES CONTROL BOARD DIVISION OF WATER RIGHTS



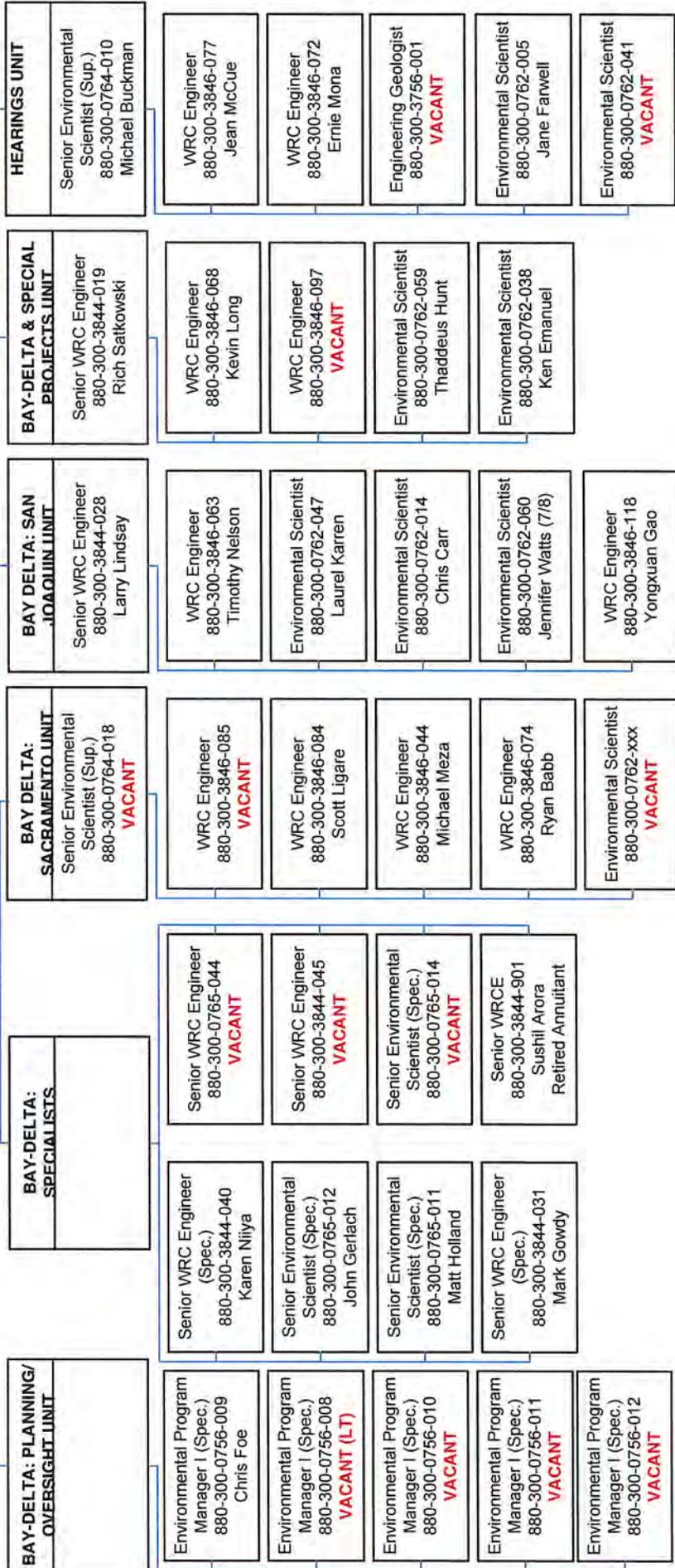
Edmund G. Brown, Jr.  
Governor

Hearings & Special Programs  
Branch  
Assistant Deputy Director  
Environmental Program  
Manager II (Sup.)  
880-300-0769-001  
Leslie Grober

Original signed by

Barbara Evoy, Deputy Director  
January 1, 2016

**BAY DELTA & HEARINGS  
SECTION**  
Environmental Program Manager I  
(Sup.)  
880-300-0756-004  
Diane Riddle



**BBID**  
**EXHIBIT 297**



**BBID**  
**EXHIBIT 299**

1 KAMALA D. HARRIS  
Attorney General of California  
2 GAVIN G. MCCABE  
Supervising Deputy Attorney General  
3 MATTHEW G. BULLOCK, SBN 243377  
CLIFFORD T. LEE, SBN 74687  
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455 Golden Gate Avenue, Suite 11000  
5 San Francisco, CA 94102-7004  
Telephone: (415) 703-1678  
6 Fax: (415) 703-5480  
E-mail: Matthew.Bullock@doj.ca.gov  
7 *Attorneys for Respondent and Defendants State  
Water Resources Control Board, et al.*

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF  
9  
10 SAN JOAQUIN

11  
12 BANTA-CARBONA IRRIGATION  
DISTRICT,

13 Petitioner/Plaintiff

14 vs,

15 CALIFORNIA STATE WATER  
16 RESOURCES CONTROL BOARD;  
THOMAS HOWARD, EXECUTIVE  
17 DIRECTOR OF THE CALIFORNIA STATE  
WATER RESOURCES CONTROL BOARD

18 Respondents/Defendants  
19  
20  
21

Case No. 39-2015-00326421-CU-WM-WTK

**Declaration of John O'Hagan in  
Opposition to Petitioner/Plaintiff's  
Application for Stay and/or in the  
Alternative Temporary Restraining Order  
and/or Preliminary Injunction**

Hearing Date: June 23, 2015

Time: 9:15 a.m.

Dept: 41

Judge: The Honorable Carter P. Holly

Trial Date: TBA

Action Filed: June 18, 2015

By Fax

1 I, John O'Hagan, declare:

2 1. I have been an employee of the State Water Resources Control Board (State Water  
3 Board) for the past 34 years, and I am currently employed by the Board. Since May 2003 I have  
4 overseen the Enforcement Section of the State Water Board's Division of Water Rights  
5 (Division). Since April 2014, I have been the Division's Assistant Deputy Director overseeing the  
6 Enforcement Section and the Permitting and Licensing Section. As Assistant Deputy Director, I  
7 supervise the State Water Board's analyses for determining if water supplies are sufficient to  
8 meet current water use demands in critical watersheds during the 2014 and 2015 drought. I am  
9 responsible to meet with stakeholders of the watershed and ensure our information is transparent  
10 and I provide monthly updates to the Board at its monthly Board Meetings. I have a 1980  
11 Bachelor of Science Degree in Civil Engineering from California State University at Sacramento,  
12 and I have been registered as a Professional Civil Engineer in California since 1984.

13  
14  
15 2. As part of my responsibility for overseeing the Enforcement Section, I am  
16 responsible for the work of the Enforcement Section that includes, but is not limited to, statewide  
17 compliance and complaint investigations of water diversion projects and initiating formal  
18 enforcement actions. Part of these activities is monitoring diversions to ensure compliance with  
19 the state's water rights priority system. These activities include monitoring for the purpose of  
20 determining whether any diversion and use of water is authorized under the Water Code.  
21

22 3. The State Water Board has been vested by the Legislature with the authority to  
23 prevent unauthorized diversions and supervise the water right priority system. (See, e.g. Wat.  
24 Code §§ 174, 186, 1050, 1051, 1051.5, 1052, 1825.)

25 4. The water right priority system provides the primary basis for determining which  
26 users may divert, and how much, when there is insufficient water in the stream for all users.  
27 Riparian right holders generally have the most senior priority to natural flows in a stream, and  
28

1 older, more senior appropriative water rights have priority over more junior appropriative water  
2 rights. Senior water right holders are more likely to receive water at times of shortage than more  
3 junior water right holders. However, once water is stored or imported from another watershed,  
4 the entity that stored or imported the water has the paramount right to that water. Other  
5 appropriative water rights holders may divert any abandoned return flows. Riparian water right  
6 holders are only entitled to divert natural flow, so are not entitled to divert releases, or the return  
7 flows from upstream releases of stored water.  
8

9 5. When the amount of water available in a surface water source is not sufficient to  
10 support the needs of existing water right holders, the more junior right holders must cease  
11 diversion in favor of more senior right holders. However, it is not always clear to a junior  
12 diverter whether there is sufficient flow in the system to support their diversion and at the same  
13 time support senior water uses downstream. It can also be difficult to determine whether releases  
14 of stored water are abandoned flows that may be diverted or whether those flows are not available  
15 for diversion because they are being released for downstream purposes. Similarly, it can be  
16 difficult for a riparian to know if water is natural flow, or stored or imported water and whether  
17 and when and to what extent correlative reductions in water use are needed due to the need to  
18 share limited supplies amongst riparians. In accordance with the State's water right priority  
19 system, the State Water Board notifies diverters of the need to curtail water diversions when  
20 sufficient flows in a watershed are not available for a water user's needs, based on their priority  
21 of right.  
22  
23

24 6. A curtailment notice is a notification to water right holders of a certain priority of  
25 right that, due to water shortage conditions, the State Water Board has determined water is not  
26 available under their priority of right. A notice of curtailment is not an enforceable decision or  
27 order of the State Water Board. The notice provides the affected water right holder with the State  
28

1 Water Board's findings of the unavailability of water under their priority of right for a certain  
2 right and the need to cease diversion under that right, the exceptions to the notice for direct  
3 diversion of water for power, and for continued use of previously stored water, and the potential  
4 for future enforcement for unauthorized diversions. A curtailment notice does not consider any  
5 particular diverter's other senior water rights or other facts such as water supply contracts,  
6 agreements, transfers or groundwater supplies that may allow the diverter to continue to divert  
7 lawfully. The notice is therefore not a State Water Board determination that any individual  
8 diverter is taking water without authorization under the Water Code. A diverter who continues to  
9 divert after receiving a notice of curtailment is not subject to penalties for violation of the  
10 curtailment notice, but may be subject to enforcement for an unauthorized diversion if their  
11 diversions do not fall within the exceptions enunciated in the notice and are not entirely  
12 authorized by other, non-curtailed water rights.  
13  
14

15 7. I have reviewed the Notice of Unavailability of Water and Need for Immediate  
16 Curtailment dated June 12, 2016 and addressed to Patterson Irrigation District and attached as  
17 Exhibit A to the petitioner's petition for writ of mandate. This notice is the type of curtailment  
18 notice that I described in paragraph 6. This notice does not constitute a decision or order of the  
19 State Water Board or a determination that Patterson Irrigation District, petitioner, or any other  
20 individual diverter has engaged in an unauthorized diversion of water under the Water Code.  
21

22 8. Diversion of water when it is unavailable under a diverter's priority of right  
23 constitutes an unauthorized diversion and a trespass against the state. The State Water Board may  
24 subject such unauthorized diversions to an Administrative Civil Liability (ACL) of up to \$1,000  
25 per day and \$2,500 per acre-foot of water unlawfully diverted in a drought year, or refer a diverter  
26 to the Attorney General's office for enforcement. The State Water Board may also issue  
27 administrative cease and desist orders and request court injunctions to require that diversions  
28

1 stop.

2 9. Before issuing such an order, the State Water Board must have particularized  
3 information regarding an unlawful diversion or the potential of such a diversion: the Board may  
4 not issue an enforceable order requiring diversion to cease simply based on lack of water  
5 availability, absent information that there is a risk of or actual continued diversion. Additionally,  
6 before issuing a final enforcement order, the State Water Board must first issue a draft Cease and  
7 Desist Order or an ACL Complaint. If such enforcement action is proposed, a water right holder  
8 is entitled to, upon written request within 20 day of receipt of the draft enforcement action, an  
9 evidentiary hearing on all issues before the order takes effect.  
10

11 10. The general analysis for determining the necessity for curtailment of water rights  
12 in any watershed compares the current and projected available water supply with the total water  
13 right diversion demand. For the water availability determination of the curtailment analysis, the  
14 State Water Board relies upon the full natural flows of watersheds calculated by the Department  
15 of Water Resources (DWR) for certain watersheds in its Bulletin 120, and in subsequent monthly  
16 updates. "Unimpaired Runoff" or "Full Natural Flow" represents the natural water production of  
17 a river basin, unaltered by upstream diversions, storage, or by export or import of water to or  
18 from other watersheds. The full natural flow amount is different than the measured stream flows  
19 at the given measurement points because the gauged flows are increased or decreased to account  
20 for these upstream operations. Forecasted flow data is uncertain so DWR provides the data in the  
21 form of "levels of exceedance" or simply "exceedance" to show the statistical probability that the  
22 forecasted supply will occur. The exceedance is simply the percent of the time that the actual  
23 flow is expected to exceed the projected flow. The 90 percent exceedance hydrology assumes  
24 inflows from rainfall and snowmelt at levels that are likely to be met or exceeded by actual flows  
25 with a 90 percent probability, or in other words, there is a ten percent or less chance of actual  
26  
27  
28

1 conditions turning out to be this dry or drier. The 50 percent exceedance is the 50/50 forecast.  
2 The State Water Board uses both exceedances for its analyses.

3 11. Specifically, for the San Joaquin River watershed, the State Water Board totaled  
4 DWR's full natural flows for the Stanislaus, Tuolumne, Merced, Upper San Joaquin, Cosumnes  
5 and Mokelumne rivers on a monthly basis as the monthly available water supply for the San  
6 Joaquin River watershed. State Water Board staff also increased these total full natural flow  
7 amounts by adding monthly quantities for smaller watersheds and estimated return flows based on  
8 the DWR's May, 2007 Report of Unimpaired Flow Data. Estimates in the report for 1977 were  
9 used for these adjustments. The monthly adjusted water supply is provided in acre-feet per month  
10 and the State Water Board converts these amount into average monthly cubic feet per second for  
11 graphic purposes (at two exceedance levels). The State Water Board also shows DWR's daily  
12 full natural flow calculations on the graph for consideration before any curtailment. DWR's daily  
13 full natural flow calculations are less accurate because they are based on less data than is  
14 available at the completion of each month. Due to the lag between the effect of upstream  
15 operations and downstream flow measurements, calculated daily FNF will fluctuate from day to  
16 day. State Water Board staff also checks available forecast information from the California-  
17 Nevada River Forecast Center, real time flow conditions from the DWR and United States  
18 Geological Survey. This real time information and forecasted precipitation events can delay the  
19 curtailment notice.  
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23 12. For water right demands, the State Water Board relies on information supplied by  
24 water right holders on annual or triennial reports of water diversion and use required to be true  
25 and accurate to the best of the knowledge of the diverters. The State Water Board also received  
26 2014 diversions data from water right holders that represents 90 percent of the water diverted  
27 from April through September in the Delta, and 90 percent of the water diverted from the upper  
28

1 Sacramento and San Joaquin Rivers. This information was required pursuant to Order WR 2015-  
2 0002 dated February 4, 2015. All reported monthly water diversion data is compiled by  
3 watershed, type of right and priority dates. The State Water Board performs quality control  
4 checks and removes obvious errors, excess reporting, removes demand for direct diversion for  
5 power, and makes additional changes based on stakeholders comments. The corrected demand  
6 data includes the 2014 reported data for 90% of the watershed demand plus for the remaining  
7 diverters, an averaged diversion amount for 2010 through 2013. These monthly diversion  
8 demands are grouped into water right types (riparian, pre-1914 and post-1914 rights) and by  
9 priority dates for pre-1914 and post-1914 rights. For the Sacramento-San Joaquin River  
10 Watersheds, special consideration of the Delta diversions is made. To be most conservative for  
11 the San Joaquin River, the State Water Board performs a proportional analysis based on the  
12 inflows from the watersheds. For example, for the month of June, the proportional full natural  
13 flow of the San Joaquin River watershed based on 90% exceedance, was 17 percent. Therefore,  
14 the San Joaquin watershed Delta demand was 17 percent of the total Delta demand.

15  
16  
17 13. The State Water Board provides graphical summations of these priorities with  
18 monthly demands for the total riparian demand at bottom, the pre-1914 demands added to riparian  
19 and depicted above the riparian demand. The monthly amounts are averaged into cubic feet per  
20 second for graphical purposes.

21  
22 14. The State Water Board is consistently making adjustments to its analyses based on  
23 new information obtained from stakeholders, or adjustments to projected flows from the DWR.  
24 State Water Board staff reviews this information and provides revisions to its data set and graphs  
25 that are all shown on the Drought Website.

26  
27 15. The goal of curtailments is principally to ensure that water to which senior water  
28 right holders are entitled is actually available to them. To ensure that this occurs generally

1 requires that some water remain in most streams to satisfy senior demands at the furthest  
2 downstream point of diversion of these senior water rights.

3 16. Attached as Exhibit ~~B~~<sup>I</sup> is a water supply and demand chart prepared by the State  
4 Water Board and issued on June 11, 2015 entitled "2015 San Joaquin River Basin Senior  
5 Supply/Demand Analysis with Proportion Delta Demand." The bar graph data discloses in terms  
6 of cubic feet per second the anticipated demand for water by riparian and pre-1914 water users  
7 for the period of March through September, 2015. The variable solid blue line displays the daily  
8 full natural flow from March 1, 2015 through June 7, 2015 of the San Joaquin River basin. The  
9 declining dotted lines represent the forecasted full natural flow through September, 2015 for the  
10 adjusted 50% and 90% exceedance levels. Based upon the data and information from which  
11 Exhibit ~~B~~<sup>I</sup> was derived and other relevant data, the State Water Board concluded that there is  
12 insufficient water in the San Joaquin River basin to satisfy water right claimants with priorities of  
13 1903 or later.  
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16 17. On January 17 and April 2, 2014, the State Water Board issued a Notice of Surface  
17 Water Shortage and Potential for Curtailment of Water Right Diversions. The notice advised that  
18 if dry weather conditions persist, the State Water Board will notify water right holders of the  
19 requirement to limit or stop diversions of water under their water rights, based on water right  
20 priority.  
21

22 18. In April, the State Water Board began issuing drought-related curtailment notices  
23 to water right holders in a number of water-short watersheds.

24 The following notices of curtailment have been mailed to water right holders:

25 April 3, 2015- Antelope Creek Fishery Protection Regulation

26 April 17, 2015- Deer Creek Fishery Protection Regulation

27 April 23, 2015- Post-1914 and Surplus Class Rights in Scott River  
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April 23, 2015- All post-1914 rights in the San Joaquin River Watershed.

April 30, 2015- all Permits and Licenses subject to Term 91 in Sacramento-San Joaquin watersheds and Delta.

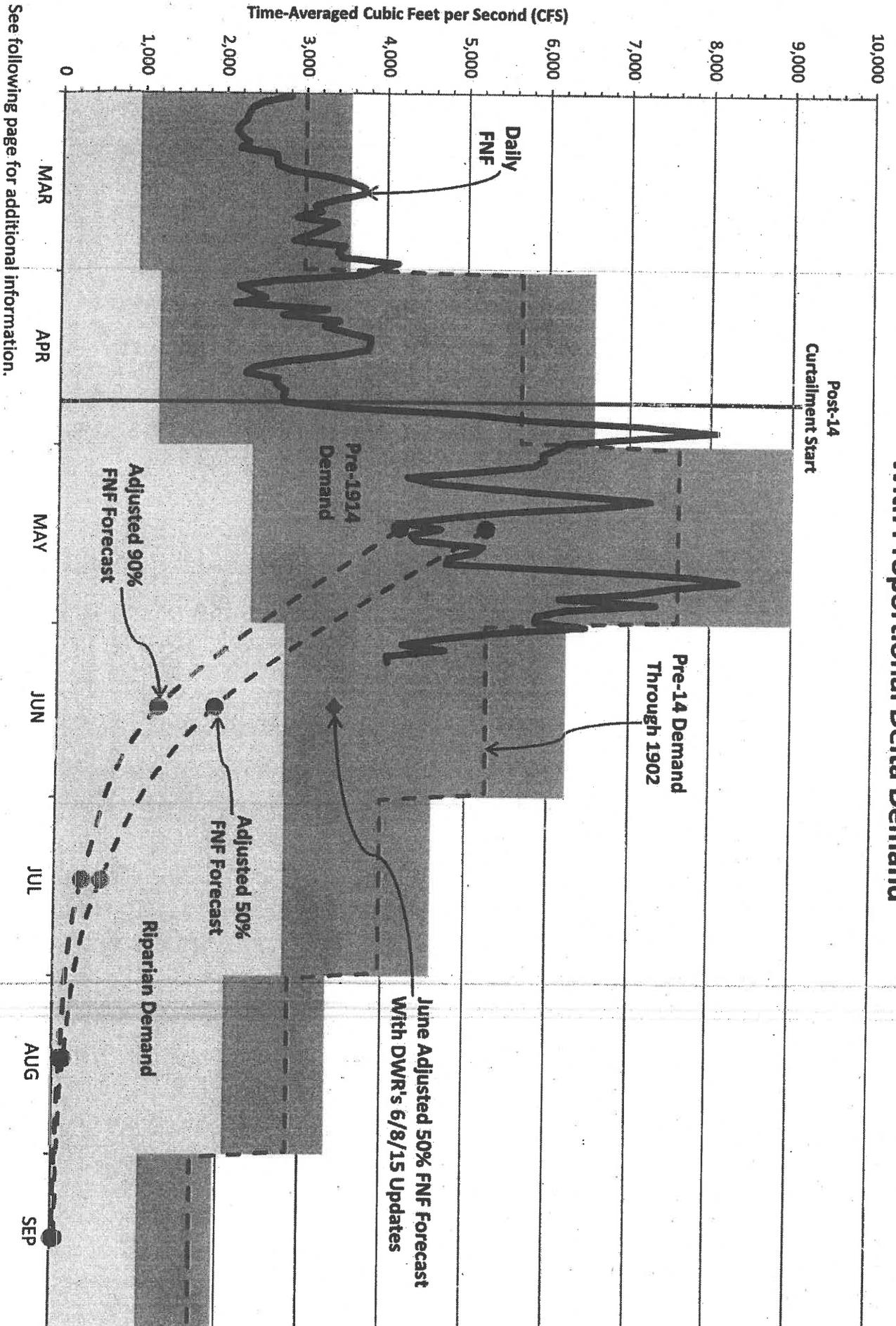
May 1, 2015- All post-1914 rights in Sacramento River Watershed and Delta

June 12, 2015- Pre-1914 rights with a priority dated of 2003 or later in the Sacramento-San Joaquin watershed and Delta.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge. Executed this 22 day of June, 2015 in Sacramento, California

  
JOHN O'HAGAN

# 2015 San Joaquin River Basin Senior Supply/Demand Analysis With Proportional Delta Demand



See following page for additional information.

**BBID**  
**EXHIBIT 301**

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SACRAMENTO**

<b>DATE:</b>	<b>July 10, 2015</b>	<b>DEPT. NO.:</b>	<b>24</b>
<b>JUDGE:</b>	<b>HON. SHELLEYANNE W. L. CHANG</b>	<b>CLERK:</b>	<b>E. HIGGINBOTHAM</b>
<p><b>THE WEST SIDE IRRIGATION DISTRICT; CENTRAL DELTA WATER AGENCY; SOUTH DELTA WATER AGENCY; WOODS IRRIGATION COMPANY,</b></p> <p style="text-align: center;"><b>Petitioners and Plaintiffs,</b></p> <p><b>v.</b></p> <p><b>CALIFORNIA STATE WATER RESOURCES CONTROL BOARD; THOMAS HOWARD, EXECUTIVE DIRECTOR OF CALIFORNIA STATE WATER RESOURCES CONTROL BOARD; and DOES 1 THROUGH 100, INCLUSIVE,</b></p> <p style="text-align: center;"><b>Respondents and Defendants.</b></p>		<p><b>Case No.: 34-2015-80002121</b></p>	
<b>Nature of Proceedings:</b>		<p><b>ORDER AFTER HEARING ON EX PARTE APPLICATION FOR TEMPORARY STAY RE: ENFORCEMENT OF CURTAILMENT NOTICE OR IN THE ALTERNATIVE TEMPORARY RESTRAINING ORDER AND/OR FOR ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION</b></p>	

This matter came before the Court pursuant to an ex parte application by the West Side irrigation District, Central Delta Water Agency, and South Delta Water Agency. The ex parte application seeks a stay or a temporary restraining order/order to show cause concerning the May 1, 2015 and June 12, 2015, “NOTICE OF UNAVAILABILITY OF WATER AND NEED FOR IMMEDIATE CURTAILMENT...”<sup>1</sup> (hereinafter referred to as the “May Curtailment Letter” and the “June Curtailment Letter”, jointly referred to as the “Curtailment Letters”) issued by the State Water Resources Control Board through its Executive Director Thomas Howard.

Counsel for Petitioners/Plaintiffs appeared at the ex parte hearing, as well as counsel for Respondents/Defendants. All parties had the opportunity to present oral arguments concerning the issues raised in the moving and opposing papers.

<sup>1</sup> This language is from the heading of the June 1, 2015 letter. The May 1, 2015 letter is titled, “NOTICE OF UNAVAILABILITY OF WATER AND IMMEDIATE CURTAILMENT...”

The Court finds the May Curtailment Letter is properly subject to a judicial determination of whether it violates the Petitioners' due process rights such that a temporary restraining order/order to show cause should issue.<sup>2</sup> The Court finds there is no administrative process Petitioners must exhaust prior to this determination as to the May Curtailment Letter.<sup>3</sup>

Although a petition for reconsideration is still pending concerning the May Curtailment Letter, the Court finds that this is a situation where the pursuit of the administrative remedy would result in irreparable harm absent a temporary restraining order. (See *People ex rel. DuFauchard v. U.S. Financial Management, Inc.* (2009) 169 Cal.App.4th 1502, 1512)(citing *Public Employment Relations Bd. v. Superior Court* (1993) 13 Cal.App.4th 1816, 1827.) Petitioners' belief that they must stop diverting water, not because to do so would be a legal violation but merely a violation of the May Curtailment Letter, will result in irreparable harm to their crops while they await a decision on the petition for reconsideration. (Decl. of Jack Alvarez, ¶¶ 7, 8, 11.) Consequently, Petitioners will be irreparably harmed should they have to wait for final resolution of the administrative process before obtaining relief from the immediate mandate the May Curtailment Letter appears to impose outside of the statutory processes provided by the Water Code.

Moreover, for the reasons stated below, the Court finds that the issuance of the May Curtailment Letter violated Petitioners' Due Process rights. Every day the Letter remains in its current form constitutes a violation of those constitutional rights. Accordingly, it is proper for this Court to issue a temporary restraining order while the administrative process is ongoing.

With regard to the June Curtailment Letter, the Court liberally construes the allegations of the Petition For Writ of Administrative Mandate, as it must, and finds that for purposes of this ex parte application, Petitioners CDWA and SDWA have adequately pled that their landowners exercise pre-1914 appropriative and/or permit licenses rights that are subject to the directives given in the Letter. (Petition, ¶¶ 13, 14.) Consequently, Petitioners CDWA and SDWA have standing to bring the instant application concerning the June Curtailment Letter.

The Court finds the 2015 Curtailment Letters are coercive in nature and go beyond the "informational" purpose the Board claims prevents a stay. Consequently, Petitioners are likely to succeed on the merits. As in *Duarte*, even though the Curtailment Letters are not

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<sup>2</sup> Petitioners have filed a petition for reconsideration pursuant to California Water Code section 1126(b) which petition is still pending before the Water Resources Control Board and for which the 90-day period for reconsideration has not yet expired. (See Petition, ¶ 21; Wat. Code §1122.) The Court declines to interfere in these administrative proceedings, and consequently in no way stays the furtherance of that petition in accordance with the Water Code. The Court agrees that in light of the pending reconsideration petition, this matter is not subject to a Civil Code section 1094.5, subdivision (g) stay.

<sup>3</sup> Respondents have not argued Petitioners are required to exhaust their administrative remedies. Respondents have instead argued the petition with regard to the May Curtailment Letter is untimely pursuant to the 30-day deadline in section 1126. However, this deadline is extended while a petition for reconsideration is pending, as is the case here.

enforceable on their own and there are no separate penalties for violating them, the language used in the Curtailment Letters results in a “command by the...[g]overnment to stop [water diverting] activities.” (*Duarte Nursery, Inc. v. United States Army Corps of Engineers* (2014) 17 F.Supp.3d 1013, 1018.) It is not a suggestion for “voluntary cessation of activities,” but instead requires Petitioners to “immediately stop diverting water.” (*Id.* at 1019; Pet. exh. B.)

Respondents argue *Duarte* is distinguishable because it involved a single letter sent to a single rights-holder, and provided that the Army Corps of Engineers had already determined that a violation of the Clean Water Act had occurred. (*Duarte*, 17 F.Supp.3d at 1015.) Respondents contend here, the Curtailment letters are form letters being sent to hundreds of appropriators, and are merely informational with no pre-determination that any individual rights-holder has violated the law.

While all parties acknowledge the Curtailment Letters were sent to more than one appropriator, the letters provided to the Court are addressed to an individual company, and identify a specific claim of rights at issue. The Curtailment Letters further declare and determine that the recipient is not entitled to divert water because that water is necessary to meet senior water rights holders, thus making a determination of the recipient’s water rights priority. (Pet., exh. B, ¶2.) Through the inclusion of this specific information, the Curtailment Letters appear not to be generalized notices, but instead a specific adjudication and command with respect to the particular rights holder.

Further, nothing in *Duarte* limits its holding to an instance involving only one notice. The *Duarte* court’s focus was on the fact that nothing in the letter notified “plaintiffs that the Corps could not take action based upon the CDO alone.” (*Duarte*, 17 F.Supp.3d at 1022.) The same is true here, as the Curtailment Letters indicate the recipient must “immediately stop diverting water” and do not clearly state that the letter is merely informational, without any legal force or effect.

The Curtailment Letters also require recipients to “document receipt of this notice by completing an online Curtailment Certification Form (Form) within seven days. The Form confirms your cessation of diversion under the specific pre-1914 claim of right. Completion of the Form is mandatory...” Nowhere in this language do the Curtailment Letters assert that Petitioners are free to ignore the directive that they cease diverting water or that it is merely a suggestion.<sup>4</sup> At the hearing on this matter, Respondents acknowledged that the Form requires diverters to sign under penalty of perjury that they are no longer diverting water.

Although the Curtailment Letters do not state that the Board has made a specific determination that the particular recipient has already engaged in illegal conduct, the letters plainly state that the recipient must “immediately stop diverting water” and that

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<sup>4</sup> This is similar to *Phelps v. State Water Resources Control Board* (2007) 157 Cal.App.4th 89, where the Court held plaintiffs were aggrieved by a curtailment notice within the meaning of section 1126(b) because it “required plaintiffs to immediately discontinue diversion of water under their licenses.” Although *Phelps* involved only one notice, the implication of the language of the letters is the same as in this case.

the only action available is to sign the compliance certification that “confirms your cessation of diversion under the specific pre-1914 claim of right.” (Pet., exh. B.)<sup>5</sup> As in *Duarte*, this strong directive implicates a pre-determination as to the availability of water pursuant to the recipient’s appropriation rights. The Board, “did not ‘notify’ plaintiffs they were operating in violation of the law, it commanded plaintiffs to stop their activities.” (*Duarte*, 17 F.Supp.3d at 1023.)

At oral argument, Respondents argued that because the Curtailment Letters did not expand or alter Petitioners’ civil liability for water diversions and are merely “informational documents”, a temporary restraining order should not issue. Respondents’ argument is not only misguided, it is also inaccurate.

The focus is not whether the Petitioners’ legal exposure remains unchanged or not, but rather whether the Curtailment Letters could be reasonably interpreted to be an order or command by the government, not merely a suggestion or request for voluntary cessation of activities. (*Duarte*, 17 F.Supp.3d at 1020.) Moreover, contrary to Respondents’ assertions, the Curtailment Letters have altered Petitioners’ legal position. The Curtailment Letters state that even if there is available water for the water user, said water is dedicated for senior water rights’ holders needs, conclude that the recipient no longer has any legal right to said water, and orders the recipient to “immediately stop diverting water...” Indeed, the Curtailment Letters appear to alter Petitioners’ civil liability as the Board has apparently concluded without hearing or notice that Petitioners are no longer entitled to divert water for their needs.

As the Court in *Duarte* stated, “If the [Letters] were simply a ‘notification’ to plaintiffs, then it should have said so, rather than clothing itself as an ‘order’ which carried with it the authority to ‘prohibit’ the plaintiffs from continuing their activities.” (*Duarte*, 17 F.Supp.3d at 1020.) The Court recognizes, and Respondents admit, that the Curtailment Letters do not subject Petitioners to any additional liability or penalties above that which they may already be subjected to due to the extreme drought conditions California is currently experiencing. However, the Curtailment Letters represent that the Board has already adjudicated that the recipients are no longer entitled to divert water and that any future diversions would be improper and a trespass [“This Form confirms your cessation of diversion under the specific post-1914 water right... Completion of the form is mandatory to avoid unnecessary enforcement proceedings”].

Respondents are free to provide truly informational notices to water diverters of the nature of the drought and the Board’s right to initiate Water Code section 1831 or 1052 proceedings. Respondents are also free to initiate inquiries with diverters as to whether they have alternate water sources and to otherwise exercise their statutory enforcement authority under the Water Code, including investigation and instituting any actions for trespass. To be clear, Respondents are free to exercise their statutory authority to enforce the Water Code as to any water user, including these Petitioners, if it deems them to be in

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<sup>5</sup> In *Duarte* the Court noted that the assertion that a violation has already occurred, by itself, is insufficient to satisfy the ripeness requirement. A letter or notice must also threaten consequences for failure to take certain action, as it does here. (*Duarte*, 17 F.Supp.3d at 1025.)

violation of any provisions of the Water Code, so long as the bases for said action are not the Curtailment Letters.

However, the language of the Curtailment Letters goes beyond informational and is instead coercive such that a recipient is likely to believe they are no longer allowed to divert. This belief is not because such a diversion would be a trespass or other legal violation, but because the Board has already declared in the Curtailment Letters that it has made a determination that they are no longer entitled to divert under their appropriative water rights, without any sort of pre-deprivation hearing. Respondents do not challenge Petitioners' assertion that any cessation of water diversion done in response to the Curtailment Letters, not as a result of an unavailability of legally divertible water, would cause a serious hardship to Petitioners. This is an issue ripe for judicial intervention and the Court concludes that the Curtailment Letters as presently drafted constitute a violation of the due process rights of the Petitioners.<sup>6</sup>

The Curtailment Letters, including the requirement that recipients sign a compliance certification confirming cessation of diversion, result in a taking of Petitioners' property rights without a pre-deprivation hearing, in violation of Petitioners' Due Process Rights. The Court hereby **GRANTS** the ex parte application for a temporary restraining order/order to show cause as to why a preliminary injunction should not issue requiring the Board to issue a revised letter/notice that is informational in nature.

A temporary restraining order shall issue staying or prohibiting Defendants State Water Resources Control Board and Thomas Howard from taking any action against the West Side Irrigation District and landowners of the other petitioner Districts on the basis of the 2015 Curtailment Letters sent by the Water Board's Executive Director, Thomas Howard, or on the basis of a failure to complete a Curtailment Certification Form.

The matter is set for an order to show cause on July 30, 2015 at 9:00 a.m. in Department 24. Respondents shall file with the clerk of Department 24 and serve (via email or fax) any supplemental Opposition to the Order To Show Cause no later than July 16, 2015. Petitioners shall file with the clerk of Department 24 and serve (via email or fax) any Reply no later than July 23, 2015. The application for a temporary stay pursuant to CCP §1094.5(g) is **DENIED**.

Counsel for Petitioners to submit a formal order for the Court's signature pursuant to CRC 3.1312.

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<sup>6</sup> There is no allegation that Petitioners have filed a petition for reconsideration with the Board concerning the June Curtailment Notice. Respondents made no argument that Petitioners were required to do so before bringing the instant petition and ex parte application. Consequently, the Court does not address whether such a reconsideration petition was required.

**BBID**  
**EXHIBIT 302**

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**State Water Resources Control Board**

**NOTICE OF PUBLIC HEARING  
and  
PRE-HEARING CONFERENCE**

The State Water Resources Control Board will hold a Public Hearing to determine whether to impose Administrative Civil Liability against

**Byron-Bethany Irrigation District**

**Intake Channel to the Banks Pumping Plant (formerly Italian Slough)  
Contra Costa County**

The **Pre-Hearing Conference**  
will commence on  
**Friday, September 25, 2015**  
at **9:00 a.m.**

in the Sierra Hearing Room  
Joe Serna Jr.-CalEPA Building  
1001 I Street, Second Floor  
Sacramento, CA

The **Public Hearing** will commence on  
**Wednesday, October 28, 2015 and continue, if necessary,**  
**on October 29 and 30, 2015**  
at **9:00 a.m.**

in the Coastal Hearing Room  
Joe Serna Jr.-CalEPA Building  
1001 I Street, Second Floor  
Sacramento, CA

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**PURPOSE OF HEARING**

The purpose of this hearing is for the State Water Resources Control Board (State Water Board or Board) to receive evidence relevant to determining whether to impose administrative civil liability against the Bryon-Bethany Irrigation District (BBID) for alleged unauthorized diversion of water and, if so, whether in the amount of \$1,553,250 or some other amount.

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

## **BACKGROUND**

Water Code section section 1052, subdivision (a), which provides that the diversion or use of water subject to Division 2 of the Water Code other than as authorized in Division 2 is a trespass. The State Water Board may administratively impose civil liability in an amount not to exceed \$500 for each day that a trespass occurs. (Wat. Code, § 1052, subd. (b).) Fines can go up to \$10,000 for each day a trespass occurs in certain critically dry years. (See Wat.Code § 1845, subd. (b)(1)(A).)

Water Code section 1052, subdivision (c), provides that any person or entity committing a trespass during a period for which the Governor has issued a proclamation of a state of drought emergency may be liable in an amount not to exceed the sum of one thousand dollars (\$1,000) for each day the trespass occurs plus two thousand five hundred dollars (\$2,500) for each acre-foot of water diverted or used in excess of that diverter's rights. A trespass is the unauthorized diversion or use of water, as defined in Water Code section 1052, subdivision (a).

Water Code section 1052, subdivision (d)(2), provides that civil liability may be imposed administratively by the State Water Board pursuant to Water Code section 1055.

On July 20, 2015, the Assistant Deputy Director of the Division of Water Rights (Assistant Deputy Director) issued an [administrative civil liability complaint \(complaint\)](#) alleging that BBID committed a trespass through the unauthorized diversion of water in violation of Water Code section 1052, subdivision (a). The complaint proposes that liability be imposed upon BBID in the amount of **\$1,553,250**.

By letter dated August 6, 2015, BBID [requested a hearing](#) on the complaint.

This notice, the complaint, and other material related to this hearing can be found on the Division's website at:

[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/hearings/byron\\_bethany/index.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/byron_bethany/index.shtml)

## **KEY ISSUES**

In determining the amount of civil liability, the Board must take into consideration all relevant circumstances (Wat. Code, § 1055.3) The hearing will address the following key issues:

- 1) Whether the State Water Board should impose administrative civil liability upon BBID for trespass and, if so, in what amount and on what basis;
  - a. What is the extent of harm caused by BBID's alleged unauthorized diversions?
  - b. What is the nature and persistence of the alleged violation?
  - c. What is the length of time over which the alleged violation occurred?
  - d. What corrective actions, if any, have been taken by BBID?
- 2) What other relevant circumstances should be considered by the State Water Board in determining the amount of any civil liability?

## **HEARING OFFICER AND HEARING TEAM**

State Water Board Member Tam Doduc will preside as the hearing officer for this proceeding. A hearing team will assist the hearing officer by providing legal and technical advice. The hearing team members will be: Nicole Kuenzi, Staff Counsel; Jane Farwell-Jensen, Environmental Scientist; and Ernest Mona, Water Resource Engineer. The hearing team and their supervisors will assist the hearing officer and other members of the State Water Board throughout this proceeding.

## **SEPARATION OF FUNCTIONS**

A staff prosecution team will be a party to this hearing. State Water Board prosecution team members will include: Andrew Tauriainen, Attorney III, Office of Enforcement and Kathy Mrowka, Manager, Enforcement Section.

The prosecution team is separated from the hearing team and is prohibited from having *ex parte* communications with any members of the State Water Board and any members of the hearing team regarding substantive issues and controversial procedural issues within the scope of this proceeding. This separation of functions also applies to the supervisors of each team. (Gov. Code, §§ 11430.10-11430.80.)

## **HEARING PARTICIPATION**

IF YOU WANT TO TAKE PART IN THIS HEARING, you should carefully read the enclosure entitled "Information Concerning Appearance at Water Right Hearings." As stated in that enclosure, anyone wishing to present evidence at the hearing must submit a **Notice of Intent to Appear**, which must be **received** by the State Water Board no later than the deadline listed below. **If BBID fails to submit a Notice of Intent to Appear by the deadline specified in this notice, the State Water Board will deem the request for a hearing regarding the imposition of administrative civil liability to be withdrawn, and the Board may impose administrative civil liability in the amount of \$1,553,250 without further notice. Similarly, if BBID withdraws its request, administrative civil liability may be imposed without further notice.**

Within one week after the deadline to submit Notices of Intent to Appear, the State Water Board will mail out a list of those who desire to participate in the hearing and a copy of all Notices of Intent to Appear that the Board timely received. The list is provided in order to facilitate exchange of written testimony, exhibits, and witness qualifications in advance of the hearing. Only parties and other participants who are authorized by the hearing officer will be allowed to present evidence. Copies of witnesses' proposed **testimony, exhibits, lists of exhibits, qualifications, and statement of service** must be **received** by the State Water Board and served on each of the parties who have indicated their intent to appear, no later than the deadline listed below.

**12:00 noon, Wednesday, September 2, 2015**

Deadline for receipt of Notice of Intent to Appear.

**12:00 noon, Monday, October 12, 2015**

Deadline for receipt and service of witnesses' proposed testimony, exhibits, lists of exhibits, qualifications, and statement of service.

## **PRE-HEARING CONFERENCE**

The hearing officer will conduct a pre-hearing conference to discuss the scope of the hearing and any other procedural issues on **Friday, September 25, 2015 at 9:00 a.m.** The goal of the pre-hearing conference is to ensure that the hearing proceeds in an orderly and expeditious manner. The pre-hearing conference will not be used to hear arguments on, or determine the merits of, any hearing issues, other than procedural matters, unless the parties agree to resolve a hearing issue by stipulation. Following the pre-hearing conference, the hearing officer may, at her discretion, modify the hearing procedures or issues set forth in this notice in whole or in part. All parties to the hearing must attend the pre-hearing conference. Failure to attend the pre-hearing conference may result in exclusion from participation in the hearing.

## **SUBMITTALS TO THE STATE WATER BOARD**

All documents, including Notices of Intent to Appear, written testimony, and other exhibits submitted to the State Water Board should be addressed as follows:

Division of Water Rights  
State Water Resources Control Board  
Attention: Jane Farwell-Jensen

By Mail: P.O. Box 2000, Sacramento, CA 95812-2000  
By Hand Delivery: Joe Serna Jr.-CalEPA Building  
1001 I Street, 2<sup>nd</sup> Floor, Sacramento, CA 95814  
By Fax: (916) 341-5400  
By Email: [wrhearing@waterboards.ca.gov](mailto:wrhearing@waterboards.ca.gov)  
With Subject of "**BBID ACL Hearing**"

**ALL HAND DELIVERED SUBMITTALS** should be Date and Time stamped by the Division of Water Rights' Records Unit on the second (2<sup>nd</sup>) floor of the Joe Serna Jr.-CalEPA Building at the above address prior to or at the submittal deadline. Persons delivering submittals must first check in with lobby security personnel on the first floor. Hand delivered submittals that do not have a timely Date and Time stamp by the Division of Water Rights' Records Unit will be considered late and may not be accepted by the hearing officer.

## **SETTLEMENTS**

Please read the discussion of "Settlements" in the enclosure entitled "Information Concerning Appearance at Water Right Hearings." In this water rights enforcement hearing, the prosecution team is prosecuting BBID for an alleged violation. The prosecution team and BBID may, at their discretion, engage in private settlement discussions and may include any other persons in those discussions. Due to the separation of functions discussed above, **the hearing team cannot participate** in settlement discussions. Should the parties reach settlement, they must notify the hearing team as soon as possible.

**IF YOU HAVE ANY QUESTIONS**

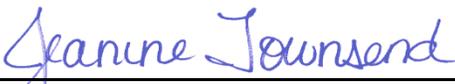
During the pendency of this proceeding, there shall be no *ex parte* communications regarding substantive or controversial procedural matters within the scope of the proceeding between State Water Board members or hearing team members and any of the other participants, including members of the prosecution team. (Gov. Code, §§ 11430.10-11430.80.) Questions regarding non-controversial procedural matters should be directed to Staff Counsel Nicole Kuenzi at (916) 322-4142 or by email to [Nicole.Kuenzi@waterboards.ca.gov](mailto:Nicole.Kuenzi@waterboards.ca.gov); or to Jane Farwell-Jensen at (916) 341-5349 or by email to [Jane.Farwell-Jensen@waterboards.ca.gov](mailto:Jane.Farwell-Jensen@waterboards.ca.gov). (Gov. Code, § 11430.20, subd. (b).)

**PARKING, ACCESSIBILITY AND SECURITY**

The Joe Serna Jr.-CalEPA Building (CalEPA Building) is accessible to people with disabilities. Individuals who require special accommodations at the CalEPA Building are requested to contact Tanya Cole, Equal Employment Opportunity Office, at (916) 341-5880.

Due to enhanced security precautions at the CalEPA Building, all visitors are required to register with security staff prior to attending any meeting. To sign in and receive a visitor's badge, visitors must go to the Visitor and Environmental Services Center, located just inside and to the left of the building's public entrance. Depending on their destination and the building's security level, visitors may be asked to show valid picture identification. Valid picture identification can take the form of a current driver's license, military identification card, or state or federal identification card. Depending on the size and number of meetings scheduled on any given day, the security check-in could take up to fifteen minutes. Please allow adequate time to sign in before being directed to the hearing.

\_\_\_\_\_  
August 19, 2015  
Date

  
\_\_\_\_\_  
Jeanine Townsend  
Clerk to the Board

Enclosures

## INFORMATION CONCERNING APPEARANCE AT WATER RIGHT HEARINGS

The following procedural requirements will apply and will be strictly enforced:

- 1. HEARING PROCEDURES GENERALLY:** The hearing will be conducted in accordance with the procedures for hearings set forth at California Code of Regulations, title 23, sections 648-648.8, 649.6 and 760, as they currently exist or may be amended. A copy of the current regulations and the underlying statutes governing adjudicative proceedings before the State Water Board is available upon request or may be viewed at the State Water Board's web site: [http://www.waterboards.ca.gov/laws\\_regulations](http://www.waterboards.ca.gov/laws_regulations)

Unless otherwise determined by the hearing officers, each party may make an opening statement, call and examine witnesses, introduce exhibits, cross-examine opposing witnesses on any matter relevant to the issues even if that matter was not covered in the direct examination, impeach any witness, rebut adverse evidence, and subpoena, call and examine an adverse party or witness as if under cross-examination. At the discretion of the hearing officers, parties may also be afforded the opportunity to present closing statements or submit briefs. The State Water Board encourages parties with common interests to work together to make the hearing process more efficient. The hearing officers reserve the right to issue further rulings clarifying or limiting the rights of any party where authorized under applicable statutes and regulations.

Parties must file any requests for exceptions to procedural requirements in writing with the State Water Board and must serve such requests on the other parties. To provide time for parties to respond, the hearing officers will rule on procedural requests filed in writing no sooner than fifteen days after receiving the request, unless an earlier ruling is necessary to avoid disrupting the hearing.

- 2. SETTLEMENTS:** In water right enforcement hearings, a State Water Board staff member or team prosecutes an alleged violation. In such enforcement cases, the prosecution and a party who is the subject of the proposed enforcement action may at their discretion engage in private settlement discussions, or may include any other persons in those discussions. Although other persons may be authorized to participate in the hearing as parties, such a designation does not constitute a ruling that those persons must be allowed to engage in any settlement discussions between the prosecution and the party against whom the agency action is directed. The consent of other parties is not required before the State Water Board, or the Executive Director under State Water Board [Resolution No. 2012-0061](#), can approve a proposed settlement agreement between the prosecution and a party subject to a proposed enforcement action. However, all parties will be given the opportunity to comment on any settlement submitted to the State Water Board or the Executive Director for approval.

In non-enforcement hearings involving an unresolved protest between a protestant and a water right applicant or petitioner, those persons will be designated as parties in the hearing. (Cal. Code Regs., tit. 23, § 648.1, subd. (b).) Other persons who file a Notice of Intent to Appear in the hearing, may also be designated as parties. In such cases, the parties whose dispute originates the action may at their discretion meet privately to engage in settlement discussions, or may include other persons. If the original parties resolve the dispute, the hearing officers will determine whether or not to continue the hearing, after allowing all remaining parties the opportunity to comment on any proposed settlement. The Executive Director or the State Water Board may approve a settlement in the absence of a hearing, notwithstanding the lack of consent of parties besides the protestant and the applicant or petitioner.

3. **PARTIES:** The current parties to the hearing are **Byron-Bethany Irrigation District; and the prosecution team for the State Water Board**. Additional parties may be designated in accordance with the procedures for this hearing. Except as may be decided by specific rulings of the hearing officers, any person or entity who timely files a Notice of Intent to Appear indicating the desire to participate beyond presenting a policy statement shall be designated as a party. The hearing officers may impose limitations on a party's participation. (Gov. Code, § 11440.50, subd. (c).) Persons or entities who do not file a timely Notice of Intent to Appear may be designated as parties at the discretion of the hearing officers, for good cause shown, and subject to appropriate conditions as determined by the hearing officers. Except as specifically provided in this notice or by ruling of the hearing officers, only parties will be allowed to present evidence.
4. **INTERESTED PERSONS:** Pursuant to California Code of Regulations, title 23, section 648.1, subdivision (d), the State Water Board will provide an opportunity for presentation of non-evidentiary policy statements or comments by interested persons who are not designated as parties. A person or entity that appears and presents only a policy statement is not a party and will not be allowed to make objections, offer evidence, conduct cross-examination, make legal argument or otherwise participate in the evidentiary hearing. Interested persons will not be added to the service list and will not receive copies of written testimony or exhibits from the parties, but may access hearing documents at the website listed in the hearing notice.

Policy statements are subject to the following provisions in addition to the requirements outlined in regulation. (Cal. Code Regs., tit. 23, § 648.1, subd. (d).)

- a. Policy statements are not subject to the pre-hearing requirements for testimony or exhibits, except that interested persons are requested to file a Notice of Intent to Appear, indicating clearly an intent to make a policy statement only.
  - b. The State Water Board requests that policy statements be provided in writing before they are presented. Please see section 7, for details regarding electronic submittal of policy statements.
5. **NOTICE OF INTENT TO APPEAR:** Persons and entities who seek to participate as parties in this hearing must file either an electronic copy or a paper copy of a Notice of Intent to Appear, which must be **received** by the State Water Board no later than **the deadline prescribed in the Hearing Notice**. Failure to submit a Notice of Intent to Appear in a timely manner may be interpreted by the State Water Board as intent not to appear. **If BBID fails to submit a Notice of Intent to Appear by the deadline specified in this notice, the State Water Board will deem the request for a hearing regarding the administrative civil liability complaint to be withdrawn, and administrative civil liability may be imposed without further notice. Similarly, if BBID withdraws its request, administrative civil liability may be imposed without further notice.**

Any faxed or emailed Notices of Intent to Appear must be followed by a mailed or delivered hard copy with an original signature.

Interested persons who will not be participating as parties, but instead presenting only non-evidentiary policy statements should also file a Notice of Intent to Appear.

The Notice of Intent to Appear must state the name and address of the participant. Except for interested persons who will not be participating as parties, the Notice of Intent to Appear must also include: (1) the name of each witness who will testify on the party's behalf;

(2) a brief description of each witness' proposed testimony; and (3) an estimate of the time (not to exceed the total time limit for oral testimony described in section 9, below) that the witness will need to present a brief oral summary of his or her prior-submitted written testimony. (See section 6, below.) Parties who do not intend to present a case-in-chief but wish to cross-examine witnesses or present rebuttal should so indicate on the Notice of Intent to Appear.<sup>1</sup> Parties who decide not to present a case-in-chief after having submitted a Notice of Intent to Appear should notify the State Water Board and the other parties as soon as possible.

Parties who are not willing to accept electronic service of hearing documents should check the appropriate box on the Notice of Intent to Appear. (See section 7, below.)

The State Water Board will mail a service list of parties to each person who has submitted a Notice of Intent to Appear. The service list will indicate if any party is unwilling to accept electronic service. If there is any change in the hearing schedule, only those parties on the service list, and interested persons that have filed a Notice of Intent to Appear expressing their intent to present a policy statement only, will be informed of the change.

- 6. WRITTEN TESTIMONY AND OTHER EXHIBITS:** Exhibits include written testimony, statements of qualifications of expert witnesses, and other documents to be used as evidence. Each party proposing to present testimony on factual or other evidentiary matters at the hearing shall submit such testimony in writing.<sup>2</sup> Written testimony shall be designated as an exhibit, and must be submitted with the other exhibits. Oral testimony that goes beyond the scope of the written testimony may be excluded. A party who proposes to offer expert testimony must submit an exhibit containing a statement of the expert witness's qualifications.

Each party shall submit to the State Water Board **three (3) paper copies** and **one electronic copy** of each of its exhibits. With its exhibits, each party must submit a completed Exhibit Identification Index. Each party shall also serve a copy of each exhibit and the exhibit index on every party on the service list. A statement of service with manner of service indicated shall be filed with each party's exhibits.

The exhibits and indexes for this hearing, and a statement of service, must be **received by the State Water Board and served on the other parties no later than the deadline prescribed in the Hearing Notice**. The State Water Board may interpret failure to timely submit such documents as a waiver of party status.

All hearing documents that are timely received will be posted on the hearings program webpage identified in the hearing notice.

The following requirements apply to exhibits:

- a. Exhibits based on technical studies or models shall be accompanied by sufficient information to clearly identify and explain the logic, assumptions, development, and operation of the studies or models.

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<sup>1</sup> A party is not required to present evidence as part of a case-in-chief. Parties not presenting evidence as part of a case-in-chief will be allowed to participate through opening statements, cross-examination, and rebuttal, and may also present closing statements or briefs, if the hearing officers allow these in the hearing.

<sup>2</sup> The hearing officers may make an exception to this rule if the witness is adverse to the party presenting the testimony and is willing to testify only in response to a subpoena or alternative arrangement.

- b. The hearing officers have discretion to receive into evidence by reference relevant, otherwise admissible, public records of the State Water Board and documents or other evidence that have been prepared and published by a public agency, provided that the original or a copy was in the possession of the State Water Board before the notice of the hearing is issued. (Cal. Code Regs., tit. 23, § 648.3.) A party offering an exhibit by reference shall advise the other parties and the State Water Board of the titles of the documents, the particular portions, including page and paragraph numbers, on which the party relies, the nature of the contents, the purpose for which the exhibit will be used when offered in evidence, and the specific file folder or other exact location in the State Water Board's files where the document may be found.
- c. A party seeking to enter in evidence as an exhibit a voluminous document or database may so advise the other parties prior to the filing date for exhibits, and may ask them to respond if they wish to have a copy of the exhibit. If a party waives the opportunity to obtain a copy of the exhibit, the party sponsoring the exhibit will not be required to provide a copy to the waiving party. Additionally, with the permission of the hearing officers, such exhibits may be submitted to the State Water Board solely in electronic form, using a file format readable by Microsoft Office 2003 software.
- d. Exhibits that rely on unpublished technical documents will be excluded unless the unpublished technical documents are admitted as exhibits.
- e. Parties submitting large format exhibits such as maps, charts, and other graphics shall provide the original for the hearing record in a form that can be folded to 8 ½ x 11 inches. Alternatively, parties may supply, for the hearing record, a reduced copy of a large format original if it is readable.

- 7. ELECTRONIC SUBMISSIONS:** To expedite the exchange of information, reduce paper use, and lower the cost of participating in the hearing, participants are encouraged to submit hearing documents to the State Water Board in electronic form and parties are encouraged to agree to electronic service.

Any documents submitted or served electronically must be in Adobe Portable Document Format (PDF), except for Exhibit Identification Indexes, which may be in a format supported by Microsoft Excel or Word. Electronic submittals to the State Water Board of documents less than 11 megabytes in total size (incoming mail server attachment limitation) may be sent via electronic mail to: [wrhearing@waterboards.ca.gov](mailto:wrhearing@waterboards.ca.gov) with a subject of "**BBID ACL Hearing**". Electronic submittals to the State Water Board of documents greater than 11 megabytes in total size should be submitted on a compact disc (CD). Each electronically submitted exhibit must be saved as a separate PDF file, with the name in lower case lettering.

- 8. PRE-HEARING CONFERENCE:** At the hearing officers' discretion, a pre-hearing conference may be conducted before the proceeding to discuss the scope of the hearing, the status of any protests, and any other appropriate procedural issues.
- 9. ORDER OF PROCEEDING:** Hearing officers will follow the Order of Proceedings specified in California Code of Regulations, title 23, section 648.5. Participants should take note of the following additional information regarding the major hearing events. The time limits specified below may be changed by the hearing officers, for good cause.

- a. **Policy Statements Within the Evidentiary Hearing:** Policy statements will be heard at the start of the hearing, before the presentation of cases-in-chief. Oral summaries of the policy statements will be limited to **five (5) minutes** or such other time as established by the hearing officers.
- b. **Presentation of Cases-In-Chief:** Each party who so indicates on a Notice of Intent to Appear may present a case-in-chief addressing the key issues identified in the hearing notice. The case-in-chief will consist of any opening statement, oral testimony, introduction of exhibits, and cross-examination of the party's witnesses. The hearing officers may allow redirect examination and recross examination. The hearing officers will decide whether to accept the party's exhibits into evidence upon a motion of the party after completion of the case-in-chief.
  - i. **Opening Statements:** At the beginning of a case-in-chief, the party or the party's attorney may make an opening statement briefly and concisely stating the objectives of the case-in-chief, the major points that the proposed evidence is intended to establish, and the relationship between the major points and the key issues. Oral opening statements will be limited to **(20) minutes** per party. A party may submit a written opening statement before the hearing or during the hearing, prior to their case-in-chief. Any policy-oriented statements by a party should be included in the opening statement.
  - ii. **Oral Testimony:** All witnesses presenting testimony shall appear at the hearing. Before testifying, witnesses shall swear or affirm that the written and oral testimony they will present is true and correct. Written testimony shall not be read into the record. Written testimony affirmed by the witness is direct testimony. Witnesses will be allowed up to **(20) minutes** to summarize or emphasize their written testimony on direct examination. Each party will be allowed up to **one (1) hour total** to present all of its direct testimony.<sup>3</sup>
  - iii. **Cross-Examination:** Cross-examination of a witness will be permitted on the party's written submittals, the witness' oral testimony, and other relevant matters not covered in the direct testimony. (Gov. Code, § 11513, subd. (b).) If a party presents multiple witnesses, the hearing officers will decide whether the party's witnesses will be cross-examined as a panel. Cross-examiners initially will be limited to **one (1) hour** per witness or panel of witnesses. The hearing officers have discretion to allow additional time for cross-examination if there is good cause demonstrated in an offer of proof. Ordinarily, only a party or the party's representative will be permitted to examine a witness, but the hearing officers may allow a party to designate a person technically qualified in the subject being considered to examine a witness.
  - iv. **Redirect and Recross Examination:** Redirect examination may be allowed at the discretion of the hearing officers. Any redirect examination and recross examination permitted will be limited to the scope of the cross-examination and the redirect examination, respectively. The hearing officers may establish time limits for any permitted redirect and recross examination.

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<sup>3</sup> The hearing officers may, for good cause, approve a party's request for additional time to present direct testimony during the party's case-in-chief. The hearing officers may allow additional time for the oral direct testimony of the witness if the witness is adverse to the party presenting the testimony and the hearing officers are satisfied that the party could not produce written direct testimony for the witness.

v. **Questions by State Water Board and Staff:** State Water Board members and staff may ask questions at any time and may cross-examine any witness.

c. **Rebuttal:** After all parties have presented their cases-in-chief and their witnesses have been cross-examined, the hearing officers will allow parties to present rebuttal evidence. Rebuttal evidence is new evidence used to rebut evidence presented by another party.

Rebuttal testimony and exhibits need not be submitted prior to the hearing, although the hearing officers may require submittal of rebuttal testimony and exhibits before they are presented in order to improve hearing efficiency. Rebuttal 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. It also does not include repetitive evidence. Cross-examination of rebuttal evidence will be limited to the scope of the rebuttal evidence.

d. **Closing Statements and Legal Arguments:** At the close of the hearing or at other times, if appropriate, the hearing officers may allow oral closing statements or legal arguments or set a schedule for filing legal briefs or written closing statements. If the hearing officers authorize the parties to file briefs, three copies of each brief shall be submitted to the State Water Board, and one copy shall be served on each of the other participants on the service list. A party shall not attach a document of an evidentiary nature to a brief unless the document is already in the evidentiary hearing record or is the subject of an offer into evidence made at the hearing.

**10. EX PARTE CONTACTS:** During the pendency of this proceeding, commencing no later than the issuance of the Notice of Hearing, there shall be no *ex parte* communications with State Water Board members or State Water Board hearing team staff and supervisors, regarding substantive or controversial procedural issues within the scope of the proceeding. (Gov. Code, §§ 11430.10-11430.80.) **Any communications regarding potentially substantive or controversial procedural matters, including but not limited to evidence, briefs, and motions, must demonstrate that all parties were served and the manner of service.** Parties may accomplish this by submitting a proof of service or by other verification, such as correct addresses in an electronic-mail carbon copy list, or a list of the parties copied and addresses in the carbon copy portion of a letter. Communications regarding non-controversial procedural matters are permissible and should be directed to staff on the hearing team, not State Water Board members. (Gov. Code, § 11430.20, subd. (b).) A document regarding *ex parte* communications entitled "Ex Parte Questions and Answers" is available upon request or from our website at:  
[http://www.waterboards.ca.gov/laws\\_regulations/docs/exparte.pdf](http://www.waterboards.ca.gov/laws_regulations/docs/exparte.pdf).

**11. RULES OF EVIDENCE:** Evidence will be admitted in accordance with Government Code section 11513. Hearsay evidence may be used to supplement or explain other evidence, but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in a civil action.

**NOTICE OF INTENT TO APPEAR**

\_\_\_\_\_ plans to participate in the water right hearing regarding  
(name of party or participant)

Administrative Civil Liability  
against  
Byron-Bethany Irrigation District

**scheduled to commence  
Wednesday, October 28, 2015 and continue, if necessary,  
on October 29 and 30, 2015  
at 9:00 a.m.**

**1) Check only one (1) of the following:**

- I/we intend to present a policy statement only.
- I/we intend to participate by cross-examination or rebuttal only.
- I/we plan to call the following witnesses to testify at the hearing. (Fill in the Following Table)

NAME	SUBJECT OF PROPOSED TESTIMONY	ESTIMATED LENGTH OF DIRECT TESTIMONY	EXPERT WITNESS (YES/NO)

(If more space is required, please add additional pages or use reverse side.)

**2) Fill in the following information of the Participant, Party, Attorney, or Other Representative:**

Name (Print): \_\_\_\_\_

Mailing Address: \_\_\_\_\_  
\_\_\_\_\_

Phone Number: ( ) \_\_\_\_\_ Fax Number: ( ) \_\_\_\_\_

E-mail: \_\_\_\_\_

Optional:

- I/we decline electronic service of hearing-related materials.

Signature: \_\_\_\_\_ Dated: \_\_\_\_\_



**BBID**  
**EXHIBIT 306**

STATE WATER RESOURCES CONTROL BOARD

BOARD MEETING/HEARING

(Portion)

JANUARY 6, 2015

Coastal Hearing Room - Second Floor  
1001 I Street  
Sacramento, California 95814

scribed By: Diane F. Fattig, CSR No. 3692

kathryndavis | & associates  
deposition reporting

555 University Avenue, Suite 116 Sacramento, California 95825 916.567.4211 [www.kdareporting.com](http://www.kdareporting.com)

BBID Exh. 306

STATE WATER RESOURCES CONTROL BOARD

BOARD MEETING/HEARING

(Portion)

JANUARY 6, 2015

Coastal Hearing Room - Second Floor  
1001 I Street  
Sacramento, California 95814

Transcribed By: Diane F. Fattig, CSR No. 3692

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STATE WATER RESOURCES CONTROL BOARD

BOARD MEMBERS PRESENT

- Chair Felicia Marcus
- Vice-Chair Frances Spivy-Weber
- Board Member Steven Moore

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PORTION OF TRANSCRIPT OF PROCEEDINGS

(22:30 - 25:20)

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CHAIR FELICIA MARCUS: Item number three. Drought update.

Hi, John.

JOHN O'HAGAN: Good morning. Happy new year.

We really have no updates for the drought update. We are continuing to work on items. Just as Ms. Trgovcich mentioned, it had --

CHAIR FELICIA MARCUS: We want to start by saying, though, that we're still in a drought.

JOHN O'HAGAN: We're still in the drought. And as Mr. O'Laughlin spoke to, the San Joaquin River conditions are worse than the Sacramento River Watershed.

But we are expecting to have the contingency plan from the Bureau and the Department coming in on January 15th, and we will have an informational item for the next board meeting.

CHAIR FELICIA MARCUS: Right. So we should plan plenty of time for that next board meeting. I know we were going to talk about that agenda.

CAREN TRGOVCICH: Right. And it's possible that we'll roll with that on the second day.

CHAIR FELICIA MARCUS: So that we'll have plenty of

1 time. Good. I don't want to rush that thing.

2 JOHN O'HAGAN: That's it

3 CHAIR FELICIA MARCUS: Right. No enforcement or  
4 anything else going on?

5 JOHN O'HAGAN: We are considering items at this  
6 time.

7 CHAIR FELICIA MARCUS: And that's all you can say?

8 JOHN O'HAGAN: Yes.

9 CHAIR FELICIA MARCUS: Because it would be  
10 enforcement.

11 JOHN O'HAGAN: Yeah.

12 CHAIR FELICIA MARCUS: Okay.

13 VICE-CHAIR FRANCES SPIVY-WEBER: I have a question.

14 With Mr. O'Laughlin speaking to the conditions of  
15 the San Joaquin today, I remember when Mark Cowin was  
16 first -- first became in charge of DWR, it was the  
17 reverse. Those conditions on the Sac were terrible and  
18 the conditions on the San Joaquin were better.

19 Do we track how -- how frequently this -- there is  
20 this mismatch of water supply, you know, from rain or from  
21 runoff among the two -- among the two rivers?

22 JOHN O'HAGAN: The Department closely tracks -- the  
23 conditions that you're talking about might be related to  
24 snowfall. I'm not sure of the status of this.

25 VICE-CHAIR FRANCES SPIVY-WEBER: Yeah. I can't

1 really -- I think it was like four or five years ago.

2 Four -- yeah.

3 JOHN O'HAGAN: Uh-huh. But they do track  
4 precipitation and the snowfall, you know, and the runoffs  
5 expected from both of those items.

6 VICE-CHAIR FRANCES SPIVY-WEBER: Okay. So they do  
7 it; we don't.

8 THOMAS HOWARD: Well, you know, this is relatively  
9 common that there's a variable hydrology between the San  
10 Joaquin and the Sacramento. And that's why the water  
11 board years ago established two separate indices,  
12 hydrologic indices, one for the Sacramento Basin and one  
13 for the San Joaquin Basin.

14 And if we look historically, you'll often see that  
15 those indices are not the same in any particular year. In  
16 fact, probably they're more often not the same than they  
17 are the same. And so -- but my point is just that this is  
18 not uncommon. It's actually quite common.

19 CHAIR FELICIA MARCUS: Nature.

20 THOMAS HOWARD: Not predictability.

21 CHAIR FELICIA MARCUS: Thank you very much, John.

22 --o0o--

23

24 (Whereupon, end of transcribed portion.)

25



**BBID**  
**EXHIBIT 308**

STATE WATER RESOURCES CONTROL BOARD  
BOARD MEETING/HEARING  
(Portion)

JANUARY 20, 2015

Coastal Hearing Room - Second Floor  
1001 I Street  
Sacramento California 95814

scribed by: Kathryn Davis CSR No. 3808

kathryndavis & associates  
deposition reporting

555 University Avenue, Suite 116 Sacramento, California 95825 916.567.4211 [www.kdareporting.com](http://www.kdareporting.com)

BBID Exh. 308

STATE WATER RESOURCES CONTROL BOARD  
BOARD MEETING/HEARING  
(Portion)

JANUARY 20, 2015

Coastal Hearing Room - Second Floor  
1001 I Street  
Sacramento California 95814

Transcribed by: Kathryn Davis CSR No. 3808

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STATE WATER RESOURCES CONTROL BOARD  
BOARD MEMBERS

- Chair Felicia Marcus
- Vice-Chair Frances Spivy-Weber
- Board Member Tam M. Doduc
- Board Member Steven Moore
- Board Member Dorene D'Amamo

1 PORTION OF TRANSCRIPT OF PROCEEDINGS

2 2:13:40 - 2:34:09

3 --oOo--

4 CHAIR FELICIA MARCUS: All right. Mr. Howard,  
5 Item No. 6. I know we are spending a fair amount of the  
6 afternoon on this. So perhaps just the -- as your  
7 plan -- about the other stuff.

8 JOHN O'HAGAN: The update -- John O'Hagan.

9 CHAIR FELICIA MARCUS: Great.

10 JOHN O'HAGAN: Good morning. I'll wait to put  
11 up my Power Point.

12 I'm going to give you a brief update for the  
13 Board's approval. I thought I would start with the  
14 activities that are in progress right now that the  
15 Division is working on. First off, we are improving the  
16 drought website.

17 CHAIR FELICIA MARCUS: That is great.

18 JOHN O'HAGAN: We are trying to make the  
19 information more easily accessible so that the public  
20 can get to items through a tabular-type format.

21 CHAIR FELICIA MARCUS: Good.

22 We are also working on the Dry Year Report that  
23 is due at the end of January.

24 CHAIR FELICIA MARCUS: Can you just say, again,  
25 for the people listening, what that is because the title

1 is not that self-explanatory.

2 JOHN O'HAGAN: It was a report that we were  
3 looking back on what we did and how to improve our work  
4 for the drought as required by the Board's regulations.  
5 And we are trying to improve how we do things and how --  
6 what information that we can provide to the public so  
7 that the system works better.

8 CHAIR FELICIA MARCUS: I appreciate all the time  
9 you've spent meeting with stakeholders and the massive  
10 binder of comments that you've gotten.

11 JOHN O'HAGAN: Yes. The next thing is Petitions  
12 for Temporary Urgency Changes and transfers. We are now  
13 getting those in for renewals for Temporary Urgency  
14 Changes. So we have two that will be issued this week.

15 We are also performing --

16 BOARD MEMBER STEVEN MOORE: What are those two?  
17 You said there was two. You didn't mention who.

18 JOHN O'HAGAN: Yes. One would be the City of  
19 Thousand Oaks, which is a renewal of a Temporary Urgency  
20 Change. And then a Department of Water Resource  
21 transfer that involves an exchange of water with stored  
22 State Water Project -- water stored in Kern River  
23 Bank -- in exchange for water being pumped at the Delta  
24 to serve -- let me look who did the survey -- pardon me.  
25 I have to think who it is going to. I'll have to get

1 back to you.

2 BOARD MEMBER STEVEN MOORE: That is okay. That  
3 is a lot of detail.

4 CHAIR FELICIA MARCUS: You got the idea of it

5 JOHN O'HAGAN: Contra Costa. I apologize.

6 We are also preparing the Statewide Notice of  
7 Potential Curtailment. This week it will be likely  
8 going out. This notice is a heads-up for people to plan  
9 ahead, as we did last year. It includes the  
10 instructions to make sure that they access our drought  
11 web page and also sign up for our Lyris noticing  
12 process, so they can get realtime information.  
13 Additional information on the notice includes our  
14 complaint process and the website access for the  
15 complaints.

16 We continue to do QA/QC of diversion demand  
17 data. And that is meeting with stakeholders and then  
18 also improving our data because we are using 2013 data  
19 that we've gotten in now. And we are looking at that as  
20 well. So we are getting more data. We are doing more  
21 QA/QC for the curtailment analysis. And then we have  
22 ongoing enforcement cases.

23 CHAIR FELICIA MARCUS: You do? Okay.

24 JOHN O'HAGAN: I wanted to give you an idea of  
25 the activity from last year to this year. As you know,

1 the Delta, that's the project Temporary Urgency Changes,  
2 we had one order and 18 revisions -- or eight revisions.

3 Other TUCs and transfers, there were 17 issued  
4 and 27 this year. Now, that encompasses 53 petitions  
5 last year and 88 additions in 2014.

6 Emergency regulations for water rights, we  
7 adopted two: The curtailment regulation and the fishery  
8 protection regulations. Water rights receiving orders  
9 of curtailments, that was the two orders in Deer Creek,  
10 so it affects 49 water right holders.

11 Water rights receiving notice of curtailments,  
12 2013, we didn't do it but 2014 there was 9,500 water  
13 rights affected.

14 Complaints received, we've gone from 54 to 172.  
15 We are still evaluating those. Compliance inspections,  
16 from 187 to over 947 water rights inspected this year  
17 compared to last year. And that is not even a full year  
18 for the 2014 number. Drought information orders, we  
19 have issued one. It affects 30 water rights. That is  
20 the San Joaquin Order.

21 And then notices of cease and desists and ACLs,  
22 last year 289 cease and desist notices, 49 ACL  
23 complaints. This year, 375 notices have been issued; 42  
24 ACLs issued as of 1/14/2015.

25 So that gives you an idea of the increased

1 workload. We are likely going to be faced with the  
2 same, if drought conditions persist this year.

3 VICE-CHAIR FRANCES SPIVY-WEBER: I have a  
4 question on that. First of all, this is great. This is  
5 a really helpful slide because I get these questions.  
6 And so this will be nice to, you know, when I meet with  
7 folks out on the road.

8 So compliance inspections, could you talk a  
9 little bit more about that, specifically with respect to  
10 the issue of for those that filed in response to the  
11 notice. I know you were inspecting, even if individuals  
12 indicated that they were complying, as opposed to those  
13 that did not respond. Did this encompass both  
14 categories?

15 JOHN O'HAGAN: Yes. That encompasses the  
16 workload that was done by our staff. And it has been  
17 told to me, from our stakeholders, that the field  
18 presence that we presented with our resources was a  
19 great deterrent for letting people know that we, indeed,  
20 intended to enforce those notices of curtailment. But  
21 the number is for both the nonresponders and the  
22 responders on the notice for the curtailment list.

23 BOARD MEMBER DORENE D'AMANO: Could you separate  
24 that out, responders versus nonresponders?

25 JOHN O'HAGAN: I can and I can provide you that

1 at a later date, yes.

2 BOARD MEMBER DORENE D'AMANO: Okay. All right.  
3 Thanks.

4 JOHN O'HAGAN: The next slide.

5 I wanted to give you an idea of the process for  
6 enforcing failure to file, for these are the online  
7 reports that we relied on water availability analysis.

8 So for permits and licenses only -- this does  
9 not include statements -- the number of reports that  
10 were due for 2013 reporting was over 12,000. And we  
11 received 74 percent of the reports. For those 373 that  
12 we had not received, we issued 373 draft notices of  
13 curtailment -- draft notices of CDO. They had an  
14 opportunity for hearing or completed task. Otherwise, a  
15 final CDO would be issued. So the next step, final CDO.

16 So 57 out of the 373 -- 15 percent -- failed to  
17 take action under the draft CDO. And then after final  
18 CDO and ACL complaint can be issued, we have thus far  
19 issued 42 ACL complaints for violation of the CDOs. The  
20 difference between the others will be revocations and/or  
21 ones that have not been able to be served and we need to  
22 process serve.

23 So that's the process just for failing to file  
24 permits and licensing reports.

25 CHAIR FELICIA MARCUS: So that is just for the

1 juniors or is it also for the seniors?

2 JOHN O'HAGAN: No. That doesn't include  
3 stakeholders.

4 BOARD MEMBER DORENE D'AMANO: Okay. And on the  
5 12 percent of non-filers, I assume you are targeting the  
6 larger water users?

7 JOHN O'HAGAN: Each year we get deeper and  
8 deeper. So these represent 100 acre feet or greater on  
9 the amounts under the water right. The previous year  
10 was 200 acre feet. The year before that was 500 acre  
11 feet. So we keep moving down.

12 As you can tell, there is a great deal of water  
13 right holders that have less than 100 acre feet that  
14 have failed to report.

15 The informational order on the San Joaquin, this  
16 is the status we are at right now. There is 30 water  
17 rights affected and we received from six of those, or 20  
18 percent, all information. Whether that information  
19 produces a base right or not, that is not identified  
20 here.

21 We got information, but received late, that was  
22 the 7 percent. Incomplete information received, another  
23 40 percent. Not received at all -- so 20 percent of the  
24 people that we asked for information did not send it in  
25 and then -- but they had to be remailed. Those are the

1 ones that probably have to be served by process server.  
2 And then the last one is no response at all, 13 percent.

3 So we are actively preparing enforcement on this  
4 at this time.

5 VICE-CHAIR SPIVY-WEBER: Have you let Mr.  
6 O'Laughlin know this? Because this is usually a  
7 question that he asks.

8 JOHN O'HAGAN: Well, we could let him know we  
9 are working on it, as I have been telling him in the  
10 past. As you can see, we have been doing other  
11 enforcement actions, but they take time to develop.

12 And that is all I have for this presentation.  
13 Do you have any questions?

14 BOARD MEMBER DORENE D'AMANO: I do. On the  
15 informational order, incomplete information received,  
16 that is pretty high, 40 percent. So is there just  
17 confusion out there? What can be done to help people  
18 along so that once they, you know, if they are intending  
19 on complying, to get them into a position so that it is  
20 a complete response.

21 JOHN O'HAGAN: This has always been a problem  
22 with complaints and the process. We get people claiming  
23 a right that they are aware of but they don't have any  
24 of the background information to support, like the year  
25 of first use and continued beneficial use of a pre-'14

1 right.

2 The riparian plan claim, if it is detached, how  
3 do they assert a riparian claim to a parcel that is now  
4 detached? They need to have some deeded information  
5 that supports that a riparian status was reserved  
6 through parcel subdivision. That's the kind of  
7 information that we do not get. And if we have to  
8 produce that, it takes even more time.

9 CHAIR FELICIA MARCUS: Sometimes you've found it  
10 for people.

11 JOHN O'HAGAN: Yeah, we try to. In our  
12 analysis, if we can get that information, we determine  
13 it. But as a claimant of a water right, you should be  
14 able to have that information available to prove-up on  
15 your right. After all, all these rights are claimed  
16 unless they have been adjudicated.

17 CHAIR FELICIA MARCUS: Right. People don't  
18 realize that but that is true.

19 JOHN O'HAGAN: And then the divergent  
20 information, some people may give rough estimates  
21 because -- then they say "we don't know exactly what  
22 we've heard."

23 BOARD MEMBER STEVEN MOORE: Thanks. An earlier  
24 report, you mentioned that you'd received some support  
25 from the Regional Board staff because that was a big

1 jump from 2013 to 2014 compliance inspections.

2 JOHN O'HAGAN: Absolutely. We receive  
3 assistance from the Department of Water Resources and  
4 the Regional Board staff. That is why we were able to  
5 bump up those inspection numbers and make a field  
6 presence. Their assistance was of extreme value. And  
7 as I said, stakeholders suggested that that presence  
8 served as a deterrent.

9 BOARD MEMBER STEVEN MOORE: Well, we really want  
10 to acknowledge that, you know, the assistance that we  
11 received and not just in words but in other ways that we  
12 can acknowledge.

13 Looking at Tom -- you know, just the extent, you  
14 know, it is not just charity out there. We want to, you  
15 know, recognize the sacrifices that they have made.

16 MALE VOICE: Pamela and I have discussed that  
17 several times, tangible forms of appreciation.

18 BOARD MEMBER STEVEN MOORE: I'm glad for those  
19 conversations. It is good that those conversations are  
20 occurring. Thank you.

21 CAREN TRGOVCICH: Can I just -- I want to just  
22 temper the bullet that John had up there on the dry year  
23 assessment. We received a lot of comments, as you all  
24 saw. Yes, Felicia has a binder with all the comments.

25 And so as we move into 2015 now, we are taking

1 things in chunks because we only have so much capacity.  
2 And this first chunk is the curtailment process itself.

3 So the report that is going to be coming out is  
4 going to be focused on the curtailment process, how we  
5 can conduct our analysis, the data that we use, the  
6 process that we use, where we make information  
7 available, et cetera.

8 That is not to say we are not looking at all  
9 those other comments, but they will be dealt with as we  
10 move forward. We are just, like everyone else, having  
11 capacity issues and we need to be able to manage this.

12 VICE-CHAIR FRANCES SPIVY-WEBER: One thing I  
13 would recommend is, one thing I would recommend -- and  
14 this goes to some of the comments that Felicia has made  
15 from time to time -- context is everything. And so  
16 providing how much water has been in this -- whatever  
17 year you are looking at -- how much water has actually  
18 been normally diverted, diverted this year and, you  
19 know, then what are we doing in terms of curtailments.

20 Because sometimes the media will pick up that  
21 there is a 5 percent or there is a 10 percent or a  
22 15 percent -- when, in fact, that is for a particular  
23 period of time. Not for the whole year and not -- you  
24 know, it doesn't reflect what happened prior to the  
25 restriction.

1           And so, I just think it is going to be  
2   incredibly -- for example, last year, I think normally  
3   -- is there a normal -- but you could expect that maybe  
4   there is some amount of water that is fairly regularly  
5   expected, but it is not 100 percent. It is 80 percent,  
6   or it is something like that. But, in fact, what  
7   actually got delivered was about 50 percent of the  
8   80 percent.

9           And so those are very important numbers for  
10  people to grasp as they start to evaluate what is going  
11  on.

12           CAREN TRGOVCICH: You just raised one of our  
13  recommendations actually, or one of the areas of the  
14  report -- not speaking to the contract, the project  
15  deliveries, but speaking to curtailments in general for,  
16  you know, a large number of water right holders are  
17  pre-'14 and riparian water right holders. We give  
18  reports once over three years covering the prior three  
19  years.

20           So being able to provide that context is a bit  
21  more difficult because we don't have the information as  
22  current. So that is one of the areas we explore in the  
23  report.

24           CHAIR FELICIA MARCUS: Great. Well, the better  
25  we can frame it in a way that -- I mean, my target used

1 to always be my Aunt Charlotte, that we need to explain  
2 everything in a way that Aunt Charlotte would  
3 understand, which was someone that didn't finish college  
4 but read the paper every day and actually wanted to  
5 know. And it is a good, a good test, because we all  
6 know so much, too. So it just becomes telling the  
7 story.

8 So thank you both for that.

9 We could talk much longer but we are going to  
10 move on because we have a heavy afternoon. And I do  
11 think we need to be able to take a break, but thank you.

12 But I do have one question. So as long as I  
13 said that, I'm going to take it away. See, fooled you.  
14 Yeah, right.

15 I was somewhere and someone said they had heard  
16 reports that there was widespread violation of our  
17 curtailment orders. And I said I didn't think that  
18 necessarily was true because we have these enforcement  
19 actions going. But that when you went out, you found  
20 people who were using other rights or had gotten water  
21 from other people.

22 Mr. Howard explained to me, when I wanted to  
23 make sure that I was seeing accurate -- and, again,  
24 "widespread" would be in the eyes of the beholder -- but  
25 part of our challenge, too, is that someone could say, I

1 got a transfer from a riparian or a senior pre-'14 and  
2 they don't have to register their transfers the way a  
3 junior would.

4 Do I have that right, Tom? I just want to make  
5 sure people -- this is an education moment.

6 All right. You couldn't get a transfer. I'm  
7 sorry.

8 THOMAS HOWARD: Senior Pre-2014 doesn't need to  
9 seek permission from the Board or from any other party  
10 for transfer.

11 CHAIR FELICIA MARCUS: Right. So we don't  
12 require that they show even a document to show that they  
13 got the transfer. They show a document, but then we  
14 don't go back and check to see whether that person had a  
15 valid right to transfer rights.

16 If you have a fully adjudicated system -- don't  
17 go crazy, it would take 30 years to do -- but then this  
18 would be all set up and monitored. But in our case --

19 Am I answering that question right?

20 JOHN O'HAGAN: Right, I believe you are. We did  
21 not find any widespread violations. And I would ask the  
22 person that information. I said, "Well, have they filed  
23 a complaint to highlight those violations to us?"  
24 Because that is what that process is for.

25 CHAIR FELICIA MARCUS: Okay.

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JOHN O'HAGAN: And then we would investigate those complaints specific to the allegations. As we found, we found a lot of land that was idled; we found groundwater being used in lieu of their water rights; parties using state and federal contracts in lieu of the post-'14 water rights; and then other parties exercising their claims to prior rights. That was the result of most of the findings that we made.

CHAIR FELICIA MARCUS: Thank you. To be continued. Appreciate it, all the hard work.

(Whereupon, end of transcribed portion.)

<http://www.yeslaw.net/help>

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REPORTER'S CERTIFICATE

State of California     )  
                                  ) ss.  
County of Sacramento    )

I certify that the statements in the foregoing hearing were transcribed in the within-entitled cause by audio; that said hearing was taken at the time and place therein named; that the testimony of said witnesses was reported by me, a duly Certified Shorthand Reporter of the State of California authorized to administer oaths and affirmations, and said testimony was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for either or any of the parties to said hearing, nor in any way interested in the outcome of the cause named in said hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this 28th day of August, 2015.

\_\_\_\_\_  
KATHRYN DAVIS  
Certified Shorthand Reporter  
Certificate No. 3808

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**BBID**  
**EXHIBIT 310**

STATE WATER RESOURCES CONTROL BOARD  
BOARD MEETING/HEARING  
(Portion)

FEBRUARY 3, 2015

Coastal Hearing Room - Second Floor  
1001 I Street  
Sacramento California 95814

scribed by: Kathryn Davis CSR No. 3808

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BBID Exh. 310

STATE WATER RESOURCES CONTROL BOARD  
BOARD MEETING/HEARING  
(Portion)

FEBRUARY 3, 2015

Coastal Hearing Room - Second Floor  
1001 I Street  
Sacramento California 95814

Transcribed by: Kathryn Davis CSR No. 3808

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STATE WATER RESOURCES CONTROL BOARD

BOARD MEMBERS

Chair Felicia Marcus

Vice-Chair Frances Spivy-Weber

Board Member Tam M. Doduc

Board Member Steven Moore

Board Member Dorene D'Amamo

1 PORTION OF TRANSCRIPT OF PROCEEDINGS

2 (Part 1 of 2; 55:06-1:07:42)

3 --oOo--

4 CHAIR FELICIA MARCUS: Next, California's ongoing  
5 drought emergency. I see Mr. O'Hagan and Ms.  
6 Montgomery.

7 John is going to take it all?

8 JOHN O'HAGAN: Good morning. I'm John O'Hagan,  
9 Assistant Deputy Director for Water Rights. They are  
10 going to bring up a presentation for me.

11 As you recall on my last update in January, I  
12 informed you of the notice of potential curtailment that  
13 went out statewide, and then also some orders that were  
14 going to be issued. So I'm just going to give you a  
15 quick update.

16 Go ahead and move forward.

17 I wanted to give you an idea of existing  
18 conditions. This is the information from CDEC on  
19 rainfall totals. Tulare Lake Basin, 6.8 inches; San  
20 Joaquin, five stations, 9.3 inches; Sacramento 8  
21 stations, 23 inches.

22 The snow water equivalent at this time is 14  
23 percent of April average. And then the major reservoir  
24 conditions, roughly about 50 percent of average for this  
25 time of year. And all those hyperlinks are there to the

1 sites that the information is coming from.

2 CHAIR FELICIA MARCUS: So then this is all going  
3 to be online so people can click on it?

4 JOHN O'HAGAN: Click on it.

5 CHAIR FELICIA MARCUS: That is great.

6 The big news over the weekend in San Francisco,  
7 and then again today, that is was not a drop in January.

8 JOHN O'HAGAN: Right. It's the driest January  
9 on record, as I understand it.

10 Okay. Next slide.

11 This is the five-day forecast for the storm that  
12 is coming in this week. As you can see, the total for  
13 the Sacramento Valley is 1.9 inches. It is a lot  
14 heavier up in the North Coast and lighter in the  
15 southern area; but that is for a forecast from NOAA that  
16 we can access and see for forecasting of rainfall coming  
17 in.

18 CHAIR FELICIA MARCUS: What does that mean? So  
19 the North Coast would get a lot of rain. Just for those  
20 small communities they helped last year, what does this  
21 mean for the reservoirs?

22 JOHN O'HAGAN: Well, this will all help because  
23 the runoff, obviously, gets into the reservoirs. But it  
24 is not a lot of rain is the point of what I'm saying.  
25 Up in the North Coast, it is very good because there is

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1 a lot of inches that may be falling up there. But as  
2 you move to the Sacramento Valley, it is not as much  
3 rainfall. So that is just information for giving you an  
4 idea of the storm coming in.

5 Okay. Go ahead.

6 The activities update. As I've mentioned, the  
7 drought website is going to be updated and available.  
8 We are going to be putting in our diversion demand data  
9 set, so that stakeholders can take a look at it and use  
10 it and give us the feedback on that data.

11 The Term 91 curtailment, as you know, that  
12 curtailment is based on the supplemental storage water  
13 releases that the projects do. We want to put up a  
14 curve for that, so people know when that is going to be  
15 anticipated.

16 We are going to be sending out a notice of  
17 probable curtailment under that Term 91 condition. That  
18 only affects permit and license holders post-1966.

19 CHAIR FELICIA MARCUS: What percentage of the  
20 water is that?

21 JOHN O'HAGAN: It's not a large percentage of  
22 water but it is a condition that the permittees and  
23 licensee holders that have those will need to address.  
24 I believe there is a total of 118 parties that were  
25 subject to Term 91.

1 BOARD MEMBER DORENE D'AMAMO: For Term 91 for  
2 quite some time, they have been notified electronically,  
3 correct? Don't they have, at least, a system where they  
4 know to look it up on the website?

5 JOHN O'HAGAN: There is a posting on the  
6 Bureau's website that identifies the supplemental  
7 project releases. We wanted to put it as a more graphic  
8 display, so it makes it simpler for people to  
9 understand.

10 And that is what we are going to be putting on  
11 our website. So a visual graph that gives them an idea  
12 of Delta conditions and then also the conditions of  
13 supplemental project water storage releases. So that it  
14 will be a really quick feedback. Once the supplemental  
15 project water goes to positive, that means Term 91 can  
16 be invoked.

17 BOARD MEMBER DORENE D'AMANO: What I was getting  
18 at is -- I'm not quite familiar with exactly the  
19 notification process -- but it is my understanding that  
20 for awhile, it has been sort of a realtime notification  
21 for Term 91, similar to where you are trying to head  
22 with the curtailments.

23 JOHN O'HAGAN: No. On Term 91, we send out  
24 actual mail-outs of the notices because it is such a  
25 small group of the parties that get it.

1 BOARD MEMBER DORENE D'AMANO: And you are able  
2 to do that within enough time to hit it, you know,  
3 giving them the advantage of it?

4 JOHN O'HAGAN: Yes.

5 BOARD MEMBER DORENE D'AMAMO: So when it needs  
6 to be invoked, they will --

7 JOHN O'HAGAN: But we also post it, so that it  
8 shows more realtime and the graph will be updated. So  
9 that is the idea to be more realtime to give the public  
10 more information on that.

11 The other graphs that we will be putting up  
12 shortly is a Sacramento, San Joaquin. The Scott River  
13 is already up. And that is -- those are the supply and  
14 demand analyses that we do for the curtailment,  
15 potential curtailments. That will all be available soon  
16 on the website.

17 As you know, we are migrating from 2014 to 2015,  
18 and we are improving that website at the same time. We  
19 did post some 2014 curtailment curves for the end of  
20 lifting, when we started lifting the curtailments, to  
21 give people an idea of that.

22 The next thing that happened is we released the  
23 Dry Year Report on 1/30/2014 -- '15. That's the report  
24 back in July of 2014 that the Board asked us to produce  
25 by January 31st. And the report analyzes the Board's

1 2014 drought response, reviewed recommendations from a  
2 1978 drought report, and reviewed -- and provided staff  
3 recommendations for improving transparency, data  
4 quality, and process for 2015 and later.

5 That report is scheduled as an informational  
6 item for discussion at the Board's meeting on  
7 February 17th.

8 Temporary Urgency Change Petitions filed by the  
9 Bureau and the Department. We received that petition on  
10 January 23rd. We had a final concurrence letter  
11 received late on January 30th. The notice was sent out  
12 on January 27th.

13 The Executive Director stated he temporarily  
14 would not object to operations of that project in  
15 accordance with the proposed TUC Petition, but that  
16 temporary approval expires today and a final decision  
17 should be out today.

18 And then a workshop is scheduled for  
19 February 18th to receive public input on the Drought  
20 Contingency Plan and on the TUC Petition. So they were  
21 already scheduled for comments at that time.

22 BOARD MEMBER DORENE D'AMANO: I have a question  
23 on that. And maybe Mr. Howard might want to answer it.  
24 I thought that there was going to be an effort to bring  
25 it to us sooner, so that for those that have concerns

1 one way or the other, that there would be an opportunity  
2 to come before the Board in short order.

3 THOMAS HOWARD: Yeah. I looked into that option  
4 and was trying to find other dates where we could get it  
5 before the Board. But the Board's schedules and room  
6 availability and other factors just seemed like it  
7 wasn't going to work.

8 CHAIR FELICIA MARCUS: Did you just check that  
9 our calendars had something on it? I mean, did somebody  
10 ask us if there were things we could move?

11 THOMAS HOWARD: Sure. We were looking at things  
12 that we could move as well. But it just looked like we  
13 were not going to be able to get -- yeah, I mean, I  
14 think there was one day where we could get three Board  
15 members, but one was only going to be there for a couple  
16 of hours. So it just didn't seem like it was going to  
17 work out --

18 BOARD MEMBER DORENE D'AMANO: So I don't want to  
19 go venture into any of the substance that would, you  
20 know, result in an inappropriate discussion, since this  
21 issue is not noticed. But considering opportunities  
22 because of the storm, I mean, there may not even be an  
23 opportunity to pick up some additional water -- but just  
24 wondering if you took that into consideration.

25 THOMAS HOWARD: Yeah. Actually, I have taken it

1 into consideration in a couple of ways. One, the  
2 opportunities that might provide for entrainment of  
3 species in the Delta.

4 And, secondly, with respect to the fact that,  
5 you know, I think one of the more contentious issues is  
6 whether between flows of 7100 to 5500, exports should be  
7 allowed to rise. But with the storm, I expect the flows  
8 to be well above 7100 over the next week or two. And  
9 so, therefore, it wouldn't be a factor for the next week  
10 or two. It might be a factor tomorrow.

11 And so by the time it gets to the Board on the  
12 18th, maybe flows will start receding by then. It might  
13 start becoming a factor again after awhile. But I  
14 assume the flows will be up next week and that issue  
15 won't be a factor.

16 BOARD MEMBER DORENE D'AMANO: Okay.

17 JOHN O'HAGAN: Okay. The last activities: We  
18 have other Urgency Change Petitions and Transfers. As I  
19 mentioned in the last update, that we had two that were  
20 going to be issued and they have been issued. It is the  
21 Department of Water Resources Temporary Transfer. We  
22 approved that on January 20th.

23 The transfer allows exchange of 5,000 acre feet  
24 between the State Water Project and CVP contractors.  
25 And it deals with Contra Costa Water District, Alameda

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1 County Water District and Alameda County Flood Control.

2 The other Temporary Urgency Change renewal we  
3 gave was the City of Thousand Oaks, which was approved  
4 on January 21st. Since that last Board update, we have  
5 received two more Temporary Urgency Change renewal  
6 requests. And that is from the June Lake Public Utility  
7 District and then also the City of Santa Cruz.

8 Do you have any questions?

9 BOARD MEMBER STEVEN MOORE: I do recognize that  
10 list of TUCPs. And I think also the last time you  
11 mentioned the Sonoma TUCP. Is that right, for the  
12 Russian River? Has that been processed?

13 JOHN O'HAGAN: I'll have to ask Amanda. She is  
14 here. I brought her down.

15 BOARD MEMBER STEVEN MOORE: My only point is  
16 that I've seen the same folks come forward, you know,  
17 this year and should expect probably some other ones,  
18 such as El Dorado and other --

19 AMANDA MONTGOMERY: We may see repeat customers  
20 going through the same situations. With the Sonoma  
21 County Water Agency, we have been closely discussing  
22 their need to file a Urgency Change again.

23 They have not decided yet. They said it was  
24 possible towards the end of this month, they would file  
25 a request; but they are waiting to see how this storm

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plays out and how it affects their reservoirs.

BOARD MEMBER STEVEN MOORE: Right. And then they had different antecedent conditions last year versus this year. There was a lot more precipitation in December. So it is interesting to see this unfold and helping out similar communities this year.

Thank you.

JOHN O'HAGAN: Thank you.

CHAIR FELICIA MARCUS: Questions? Thank you very much. Keep up the good work.

(Whereupon, end of transcribed portion.)

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REPORTER'S CERTIFICATE

State of California        )  
                                  ) ss.  
County of Sacramento     )

I certify that the statements in the foregoing hearing were transcribed in the within-entitled cause by audio; that said hearing was taken at the time and place therein named; that the testimony of said witnesses was reported by me, a duly Certified Shorthand Reporter of the State of California authorized to administer oaths and affirmations, and said testimony was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for either or any of the parties to said hearing, nor in any way interested in the outcome of the cause named in said hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this 28th day of August, 2015.

\_\_\_\_\_  
KATHRYN DAVIS  
Certified Shorthand Reporter  
Certificate No. 3808

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**BBID**  
**EXHIBIT 312**

STATE WATER RESOURCES CONTROL BOARD  
BOARD MEETING/HEARING  
(Portion)

FEBRUARY 17, 2015

Coastal Hearing Room - Second Floor  
1001 I Street  
Sacramento California 95814

scribed by: Kathryn Davis CSR No. 3808

kathryndavis & associates  
deposition reporting

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BBID Exh. 312

STATE WATER RESOURCES CONTROL BOARD  
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(Portion)

FEBRUARY 17, 2015

Coastal Hearing Room - Second Floor  
1001 I Street  
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Transcribed by: Kathryn Davis CSR No. 3808

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STATE WATER RESOURCES CONTROL BOARD  
BOARD MEMBERS

- Chair Felicia Marcus
- Vice-Chair Frances Spivy-Weber
- Board Member Tam M. Doduc
- Board Member Steven Moore
- Board Member Dorene D'Amamo

1 PORTION OF TRANSCRIPT OF PROCEEDINGS

2 (Part 1 of 2 - 18:42 - 28:33)

3 --oOo--

4 CHAIR FELICIA MARCUS: Informational items. We  
5 have a number of very important ones today. First will  
6 be our drought update.

7 AMANDA MONTGOMERY: We have a fairly short  
8 update. We were thinking about going back there, but we  
9 are happy to be up front at this time.

10 I'm Amanda Montgomery, the Program Manager --  
11 the mic is on, get it even closer to me -- the Program  
12 Manager for Water Rights Permitting and Licensing. And  
13 also I have Katherine Mrowka, the Program Manager for  
14 Water Rights Enforcement.

15 So on the permitting and licensing side, we have  
16 one urgency change that we approved since the last Board  
17 meeting. That was the second renewal of the City of  
18 Santa Cruz urgency change. So, again, that urgency  
19 change produces their fish releases from 1 CFS to .2  
20 CFS. They do monitoring downstream to make sure there  
21 are no fishery issues, and they haven't seen any.

22 So they are continuing to go forward. That  
23 allows them to store more water in their Newell Creek  
24 Reservoir, so they have more water for their city and  
25 they are implementing conservation requirements.

1 CHAIR FELICIA MARCUS: I had heard somewhere  
2 that they had rolled back some of them after the last  
3 set of rains, but they are still one of the high  
4 achievers in the state, as I recall, on those charts.

5 AMANDA MONTGOMERY: That is definitely true.  
6 And they are still above 20 percent confirmation  
7 compared to baseline conditions. They have set back a  
8 little bit, but they are still in Stage 3, so they could  
9 bring it back up, depending on how conditions change.

10 CHAIR FELICIA MARCUS: All right.

11 AMANDA MONTGOMERY: We also have one urgency  
12 change that we need to process. It is an "also renewal"  
13 from June Lake Public Utility District in Mono County.  
14 And they are asking for renewal of their 180-day urgency  
15 change.

16 It, again, reduces fishery flows. And they  
17 conducted monitoring during the last period. They would  
18 like to see that production again. So we are in the  
19 process of looking at that renewal within the next  
20 several weeks.

21 That is what we have on the permitting side, so  
22 I'll turn it over to Katherine Mrowka to talk about  
23 enforcement.

24 KATHERINE MROWKA: On the enforcement side, we  
25 have issued a letter last Friday to notice a probable

1 curtailment under Term 91. So it is not yet the  
2 curtailment item, but we like to give advance  
3 notification.

4 We also like to be really cognizant of all the  
5 other efforts going on. And the Dry Year Report  
6 indicated that we should be providing more information  
7 to the public on our web. So we have developed a  
8 graphic that we have posted. There is text to go with  
9 it. We are still working with the Water Master's office  
10 and the projects on the text that will go with it; but  
11 we are confident that the graphic is a good product at  
12 this point. So that the public can follow along and  
13 see, you know, what is actually happening. Rather than  
14 just getting a date certain and saying, "Well, May 5th  
15 we are going to curtail under Term 91," you get a lot  
16 better ability to see how, basically, rainstorms have  
17 happened, the situation is changing or not changing.  
18 But we also wanted it to be simple with check boxes that  
19 Term 91 is in effect, not in effect, Delta condition is  
20 balanced or excess.

21 So that if somebody is looking at this who  
22 doesn't have a lot of technical background, they could  
23 just look at it. They get it. And then the text that  
24 is currently under development, that will be more  
25 technical in nature, so that if you are a more savvy

1 water user, you could get a little more information.  
2 So, you know, basically something for everybody. That  
3 is what our goal is here.

4 So this year we issued the notice of probable  
5 curtailment. We are going to use the graphic to  
6 institute curtailment. It will reflect our official  
7 notice to parties on curtailment. So we would have to  
8 issue an official notice.

9 CHAIR FELICIA MARCUS: All right. That's  
10 technical. Now explain this graph to me. If you think  
11 this is easy to understand, I do not, so you can help me  
12 understand.

13 KATHERINE MROWKA: Certainly. So on the one  
14 side, we have the flow numbers for the Delta there. And  
15 then on the other axis, we have dates. So we are going  
16 to be doing weekly updates with this graphic. And it  
17 basically tells you the flow trends of the Delta flow.

18 We lifted our curtailment 11/26/2014, Term 91.  
19 The black dotted line is, if you cross the dotted line,  
20 you are in Term 91. And if the Delta condition is  
21 balanced, also the check box has to be balanced, and you  
22 cross the line, and then you are in Term 91.

23 So that means that the State and Federal Water  
24 Projects are releasing storm water in order to maintain  
25 the Delta in balanced condition. And at that point,

1 when the projects are releasing water, that water is not  
2 available for diversion by others. And that is why we  
3 issue our notice of curtailment at that point.

4 CHAIR FELICIA MARCUS: Am I the only one that  
5 doesn't think that is obvious? It is not obvious to me  
6 at all. So tell me what the blue line really means.

7 KATHERINE MROWKA: So that is the flow. We had  
8 the big rainstorms. They came in February 11th. So at  
9 that point, there was a lot of quell in the Delta. We  
10 didn't have a problem with respect to whether reservoirs  
11 had to release water to maintain conditions. So  
12 basically the --

13 CHAIR FELICIA MARCUS: You guys can read them  
14 but regular people can't. So is it just me or is it  
15 just other people who are looking at this? It is not  
16 obvious to a layperson, including a water rights user  
17 who is not one of the big expert water rights users.  
18 So give it a try, Barb.

19 BARB \*: I can only see your forehead from here  
20 so -- I could stand up but it just feels a little odd.

21 What Kathy alluded to earlier was, there will be  
22 text with a particular chart that will lay it out. It  
23 is not meant to be, in and of itself, an entire snapshot  
24 that will be easily seen.

25 Because, as you know, the Term 91 does have

1 bells and whistles and it is an elaborate equation that  
2 has worked to make these charts. So the text that Kathy  
3 referred to will come with the Term 91 curtailment graph  
4 so that people will be able to understand how it is  
5 worked through.

6 CHAIR FELICIA MARCUS: If I'm going to look at  
7 this, and we are talking about natural Delta flow, how  
8 do you see when they are releasing water? Will that  
9 look different?

10 BARB: When all the conditions of Term 91 are  
11 met, that is when the blue line goes up and crosses the  
12 black line -- and so what it will explain is the  
13 equations that are used to understand that.

14 But what it is meant to be a visual for is as  
15 the blue line approaches, as you can see, unless we got  
16 the storms that came in very recently, the blue line  
17 would be approaching the black. And it would give  
18 people advance notice, then, to know when curtailment  
19 might be happening, if no more storms are coming in.

20 And so, we are just trying to give people a  
21 better planning tool, so that they have the ability to  
22 know when it is approaching and aren't surprised when  
23 they receive a letter in the mail from us.

24 BOARD MEMBER DORENE D'AMAMO: I understand from  
25 conversations that I had with the Water Master staff --

<http://www.yuba.law.net/ncdhp>

1 this is not recent, probably about a year ago -- that a  
2 lot of people that are subject to Term 91 frequently go  
3 online to track things.

4 So this is a new chart? What have they been  
5 using in the past?

6 KATHERINE MROWKA: Okay. So what is available  
7 online, the projects put out graphical information. So  
8 you have to really know where it is found on their  
9 website and you have to be able to read the text, the  
10 graphics. It is not that -- I'm sorry. It is an Excel  
11 spreadsheet. You can read the Excel spreadsheet at any  
12 time and know what is going on from those numbers.

13 We haven't seen a graphical representation like  
14 this previously. So we have always tried to maintain  
15 the website -- The Water Master has been doing that the  
16 last year and a half or so -- to provide ongoing  
17 information to the public, but this is a similar tool.

18 BOARD MEMBER DORENE D'AMANO: So when they get  
19 close to that dashed line, they know something is coming  
20 their way.

21 KATHERINE MROWKA: Right.

22 BOARD MEMBER DORENE D'AMONO: Could you provide  
23 links to those other sites that they already probably  
24 know about?

25 KATHERINE MROWKA: Yeah, we can do that. What

1 we are trying to do with the project is we are trying  
2 to determine -- and if is a question of, you know,  
3 computer system, securities and things like that, I  
4 couldn't get a direct feed from the projects to update  
5 the graphics.

6 So we are working on some additional bells and  
7 whistles right now, as soon as we can determine about  
8 computer security issues. So we are hoping to have even  
9 more.

10 BOARD MEMBER DORENE D'AMANO: I'm just saying,  
11 you know, that way, they can see that there is  
12 discussions going on with the entities that produce the  
13 information that they have been relying on in the past.

14 KATHERINE MROWKA: Absolutely. I think that is  
15 a great idea. So, absolutely.

16 CHAIR FELICIA MARCUS: Great. If you want to  
17 use me as a guinea pig for that task, I would volunteer.

18 KATHERINE MROWKA: Thank you.

19 CHAIR FELICIA MARCUS: Other questions? Thanks  
20 very much.

21 (Whereupon, end of transcribed portion.)

22 --oOo--

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REPORTER'S CERTIFICATE

State of California     )  
                                  ) ss.  
County of Sacramento    )

I certify that the statements in the foregoing hearing were transcribed in the within-entitled cause by audio; that said hearing was taken at the time and place therein named; that the testimony of said witnesses was reported by me, a duly Certified Shorthand Reporter of the State of California authorized to administer oaths and affirmations, and said testimony was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for either or any of the parties to said hearing, nor in any way interested in the outcome of the cause named in said hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this 28th day of August, 2015.

\_\_\_\_\_  
KATHRYN DAVIS  
Certified Shorthand Reporter  
Certificate No. 3808

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**BBID  
EXHIBIT 314**

STATE WATER RESOURCES CONTROL BOARD

BOARD MEETING/HEARING

(Portion)

MARCH 17, 2015

Coastal Hearing Room - Second Floor  
1001 I Street  
Sacramento, California 95814

scribed By: Diane F. Fattig, CSR No. 3692

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BBID Exh. 314

STATE WATER RESOURCES CONTROL BOARD

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(Portion)

MARCH 17, 2015

Coastal Hearing Room - Second Floor  
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Transcribed By: Diane F. Fattig, CSR No. 3692

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STATE WATER RESOURCES CONTROL BOARD

BOARD MEMBERS

- Chair Felicia Marcus
- Vice-Chair Frances Spivy-Weber
- Board Member Tam M. Doduc
- Board Member Steven Moore
- Board Member Dorene D'Amamo

1 PORTION OF TRANSCRIPT OF PROCEEDINGS

2 (File 9, 2:00 until end)

3 (File 10, entire file)

4 --o0o--

5 CHAIR FELICIA MARCUS: We're reconvened at 5:20.

6 Mr. Howard, are you ready for item number nine?

7 BOARD MEMBER DORENE D'AMANO: Let's call for the  
8 vote.

9 CHAIR FELICIA MARCUS: I was trying to see who was  
10 just going to step up and -- maybe I should have made it a  
11 longer coffee break, but we need to get going.

12 Item number nine.

13 ANDREW TAURIAINEN: Good evening --

14 CHAIR FELICIA MARCUS: Good evening.

15 ANDREW TAURIAINEN: -- Chair Marcus and members of  
16 the Board. I'm Andrew Tauriainen, attorney with the  
17 Office of Enforcement.

18 Due to an unfortunate and also a bit convoluted  
19 series of events I'm kicking off this staff presentation.  
20 Mr. O'Hagan's voice is gone due to an illness so we'll be  
21 -- Brian Coats and I will be tag teaming on the  
22 presentation.

23 CHAIR FELICIA MARCUS: And you can say all the  
24 things you always wanted to say when Jon was speaking  
25 before.

1           ANDREW TAURIAINEN: His voice isn't all the way  
2 gone. Right. But -- so --

3           BOARD MEMBER STEVEN MOORE: And Jon can use sign  
4 language like -- yeah, that kind of thing.

5           ANDREW TAURIAINEN: This slide I won't linger too  
6 much on just because it really gives the headings of all  
7 the subsequent slides. But this is the outline of our  
8 presentation.

9           Now I'll turn it over to Brian.

10          BRIAN COATS: Okay. These first four slides are  
11 somewhat redundant based on the information that you have  
12 all seen earlier today from the presentations by the DWR,  
13 USBR and other agencies. So I'll go through them really  
14 quick.

15          On the first slide here we're indicating that these  
16 are two pictorial representations of the level of drought,  
17 the one on the left being from 2014 in March and the one  
18 on the right being from 2015. The darker the color, the  
19 more severe the drought.

20          And, as you can see, we're in much worse shape this  
21 year than we were last year with the exception of the  
22 North Coast. Every other area seems to be pretty much a  
23 darker shade.

24          And this is just a little background information as  
25 the -- as to the continuing need for the emergency. Due

1 to insufficient rainfall being able to end the state's  
2 historic drought, Governor Brown signed an executive order  
3 on December 22, 2014, extending the California  
4 Environmental Quality Act waiver to May 31st of 2016,  
5 which consequently extended the Board's authority to adopt  
6 emergency regulations.

7 To mitigate the effects of the drought and allocate  
8 the limited water resources, State Water Board needs an  
9 effective method of acquiring information to address water  
10 allocation during curtailment, responding to complaints  
11 and enforcing against unauthorized diversions.

12 Due to time commitments required pursuing these  
13 changes in our normal rule-making process and a limited  
14 window for the current water year, the need for emergency  
15 relations is present.

16 And here you can notice that there's two graphs.  
17 One is on the Sacramento eight-station precipitation  
18 index, and the one on the right is the San Joaquin  
19 five-station precipitation index indicating as of  
20 yesterday on March 16 we currently stand at 31.1 inches  
21 for the Sacramento eight-station area and then 13.5 for  
22 the one on the right.

23 Okay. And -- turn it back on. Okay. All right.

24 And this is a -- it's still doing that to me. So  
25 this is just a little bit of background information as

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1 well, as of -- I don't know. This is a couple days ago.  
2 We're currently standing at 17 percent of normal for date  
3 -- is it working? Okay.

4 And then there's some background information there  
5 for the Sacramento Watershed Supply Forecast and the San  
6 Joaquin River Watershed Supply Forecast you can visit.  
7 These are the supply forecasts for different levels of  
8 exceedence and as well as a general summary provided by  
9 Bulletin 120 at the following address.

10 Okay. Okay. So for the 2014 curtailment effort,  
11 our goals consisted of improving the enforcement process  
12 with better information, namely refined reported demand,  
13 and noting which curtailed post-1914 rights could claim an  
14 alternate basis of right.

15 Secondly, providing a level of transparency in our  
16 analysis to the public. Through this increased level of  
17 transparency gaining stakeholder buy-in of our analysis  
18 through watershed meetings and providing our analysis  
19 dataset willingly.

20 And, lastly, providing the public with frequent  
21 updates to the curtailment effort and ensuring the  
22 effort's effectiveness by enforcing against any party  
23 failing to respond to a Board order and/or notice.

24 During the 2014 curtailment effort, division staff  
25 hosted watershed stakeholder meetings to improve data

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1 quality and discuss project operations. Once curtailment  
2 notices were issued, we later hosted meetings to discuss a  
3 method of lifting curtailment in response to short-term  
4 rainfall events. That method of implementing an e-mail  
5 notification system was very effective at notifying  
6 curtailed parties of a temporary lift and later a  
7 permanent lift of of the 2014 curtailments due to  
8 short-term rainfall events.

9 Division staff have also posted our 2015 demand data  
10 set on our website as of February, which uses a four-year  
11 average demand versus the prior year's curtailment's  
12 single year. By posting the demand data set well in  
13 advance of any potential curtailments, division staff have  
14 contributed to our goal of increased transparency.

15 Currently division staff are in the process of  
16 preparing to host another stakeholder meeting, initially  
17 for the San Joaquin River Watershed, to discuss potential  
18 curtailment.

19 Division staff are also in the process of  
20 downloading and analyzing almost 1,000 responses to the  
21 most recent Informational Order for the Sacramento,  
22 San Joaquin and Delta statements.

23 As you know, over 9,000 curtailment notices were  
24 issued in 2014. While the 2014 emergency regulations  
25 provided the means to issue orders after the notices had

1 gone out, division staff did not pursue this enforceable  
2 route due to limited resources already deployed for  
3 curtailment inspections.

4 For the watersheds not curtailed but considered in  
5 our spring analysis, local voluntary solutions such as  
6 those in the Tulare Lake Basin and also lack of supporting  
7 information for the Salinas River Watershed were found not  
8 to meet the need to go about the order route.

9 Lastly, since the 2014 emergency regulations were  
10 limited to post-1914 rights, there was no avenue to issue  
11 an enforceable curtailment order against a senior right.

12 Of the parties that returned the curtailment  
13 certification form, some of the responders claimed a  
14 senior right as an alternate source. Division staff  
15 looked at a 325 inspection sample size out of the 950  
16 conducted and found 54 claimed a senior right. Of those  
17 54, 20, or about 37 percent, did not have a statement  
18 filed with the division.

19 For these 20 parties, if 2014 was the first year of  
20 use under their senior right, they are required to file an  
21 initial statement by July 1, 2015, which currently  
22 restricts enforcement of the statement filing law until  
23 the summer. Had curtailment orders been issued in  
24 addition to the notices for post-1994 water rights, the  
25 result would likely have been the same.

1           And this is just the most recent update of the  
2 curtailment certification form response table. Hasn't  
3 been an update for the last months, but just indicates the  
4 number that have been curtailed, the number that have been  
5 returned, the percent at face value, and so forth.

6           CHAIR FELICIA MARCUS: Can you go back? The percent  
7 returned by face value number is obviously really  
8 important.

9           BRIAN COATS: Right.

10          CHAIR FELICIA MARCUS: The percentage of forms that  
11 are returned, though, are crazy low.

12          BRIAN COATS: Yeah. That column is a little  
13 interesting. That's the percent forms that were returned  
14 and the amount that was curtailed by face value. So of  
15 the amount -- of the forms that were returned.

16          So of the 40 that were returned, let's say, for the  
17 Sacramento Watershed, the 40 percent there, how much of  
18 that was actually curtailed by face value, meaning they  
19 didn't claim an alternate right.

20          CHAIR FELICIA MARCUS: Oh, how much of the 40?  
21 That's not how much of the --

22          BRIAN COATS: Yeah. So that's 7.3 percent.

23          So percent forms returned and diversion curtailed by  
24 face value. So of the 40 percent that were returned, that  
25 represents 7.3 percent of the actual face value that was

1 actually curtailed, meaning they actually stopped and they  
2 didn't claim an alternate basis of right.

3         So some of those that were claiming a senior right  
4 since the post-1914 right was curtailed. So in that  
5 event, yes, their post-1914 right was curtailed but the  
6 actual amount diverted is -- they're still diverting it,  
7 but they're doing it under a senior right.

8         CHAIR FELICIA MARCUS: But wait. That's just a  
9 percent from the ones that returned the form.

10         BRIAN COATS: Yes.

11         CHAIR FELICIA MARCUS: What about people that didn't  
12 return the form?

13         BRIAN COATS: We don't have that information right  
14 there. We can compile it, I'm sure. Yes.

15         CHAIR FELICIA MARCUS: Well, it's just apropos of  
16 the enforcement conversation we keep having.

17         BRIAN COATS: Yeah, there's always been a lot of  
18 questions on that last column. It's kind of interesting  
19 but, you know. Okay.

20         Okay. And late last year division staff issued 23  
21 Informational Orders to parties downstream of Friant Dam  
22 as a result of a complaint filed in May of 2014.

23         Enforcement action has been taken for failure to  
24 respond, with additional actions for failure to respond,  
25 and threatened and/or unauthorized diversions are pending.

1 Of the Informational Order recently issued in  
2 February 2005 to the top 90 percent of Delta statement  
3 holders and the remaining top 90 percent of the Sacramento  
4 and San Joaquin River statement holders, we have received  
5 as of a couple days ago, over a 94 percent response rate  
6 with the preliminary results showing in the following  
7 graphs.

8 CHAIR FELICIA MARCUS: Now, that's a number.

9 BRIAN COATS: That's pretty good.

10 CHAIR FELICIA MARCUS: I like it.

11 BRIAN COATS: I like it. Okay. So this -- again,  
12 on the -- this is the actual amount of water that we were  
13 using. On the left there, the brown or red, whatever, if  
14 you're color-blind or not. So that's the 2010 to 2013  
15 four-year average demand we were using for curtailment  
16 analysis up to the Informational Order.

17 And so you can see there there's 5.2 million  
18 acre-feet or fifty two hundred fifty four thousand  
19 acre-feet that we had planned on being consumed for the  
20 Sacramento, San Joaquin and Delta statement holders.

21 After compiling the responses to the web form from  
22 the informational order, we noted -- we noticed a  
23 reduction for 2014 reported diversions of about 23 percent  
24 down to about 4,031 -- or 4 million acre-feet. So that's  
25 already a 23 percent reduction in demand just from the

1 Informational Order results we compiled.

2 CHAIR FELICIA MARCUS: Not a reduction in demand.  
3 It means it's trued up the numbers we would be relying on  
4 versus our estimate.

5 BRIAN COATS: Right. So in our --

6 CHAIR FELICIA MARCUS: That's an important reason to  
7 have the information.

8 BRIAN COATS: Exactly. That's the reason why --  
9 that's the benefit of the Informational Order is prior to  
10 those results coming in from the Informational Order, we  
11 would have utilized the 5.2 million acre-feet number for  
12 demand, which would have unfortunately caused us likely to  
13 curtail people that didn't need to be because the 2014  
14 demand is showing a lesser number.

15 And then the 2015 in green is the projected  
16 diversions. So it's a little bit less. And so that's the  
17 April through September summary.

18 And if you go to the next graph here, and this is  
19 the monthly distribution. Because, again, when we  
20 requested that information from the statement holders, it  
21 was by month, and so we graphed this to show that as well.

22 So the top curve there representing the four-year  
23 average demand we were initially using. The blue curve  
24 representing the adjusted 2014, and then the green what  
25 they plan on doing this year for demand. And so that's

1 going to help everyone because we're not going to need to  
2 curtail down to a certain level or curtail at an earlier  
3 date in the absence of that.

4           Yeah. And that's -- another issue there is we --  
5 that 94 percent reporting as of March 12, but most of that  
6 data was due on March 6. So we've done about the last  
7 week and a half of compiling that.

8           BOARD MEMBER STEVEN MOORE: And roughly on face  
9 value, so 94 percent of the parties?

10           BRIAN COATS: Yeah, it's 94 percent of the statement  
11 holders. So we sent that out to 1,061 statement holders.  
12 And so 94 percent response rate, and so we're only  
13 tallying up the 94 percent that responded in comparison to  
14 the four-year average demands.

15           BOARD MEMBER STEVEN MOORE: Okay. So --

16           BRIAN COATS: I'm sorry. Go ahead.

17           BOARD MEMBER DORENE D'AMANO: This shows a peak of  
18 decline in June and July. Doesn't that seem a very odd  
19 pattern, especially if it's principally irrigation water?

20           CHAIR FELICIA MARCUS: Yeah.

21           BRIAN COATS: Some of that might include the  
22 storages.

23           And so, again, this is just the rough summation of  
24 the submitted data. There's additional comments that we  
25 haven't had time to actually compile yet because it's only

1 been less than two weeks. But this is just the initial  
2 results.

3 BOARD MEMBER DORENE D'AMANO: And I guess --- it was  
4 my understanding that last year in 2014 crops came in  
5 earlier because it was so hot, and so you might have had a  
6 decline because they were just harvesting rather than  
7 watering.

8 Well, not in May, but when you get out to July.

9 BOARD MEMBER STEVEN MOORE: I think historically the  
10 storage units sounds correct. Thank you.

11 BRIAN COATS: Okay. At this point I'll hand the  
12 presentation over to Andrew.

13 ANDREW TAURIAINEN: Thank you. I'm going to get  
14 into the nuts and bolts of the proposed emergency  
15 regulation. First I want to just mention briefly what the  
16 existing 879(c) does, the one adopted last July.

17 879(c), the current, allows informational orders  
18 only against pre-1914 and riparian claimants and only in  
19 two limited conditions. One is whether -- when there's a  
20 complaint received alleging an interference with a water  
21 right by that type of claimant or, two, when the division  
22 receives information alleging unlawful diversion of stored  
23 water. So it's a very limited tool for gathering this  
24 type of information.

25 The proposed emergency regulation expands this

1 authority. It makes it a more useful tool for the  
2 purposes that we're proposing it for. Let me talk about  
3 what it is.

4 It's an enforceable tool to investigate complaints  
5 alleging interference with a water right by a water right  
6 holder, diverter or user. And in that sentence -- and  
7 this is the way it reads in the -- in the resolution --  
8 oh, and also you've probably seen, but the first page of  
9 the digest has a red-lined version or strike-out bolt  
10 underlined, and strike-out version comparing the proposal  
11 to last year's because the changes are fairly significant.

12 But in the first sentence in the first bullet point,  
13 the interferor is the water right holder, diverter or  
14 user. The complaints don't have to come from those  
15 parties.

16 So also, in circumstances where parties claim  
17 previously unasserted senior rights in response to an  
18 investigation or curtailment, which we did see last summer  
19 and last fall during the inspections on the curtailment  
20 notices.

21 Also in response to parties claiming unverified and  
22 previously unnoticed transfers or contract purchases.  
23 What we mean there is when a party claims instead of a  
24 senior right they say I've purchased or I've received a  
25 transfer from somebody claiming a senior right. And this

1 would allow us to verify the underlying status of the  
2 right.

3           And then finally, in circumstances where there are  
4 threats of waste or actual waste, unreasonable use,  
5 unreasonable method of diversion, unlawful diversion of  
6 water by any water right holder, diverter or user.

7           So in any of those circumstances those -- that last  
8 slide was the triggering conditions. If any of those  
9 conditions are met then the Deputy Director may issue an  
10 order requiring information regarding claim of right,  
11 property patent date, date of initial appropriation, and  
12 diversions made or anticipated during the current year.

13           Those are all more or less in the current version of  
14 879(c). The last two bullets points, compliance with  
15 transfer law if the diversion is not subject to approval  
16 of Board or Department of Water Resources. Again, that's  
17 a paraphrase of what's actually in the section, but the  
18 intent there is to allow us to gather information  
19 regarding the right underlying any approval -- or any  
20 transfer or contract purchase if we didn't already know  
21 about it.

22           And then finally, any other information relevant to  
23 authenticating the right or forecasting the use and  
24 supplies in the current drought year.

25           So why do we need this tool? This allows the

1 division to focus information gathering into really two  
2 categories. The first is investigations and enforcement  
3 in response to complaints, curtailment notices and  
4 allegations of waste and unreasonable use or unreasonable  
5 method of diversion. And then also, as Brian has noted  
6 and shown, to address curtailment decisions and to use the  
7 information gathered to help refine the curtailment  
8 decisions.

9 An important distinction is that the proposed  
10 regulation does apply to post-'14 water rights as opposed  
11 to just pre-'14s and riparians under the current version.

12 And then finally, that we can and almost certainly  
13 will require reporting on water use and compliance with  
14 any curtailment notice if there's an Informational Order  
15 issued in response to a curtailment notice or a complaint  
16 that involves a curtailment notice.

17 This kind of regulation, this kind of information  
18 tool, allows us to get better information faster. It is  
19 important to note that as a regulation adopted under the  
20 drought emergency provisions of the water code it becomes  
21 immediately enforceable. That is, a party who doesn't  
22 respond or who wholly inadequately responds could  
23 potentially be subject to enforcement immediately.  
24 There's a \$500 per day provision allowing going directly  
25 to administrative civil liability for that kind of

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1 violation.

2 But the penalties -- or enforcement can also take  
3 place under the sort of standard enforcement provisions of  
4 the water code. That is, start with a cease and desist  
5 order and then go into ACLs, administrative civil  
6 liabilities, for violations of the cease and desist order,  
7 or an administrative civil liability for unauthorized  
8 diversion.

9 These -- the orders themselves won't necessarily  
10 cause these kinds of enforcement actions, but they will  
11 help bolster those cases.

12 And finally, better information aids enforcement,  
13 helps the Board to more quickly and accurately refine  
14 curtailments.

15 A couple slides about the fiscal impact analysis.  
16 This is Appendix 10 of the regulatory digest.

17 As you're aware, the analysis is required by the  
18 Office of Administrative Law to examine the effect on  
19 state and local government, federal funding of state  
20 programs. And the analysis does not require a broader  
21 economic impact analysis. It's just impacts on public  
22 agencies.

23 So here the government agencies we've identified as  
24 being potentially affected are public, agricultural and  
25 municipal water agencies and state and local governments.

1           The cost to the -- to water agencies associated with  
2 the new certification form: Again, we were anticipating  
3 that the type of form that was used under the recent  
4 Informational Order, the one that was issued in February,  
5 would apply to any new Informational Orders issued under  
6 the new -- the new proposed regulation.

7           And that form is essentially -- it's a web-based  
8 form that you fill out, and then in some cases where there  
9 needs to be further justification of the basis of the  
10 water right claimed, that information is e-mailed in. So  
11 we've estimated the time we -- we think it would take for  
12 public agencies to comply with this form. There are 2,483  
13 diversions owned or controlled by public agencies in our  
14 records. Of those, 2,058 are post-'14 water rights. So  
15 they're permits or licenses. In those cases those  
16 agencies would not have to submit the backup information  
17 to support their claim of right. That's already on file.

18           So for them it would take, we estimate  
19 conservatively, about an hour to gather their diversion  
20 data because that's information they should be collecting  
21 along the way anyway, compile it and then submit it.

22           For riparians and pre-'14s, there are 425 riparians  
23 and pre-'14 claims controlled or owned by state and local  
24 governments. There they have the one hour to compile  
25 their diversion data and submit it on the form, but they

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1 also need to gather the underlying supporting information.

2 We've estimated that, you know, conservatively -- or  
3 roughly estimated that about half of the agencies will  
4 have that information somewhat easily obtainable, meaning  
5 they can obtain it within three to five hours of staff  
6 time. In other cases it may take them a lot longer, so  
7 the other half would be up to 24 hours of staff time to  
8 gather the information.

9 We averaged that out to 15 and a half hours total  
10 compliance time for those 425 diversions.

11 Multiply all of the hours that we -- it would take  
12 for each of these diversions by our estimate of \$65 an  
13 hour for a staff engineer. It's the same estimate used in  
14 last year's fiscal analysis for the previous version of  
15 this emergency regulation. And the total fiscal impact of  
16 the cost state wide -- and this is important to note.  
17 This would assume that every state agency's diversion  
18 receives an Information Order, which I think is a very,  
19 very conservative estimate, is \$561,958.

20 The curtailments and related costs were not affected  
21 by these Information Orders, and in our examination  
22 there's no effect on state or local government or on  
23 federal funding of state programs.

24 There's one -- we didn't do a change order for this.  
25 There's one small typo that occurred in between bullet --

1 well, it occurred in between the agenda notice that went  
2 out about ten days ago and the digest that was posted  
3 about four or five days ago. One letter of one word of  
4 Subsection (c)(1)(C) was changed. And you can see at the  
5 very end the word "has" was changed to "had."

6 So that's the correction. Again, we don't have a  
7 change sheet, but we're going to propose that -- we're  
8 going to recommend that the Board adopt the resolution as  
9 presented with this correction.

10 The next steps -- this is repetitive of the present  
11 staff presentation from the prior item. This is just the  
12 OAL process. We are hopeful that the regulation can go  
13 into effect in early April. The current version of 879(c)  
14 expires on April 14. It -- it goes through April 13. And  
15 then it would last for 270 days.

16 That last point about when the regulation expires is  
17 relevant because a number of the commenters made comments  
18 about the status of Section 879(c). The comment deadline  
19 was extended until yesterday at noon.

20 We received about seven comments. We did list them,  
21 but I haven't been able to, you know, tabulate what the  
22 comments are into a slide. I can briefly note what the  
23 main comments are, the ones that are shared by several  
24 commenters.

25 The first is that there -- that the 30-day time

1 limit might not be enough when it's necessary to gather  
2 information to support the basis of a right.

3         We found this to be a common theme of the responders  
4 to the February Information Order. And so the proposed  
5 regulation is (C)(3), allows the Deputy Director to grant  
6 additional time beyond the 30 days upon a showing of good  
7 cause and if there's substantial compliance with the rest  
8 of the regulation requirements. Meaning if they can  
9 submit what they have. And that especially means the  
10 diversion data which should already be present. Most  
11 agencies should already have that. Or most diverters.

12         The second comment is that Section 879(c) actually  
13 expired on February 28. A number of commenters -- local  
14 agencies of the North Delta, Restore the Delta,  
15 San Joaquin Tributaries Authority, and Spaletta Law -- all  
16 made this comment. There may be others that I'm  
17 forgetting.

18         Oh, pardon me. It's Merum Crabtree's comments. The  
19 Banta-Carbona.

20         The -- 879(c) was adopted in an emergency regulation  
21 that was approved by OAL on July 16th of last year, so it  
22 doesn't expire until April 14. April 13 is the last date  
23 it's valid

24         CHAIR FELICIA MARCUS: They're counting from the  
25 date of adoption rather than OAL?

1           ANDREW TAURIAINEN: No. They're counting from the  
2 date that 879 initially was adopted under last year's  
3 version of the fisheries regulation, and that did expire  
4 on February 28. But 879(c) was added in July with the  
5 state-wide curtailment order. Right.

6           DAVID ROSE: Yeah, briefly. The initial package  
7 that you -- well, the Mill, Deer and Antelope Creek  
8 package that the Board just heard about was initially  
9 adopted last year -- I believe May 21 -- and that included  
10 a number of sections in brand new Article 24. One of  
11 those was Section 879. It only included subdivisions (a)  
12 and (b), which were reporting requirements for anybody who  
13 received a curtailment order.

14           This item, this state-wide curtailment and  
15 Informational Order item, was presented at the Board and  
16 made its way around about a month later. And 879(c) was  
17 added at that time. So while it's true that --

18           CHAIR FELICIA MARCUS: We didn't do everything on  
19 the same day last year.

20           DAVID ROSE: No, we did not. 879(a) and (b) have in  
21 fact expired except that the Board readopted them an hour  
22 ago. They haven't gone to OAL yet, so they're not on the  
23 books. But 879(c) is not floating out there in the ether.  
24 It does still exist and will until April 14, when it would  
25 expire after 270 days.

1           ANDREW TAURIAINEN: And then the last sort of  
2 general category of comments -- there's a number of  
3 comments that I'm going to skip. I see that most of the  
4 commenters are here and they will probably bring up some  
5 of the specific ones.

6           But the comment that I think was most common is that  
7 the regulations should define the term "complaint" as it's  
8 used in Section (c)(1)(a). And again, the language there  
9 is upon -- it's a triggering condition for issuing these  
10 orders upon receipt of a complaint alleging interference  
11 with a water right by a water right holder, diverter or  
12 user.

13           The term "complaint" has its commonly understood  
14 definition, and the Board has always used it that way.  
15 There is no specific definition of "complaint" anywhere.

16           There is a section in the Code of Regulations  
17 addressing complaints alleging certain types of harm  
18 caused by violations of permit and term -- permit and  
19 license terms or conditions. But that's -- that's really  
20 more of a form-in-process requirement.

21           Broadly speaking, there's always been a complaints  
22 unit in the Division of Water Rights, and there still are  
23 staff that receive complaints. There's a direct phone  
24 line for phoning in verbal complaints and there's no  
25 format requirement there.

1 We get complaints from a number of other vectors,  
2 notably the Cal EPA website. And, again, that's just a  
3 simple web form that alleges complaints.

4 CHAIR FELICIA MARCUS: Isn't that what some folks  
5 wanted? It's almost like a standing argument? They  
6 wanted the complaints to only be from another water rights  
7 holder as opposed to anyone else?

8 ANDREW TAURIAINEN: Yeah, that's one of the other  
9 comments, that standing or -- standing as a water right  
10 holder or standing as a water right holder who's been  
11 harmed. I think injury and standing are sort of  
12 conflated. And that's never been a condition that the  
13 division has required for investigating complaints. And I  
14 think it's evident in the fact that the division  
15 investigates complaints alleging public trust harm, waste  
16 and unreasonable use allegations, and complaints that may  
17 have no definitive source at the time the complaint is  
18 made. My stream went dry. I don't know what caused it,  
19 but maybe somebody upstream is doing that. Is causing it.

20 But, you know, the -- the complainant at the time  
21 can't point to specific injury caused by a specific  
22 diverter necessarily.

23 So -- and then related -- I'll go a little further  
24 in this concept of complaint because a couple of the  
25 commenters have proposed language to the effect that staff

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1 -- that the division should make a determination that any  
2 complaints that are issued are reasonable and  
3 substantiated.

4 Another one of the proposed languages is that the  
5 complaints meet a minimum standard of evidence to support  
6 a claim of unlawful diversion.

7 Staff does these kinds of examinations for every  
8 complaint that's received. If a complaint comes in and  
9 has no basis and no substantiation through staff's own  
10 investigation, or based on what's received, then the  
11 complaint goes no further. But if there is some basis for  
12 it, complaints -- investigations can occur for a very long  
13 time. I'm one of the attorneys now who helps shepherd  
14 those complaints through their -- and those investigations  
15 through their process.

16 So I would say those proposed changes are  
17 unnecessary.

18 We've hit most of the main comments -- I don't --  
19 unless the Board would like, I don't necessarily want to  
20 list right now all the specific comments, because I think  
21 we're about to hear them relating to, you know, the  
22 concept of water rights in the Delta or water availability  
23 in the Delta for a couple reasons. One, we're about to  
24 hear them and, two, a lot of the issues are raised in  
25 petitions for reconsideration of the Delta -- or of the

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1 statewide San Joaquin, Sacramento and Delta Informational  
2 Order that was issued in February. It's Order WR  
3 2015-2-DWR. And I don't necessarily want to go too deeply  
4 into any of those matters that might be subject to the  
5 petition.

6 At this point that concludes the staff presentation.  
7 And we'll take questions now.

8 CHAIR FELICIA MARCUS: Questions now?

9 All right. Well, let's move on to the comments now.  
10 Thank you very much.

11 First we have Jon Rubin, San Luis and Delta-Mendota  
12 Water Authority. I'd thought you'd be last and you could  
13 open and close. Someone thought you wanted to do that,  
14 but here you are on the top of the pile. What can I do?

15 JON RUBIN: After your reaction to my comments this  
16 morning, I'm happy to be before you.

17 CHAIR FELICIA MARCUS: He's followed by Tim  
18 Stroshane.

19 JON RUBIN: Good afternoon, Madam Chair, members of  
20 the Board. Jon Rubin, general counsel for the San Luis  
21 and Delta-Mendota Water Authority, and I do have just a  
22 brief comment for you.

23 The water authority believes it's important that the  
24 State Water Board be prepared to exercise mechanisms or a  
25 mechanism to stop the diversions that are causing a

1 trespass on the waters of this state.

2           And because of that, I do want to highlight what's  
3 not before you today. Last year when you were faced with  
4 this question about action to stop it -- diversions that  
5 are illegal, there was discussion about the mechanism that  
6 you currently have or the mechanisms that you currently  
7 have that are set forth in the water code. And there was  
8 also a discussion about supplementing that.

9           And last year staff had proposed a regulation,  
10 emergency regulation, and through discussions with the  
11 Board ultimately the Board adopted something, but it was  
12 different than the staff's proposal. I believe it was  
13 codified under Section 875.

14           That regulation or something similar to that  
15 regulation is not before you.

16           I stand today not to recommend a particular course  
17 of action, but just to highlight how important it is,  
18 given how dry conditions are, that you do have a mechanism  
19 that would allow you to act very quickly to stop illegal  
20 diversions.

21           From my understanding of the Water Code, if you do  
22 not adopt an emergency regulation, you really only have  
23 one mechanism available to you, and that's under Water  
24 Code Section 1052, and specifically it's a referral to the  
25 attorney general.

1           And so with that, I have nothing further but, again,  
2 just want to stress the importance of being able -- of you  
3 being able to stop illegal diversions if they do occur.

4           CHAIR FELICIA MARCUS: Thank you. I agree. We're  
5 not foregoing an ability to come back later, but I think  
6 getting information first and foremost to deal with this  
7 is going to put us in a better position to decide what to  
8 do.

9           But good point.

10          JON RUBIN: Thank you.

11          CHAIR FELICIA MARCUS: Tim, followed by Kyle Jones  
12 from Sierra Club.

13          How do you say your last name again? I say it wrong  
14 every time.

15          TIM STROSHANE: Oh, it's just -- there's no accent  
16 to it. It's --

17          CHAIR FELICIA MARCUS: "Stro-shane."

18          TIM STROSHANE: -- "Stro-shane." That's how I've  
19 always heard. But it sounds funny to say the other way.

20          Good evening. So we've made it to the evening  
21 already. I'm Tim Stroshane, policy analyst with Restore  
22 the Delta. Our organization submitted comments yesterday  
23 morning, and I will summarize some of them.

24          Drought emergency regulations may come and go, but  
25 much of the data that the Board collects through its

1 Information Order should be useful beyond just  
2 constructing this year's demand curves. We encourage the  
3 State Water Board to address the paper water issue for all  
4 Central Valley water right holders, perhaps not now but in  
5 the future when there's more time perhaps.

6 And the California -- that you would address this  
7 issue for all Central Valley water right holders and the  
8 California public that cares about the state's rivers and  
9 streams and the natural heritage of the Delta.

10 Paper water is the practical reality that there are  
11 far more water rights claims to use water than there is  
12 actual water available to allocate especially, of course,  
13 during droughts.

14 Since eight of the last nine years have been below  
15 normal water years, it may be that in the era of climate  
16 change, California enters a new normal. We urge the Board  
17 to ask and hopefully answer questions like if water right  
18 holders have riparian or pre-1914 right and also post-1914  
19 rights, do they really need multiple rights?

20 There may be a basis for it. I don't know. And the  
21 Board would need to investigate that, but it's a question  
22 that I think you should be asking.

23 What is the status of claims -- the second question  
24 is what is the status of claims against which enforcement  
25 actions are applied? Are those claims to divert water

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1 extinguished permanently by Board action under emergency  
2 drought regulations or are enforcement actions merely in  
3 effect while the emergency regulations are in effect?

4         Third, what due process and equal protections must  
5 the Board apply to permanently eliminate redundant --  
6 excuse me. Redundant water rights once they are  
7 identified?

8         Another question is if the State Water Board  
9 believes it obtains meaningful information on demand and  
10 supply, could and should the Board encourage the  
11 Department of Water Resources and the Bureau of  
12 Reclamation to better plan their operations to fit that  
13 new normal better than they do now?

14         By doing so couldn't the multiple objectives of  
15 reservoir operation for water supply, temperature control  
16 and salinity and water quality control in the Delta be  
17 planned before experts -- sorry. Exports are determined?

18         I've done research into these sorts of questions,  
19 but I don't know the answers to them. I don't -- I'm not  
20 sure that you do either right now.

21         But it seems to me that answers to such questions  
22 may help reduce confusion and increase reliability of  
23 water rights found valid by the Board. By reducing  
24 confusion the Board can help reduce the claims of so many  
25 chasing so little water during California's droughts,

1 today's as well as tomorrow's.

2 Other western states have done much to accomplish  
3 something similar. Reduced water demand would benefit  
4 public trust resources, including listed species ease in  
5 the Delta, whichever ones still exist.

6 The Delta Protection Act of 1959, I'll conclude,  
7 states that it is state policy that no person, corporation  
8 or public or private agency or the state or the United  
9 States should divert from the channels of the Sacramento/  
10 San Joaquin Delta to which the users within said Delta are  
11 entitled.

12 Finally, the act also says that in determining the  
13 availability of water for export from the Delta, no water  
14 shall be exported which is necessary to meet the  
15 requirements of the act.

16 And I want to thank you for the opportunity to  
17 comment.

18 CHAIR FELICIA MARCUS: Thank you very much.

19 After Mr. Jones, Tim O'Laughlin. Or Valerie  
20 Kincaid.

21 KYLE JONES: Good evening, Chair, Board. Sierra  
22 Club of California -- Kyle Jones with Sierra Club of  
23 California, and we'd like to show strong support for this  
24 measure.

25 Information pertaining to rights that -- prior to

1 1914 and riparian rights is critical to helping us  
2 understand exactly what we're dealing with, what resources  
3 we have going forward through this drought and however  
4 long it may last and for future droughts.

5 Again, strong support for this. Thank you.

6 CHAIR FELICIA MARCUS: Thank you, Mr. Jones.

7 Valerie Kincaid, followed by Rebecca Akroyd from  
8 Westlands Water District.

9 VALERIE KINCAID: Thanks. Valerie Kincaid,  
10 San Joaquin Tributaries Authority.

11 The San Joaquin Tributaries Authority submitted  
12 comments, and I'm not going to go through those. It's  
13 late. But I do want to go through the issue of the  
14 finding of emergency and focus on that.

15 There were significant changes from the previous  
16 version to the new proposed version, and the finding of  
17 emergency doesn't explain the need for those changes and  
18 it doesn't explain why those changes are needed in an  
19 emergency context, which I think is very important.

20 And it feeds into my second point, which is that it  
21 would be very helpful from a stakeholder perspective to  
22 understand what the State Water Board and the State Water  
23 Board staff plans to do with this information. It's the  
24 number one question I get from clients all over the state  
25 is why are we submitting this? What are the next steps?

1           And unfortunately, there's not a good answer. I've  
2 talked to staff a little bit about that and have gotten  
3 somewhat vague answers. And I think that frequently feeds  
4 back into the emergency context. The State Water Board  
5 just asked and my understanding is received from the  
6 presentation today volumes of information. If it's not  
7 going to ask and receive and look at volumes of  
8 information from this now-proposed change regulation in  
9 the next couple months, it's not an emergency. You don't  
10 need it. So if you are, that's great, but it has to be  
11 part of a bigger plan.

12           And it would be really helpful for stakeholders to  
13 understand not only just for them to feel comfortable but  
14 for their due process rights if this is going to lead to  
15 an enforcement action, if there's an adjudication down the  
16 road.

17           And I understand that you might not have all of that  
18 figured out right this second, but there has to be a  
19 greater plan of why you're just collecting the  
20 information. Certainly collecting this information just  
21 to collect it and not do anything with it also probably  
22 can't be an emergency under these regs.

23           So we have the technical comments and I guess my  
24 plea maybe would be just to work with stakeholders and ask  
25 them for this information. Most of our clients, if you go

1 and ask and say hey, listen, we're unclear about the basis  
2 of your right, can you provide us this information in a  
3 nonthreatening and a nonenforcement context, they would be  
4 much more willing to do that.

5 I think unfortunately this round of emergency regs  
6 has put people a little bit on the defensive. They feel  
7 like they're having allegations thrown at them.

8 And then the second part of it is that they really  
9 don't understand what's going to happen with these  
10 allegations. So, you know, from my perspective this  
11 caused quite a bit of confusion and maybe from your  
12 perspective more panic than there needs to be since maybe  
13 you guys either have an understanding of what you would or  
14 wouldn't do and have a greater plan. But the stakeholder  
15 community doesn't understand that and hasn't been given  
16 enough information to better understand that.

17 Thanks.

18 CHAIR FELICIA MARCUS: Thanks. (Unintelligible)

19 MICHAEL LAUFFER: Well, first of all, I think the  
20 digest as well as the presentation you heard from the  
21 division staff and then also from Mr. Tauriainen this  
22 morning goes through a number of the reasons why the  
23 division may may be interested in using this information.

24 It's important to appreciate that until an order is  
25 actually issued, there hasn't been a finding, if you will,

1 as there is in the context of a specific order, that  
2 there's a basis for that specific request to the diverter.

3         However, in the context of the regulations and the  
4 types of information that the Board is interested in  
5 gleaning, some of it may be just for purposes, as  
6 Mr. Tauriainen explained, of determining whether or not  
7 there is an appropriate basis for the diversion. And that  
8 could potentially lead to a subsequent enforcement action.

9         And likewise, as you heard in the presentation  
10 earlier this evening, it is used to feed into our overall  
11 demand curve, which informs the Board's drought response.

12         I mean this is a recurring theme that you all have  
13 heard over the last year, which is the Board's inability  
14 to -- or the Board's lack of sufficient information to  
15 respond to the drought and make the determinations about  
16 whether or not curtailment needs to be turned on or off.  
17 And you see these regulations as part of an approach to  
18 ensuring that if we get to that point later this year we  
19 will have tools to issue informational orders or take  
20 other enforcement action as appropriate

21         CHAIR FELICIA MARCUS: Well, in a timely manner so  
22 that it might matter. Also in the hopes of resolving some  
23 of the long held, I would say rhetorical, badmitten  
24 matches that have gone on. I think our goal is to try and  
25 resolve issues in as timely a way we can. Some of them we

1 won't be able to resolve immediately, but the first basis  
2 would be to have the information, which we don't have at  
3 our fingertips for a variety of reasons.

4 BOARD MEMBER STEVEN MOORE: Thank you for that. I  
5 think that in some ways, you know, the comments we  
6 received -- we respect that concern. These things are  
7 happening quickly in the emergency context.

8 At the same time, I hope you can bring back to your  
9 clients and folks in the room that staff did turn around a  
10 summary analysis of the information we received in a very  
11 rapid fashion. You saw a graph in terms of the refinement  
12 of what we had to use based on 2010 statements of  
13 diversion and use versus the information we received in  
14 the last couple of weeks and how that's changed our  
15 assumptions on demand management, and that will feed into  
16 our determinations of what water is available or has to be  
17 curtailed.

18 So we hope that this gives you an example of our  
19 very firmly held goal, I believe -- I'll speak for  
20 myself -- of an orderly administration of water rights,  
21 especially during a drought emergency. And, you know,  
22 this is where we -- our system gets tested.

23 (End of file 9)

24 (File 10)

25 BOARD MEMBER STEVEN MOORE: The lessons we learned

1 from last year was that the quality of information, the  
2 timeliness of information was lacking for us to do the  
3 orderly administration.

4 That's just my take on it. I think those are valid  
5 questions and we didn't mean to communicate these type of  
6 intents. But I think it's important that we be -- that we  
7 respond in a fashion that mirrors our findings of  
8 emergency.

9 So I want to honor that comment

10 CHAIR FELICIA MARCUS: Ms. Akroyd, followed by John  
11 Herrick, South Coast Water Agency.

12 REBECCA AKROYD: Good evening. Excuse a bit of  
13 laryngitis. Rebecca Ackroyd, for Westlands Water  
14 District.

15 My comments are going to build slightly on Jon  
16 Rubin's comments that were made just a little while ago.  
17 As Jon pointed out, in July 2014 when the precursor to the  
18 present regulation was enacted, it was paired with an  
19 emergency regulation that allowed the Board to issue  
20 curtailment orders. Right now there's no similar  
21 curtailment order regulation being proposed.

22 However, as Jon also stated, there's existing  
23 authority that allows the Board to investigate and stop  
24 illegal diversions. Westlands's comments today would  
25 encourage the Board to be prepared to utilize that

1 authority, either existing authority or authority under  
2 new emergency regulations, to stop illegal diversions.

3 Separate and apart from the proposed emergency  
4 regulation regarding the Information Orders, the Board has  
5 the ability to undertake investigations to determine  
6 whether a water use is illegal. In Section 856 of the  
7 Board's regulations require the Board to investigate  
8 allegations of misuse of water.

9 And I think, going back to what was said earlier  
10 just talking about allegations, no complaint is required  
11 to investigate allegations of misuse of water.

12 Past investigations, the Board has the ability to  
13 take immediate actions to stop illegal diverters, whether  
14 the diverter claims riparian or other right. Water Code  
15 Section 275 requires the Board to take all of the  
16 proceedings or actions for executive, legislative and  
17 judicial agencies to prevent waste or unreasonable use.

18 So together the Water Board and Board -- sorry.  
19 Excuse me. The Water Code and Board regulations require  
20 the Board to both investigate and take appropriate  
21 proceedings to stop illegal diversion.

22 Although typically the Board has used the EO and  
23 administrative civil liability as the tools to accomplish  
24 this end, as Jon stated before, Section 1052 provides  
25 another even more important tool in the present drought,

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1 which is immediate referral to the attorney general to  
2 institute actions for injunctive relief.

3 That enables the Board to request the attorney  
4 general to have an action for a temporary restraining  
5 order, preliminary injunction or permanent injunction for  
6 any unauthorized diversion or use, including a violation  
7 of a Board order or decision.

8 We believe it's critically important that the Board  
9 be prepared to take immediate action to stop illegal  
10 diversions. While the Board must do so in a way that  
11 respects due process, the action must be swift. We  
12 believe taking swift action this year will put us in a  
13 better position for later this year, for next year if  
14 there's continued droughts or for future droughts.

15 If the Board does not plan on using its existing  
16 authority under Section 1052 or other provisions, then we  
17 would request that the Board consider adopting new  
18 emergency regulations that would give the Board additional  
19 authority to do so.

20 Any questions?

21 Great. Thank you.

22 CHAIR FELICIA MARCUS: All right. Mr. Herrick,  
23 followed by Mr. Nomellini from the Central Delta Water  
24 District.

25 JOHN HERRICK: Good evening, Ladies and Gentlemen,

1 Chairlady and members. John Herrick for the South Delta  
2 Water Agency. Thank you very much.

3 I won't say déjà vu all over again, but here we are  
4 in the fourth year of a drought, emergency regulations at  
5 the last minute in order to address problems, which is not  
6 the way to handle things. I think everybody would agree  
7 with that.

8 Last year we made comments -- I'll just say them  
9 briefly again -- dealing with the due process issues. You  
10 know, we all have serious concerns that an expedited,  
11 truncated process that would fine somebody for not  
12 responding within a short period of time actually turns  
13 out to substitute for an evidentiary hearing determining  
14 somebody's water rights.

15 So I don't know how the Division of Water Rights is  
16 going to make a decision that somebody is or isn't worthy  
17 of a cease and desist order or something else, you know, a  
18 in 30-day period after somebody's only had that much time  
19 to provide information. But that's the -- that's our  
20 complaint from before.

21 I'd like to join the comments of Ms. Spaletta and  
22 Ms. Zolezzi, and I want to focus on one issue and that was  
23 touched upon by staff and that deals with the -- what  
24 complaint might start an investigation.

25 The reason that's important is -- we've already gone

1 through this. There's either -- there are two issues.  
2 It's either a water right or a water availability issue  
3 for purposes of you going after them during the drought.

4 Now, for water rights, I think everybody remembers  
5 back in 2009 and before where the general consensus was to  
6 slander my clients in public and say they were all illegal  
7 diverters. And we had the legislation saying they're all  
8 illegal diverters, and appointed a watermaster to  
9 investigate only my clients, and not other people.

10 And the watermaster did three or four years'  
11 investigation and we spent -- we spent hundreds of hours  
12 and thousands of documents and hundreds of meetings -- not  
13 hundreds of meetings, lots of meetings -- and the  
14 watermaster prepared that I saw two reports or two updates  
15 that would be presented to you which said goodness, we  
16 just wasted all our time and money. It appears there are  
17 a few issues and we're pursuing those few people and it  
18 appears that everybody else has sufficient water rights.

19 So the notion that you need me to spend another  
20 thousand hours to give you more information on the Delta  
21 water right diverter seems odd at the very least. Your  
22 process has already made that initial threshold  
23 determination for purposes of pursuing somebody, I think.

24 Now, maybe you don't trust your prior watermaster.  
25 Maybe someone threw away his boxes. I don't know, but we

1 already went through that. And so I don't see you -- what  
2 the purpose is to have an expedited method by which to  
3 make me work overtime that I don't get paid for, even on  
4 St. Patrick's Day. So I have no concerns.

5         The second area deals with the supply. Now, I'm not  
6 going to get into that now, but we have the issue -- we've  
7 gone through this before -- about whether or not the Delta  
8 always has water. We think we showed you before that when  
9 you don't have releases, when you don't have stream flows,  
10 there's no water in the Delta, it slowly degrades and  
11 you're obligated to protect water salinity or quality.  
12 Excuse me.

13         All those things are, I guess, valid points of  
14 disagreement. We think it's pretty clear on our part.  
15 But that's a disagreement between the contractors, or the  
16 state and federal projects, and us. And we think it's all  
17 pretty clear.

18         So I don't know what you would do in the middle of  
19 that fight unless you're trying to fight for there being  
20 water surplus to the needs of the areas of our knowledge  
21 for the Delta. And this is the fourth year of drought.  
22 If anybody thinks there's water surplus to the needs of  
23 the North California Delta, I don't know what they're  
24 looking at. Right? We can't meet our minimum standards,  
25 so there isn't any surplus water.

1           So finding on the edges there to see if somebody can  
2 be shut down in the Delta so that, you know, four CFS is  
3 either released or not released from Shasta seems like a  
4 poor use of our time.

5           Now, again, I think that's something between the  
6 contractors, the projects, and us. I don't know what  
7 purpose or benefit you guys would have joining in that  
8 fight in that you would have to make these decisions based  
9 upon what we think was pretty clear. So I don't know.

10          Anyway, I also wanted to say really quickly the  
11 costs that you have done and the analysis for the thing is  
12 offensive, horribly wrong. The notion that somebody would  
13 -- would spend a short amount of time responding to a  
14 30-day demand or request to provide evidence of a pre-1914  
15 right is unrealistic, to say the least.

16          We have other fights going on, as you know. Some of  
17 them involve hearings scheduled here, so I'm not going to  
18 get into that. But, you know, we spent years and hundreds  
19 of thousands of dollars, and people are out there reading,  
20 you know, thousands of newspapers from 1880 through, you  
21 know, 1914, looking for certain key words.

22          The notion that it's a small cost for somebody to  
23 comply with this is incorrect. I mean it takes a long  
24 time, which again, argues against this notion that you  
25 need an emergency regulation so you can demand something

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1 in 30 days.

2 If you -- if you contact any diverter who's a single  
3 diverter, not an agency or an irrigation district, and you  
4 say show me what happened on your land in 1893 or 1914,  
5 that takes a lot of work. There isn't -- there aren't  
6 documents that say, you know, hi, got up this morning and  
7 applied water on 37 acres. There isn't that information.

8 So, you know, I don't see what the purpose of this  
9 is. The Board does need information. As you know, we've  
10 spent lots of time assisting you in gathering information.  
11 So I don't know why you need the threat against somebody  
12 to get it done.

13 I'm actually here to express my disappointment that  
14 nobody's thanked us for all the work that we did for that  
15 94 percent compliance rate. It's higher than that because  
16 a couple of -- a number of the ones that add up to the six  
17 percent were -- were statements that have been  
18 deactivated. So it wasn't a noncompliance.

19 But anyway, and with that stupid joke. You know, we  
20 think the regulation's unnecessary. We need to have a  
21 process that deals with these things on a normal basis,  
22 not at the last minute.

23 We cannot give you a complete history of a diversion  
24 upon 30-day notice. I thought I did that to a sufficient  
25 level with the last watermaster, and apparently it has no

1 effect on the Board's decisions now, so with that I oppose  
2 the regulation.

3 Thank you very much.

4 The extra time I took should come off of Dante's  
5 because of what happened last time.

6 CHAIR FELICIA MARCUS: And following Mr. Nomellini  
7 will be Terry Erlewine from the State Water Contractors.

8 DANTE JOHN NOME LLINI: Hello. I'm Dante John  
9 Nomellini, manager and co-counsel for the Central Delta  
10 Water Agency.

11 Without belaboring the point, I think your emergency  
12 regulations are an abuse of the emergency. I would just  
13 restate that for the record because that's my feeling,  
14 that we have artificially created a situation here where  
15 the projects depleted the storage, created a situation  
16 where we don't have sufficient water to meet the  
17 standards.

18 The standards have been set. The people have  
19 adopted emergency -- temporary emergency changes to let  
20 them off the hook. That's okay. The water's gone. And,  
21 like I said before, I recognize that there's not a hell of  
22 a lot to fight over at this stage.

23 Now, with regard to the emergency order, it seems to  
24 me that it's unnecessarily too broad and not defining what  
25 the delegation of the authority is to the -- your staff.

1 That any user could come in and say hey, we do an  
2 investigation and an emergency order could go out  
3 demanding information.

4 Now, we are committed in the Central Delta and the  
5 South Delta to give you 100 percent response. You know, I  
6 don't appreciate the shortness of time in the notice and  
7 the lack of discussion with your staff beforehand because  
8 we could have helped address this in a way that would make  
9 more sense.

10 However, I want to thank them for making changes in  
11 the form so we could at least have our clients find it.  
12 And there was a concerted effort, and it helped us achieve  
13 the success that we have in providing the information.

14 The other thing was we started trying to gather the  
15 database in September of last year, and we were  
16 fortunately able to get it indexed because the data is  
17 there. But how do you find it for an individual point of  
18 diversion?

19 So, and I think I said it before, I sent one of my  
20 staff over to try and find this information, whatever it  
21 is, and they stumbled into the State Lands Commission and  
22 they were willing to provide an index for the Central and  
23 South Delta.

24 I should have ordered it for the whole Delta because  
25 the database, I think, is for the whole state.

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1           Anyway, they wanted an immediate payment of \$5,000.  
2 We gave it to them and it took about -- over two months  
3 before we got an index. But it was that index that  
4 allowed us to be responsive to this short-term request.  
5 Don't think that that short term would allow somebody else  
6 that didn't have the fortune of getting the index to  
7 provide you that information.

8           I think we're okay. We've given you patents. We've  
9 given you -- that database has the certificates of  
10 purchase. It has the swamp and overflow surveys.

11           Now, what you're going to do with it -- and I  
12 cautioned everybody before -- is that we have no problem  
13 trying to give you the information, but what you're going  
14 to do with it is a different problem.

15           And that is you're going to formulate curtailment  
16 notices perhaps. And I've discouraged you from doing that  
17 because water rights are very specific to location and to  
18 the individual situation.

19           For example, the patent date in our -- in my humble  
20 opinion as a lawyer practicing in the water field, gives  
21 you the date of vesting, not necessarily the date of  
22 priority. The date of priority is when settlement took  
23 place, where you could have started water on the piece of  
24 property. That's a riparian right, and it's not  
25 quantifiable. In an adjudication you can quantify it, but

1 it doesn't have a limit except reasonable beneficial use.  
2 Okay.

3 So giving you a quantity for riparian right, no  
4 lawyer in their right mind that represented a client like  
5 that could do that short of an adjudication.

6 So some of the problems we have and you have and  
7 your staff has in reporting is trying to do something that  
8 we can't -- can't do.

9 CHAIR FELICIA MARCUS: Is that why you used the  
10 comment section?

11 DANTE JOHN NOMELLINI: Yeah. That's why we've given  
12 you an explanation. The comment section wasn't in the  
13 first round of the forms, but we submitted a standard  
14 explanation form with everything that we did in our office  
15 to you to explain that, and we talked to staff about it as  
16 well.

17 So the priority date is not the date of patent, but  
18 that establishes the vesting of the title to make that  
19 claim. So the priority date is different.

20 The pre-1914 date, some drunken miner went up on  
21 federal land and diverted water to separate the gold from  
22 the gravel diggings or whatever. That establishes a  
23 pre-1914 use of the water.

24 There's a very complicated issue as to whether  
25 there's a priority for that right versus the riparian

1 right and how it all works. I'm not sure I've got a firm  
2 grasp on that. I looked at cases, but the law is yet to  
3 be completely clarified.

4 Now, we also have filings -- post-1914 filings in  
5 the Delta. Years ago when there was turmoil around how  
6 water rights were going to be treated and this and that,  
7 many of the more sophisticated people said well, we better  
8 cover our bet, and they filed for appropriate rights with  
9 the Board.

10 So we have overlapping rights that we cannot unwrap  
11 without adjudication and determining some of these issues.  
12 And it isn't because we're just trying to be obstinate.  
13 It's a real practical problem for us.

14 Now, we are willing in the Delta, Central Delta and  
15 South Delta, to work with your staff to try and sort this  
16 out. Now, there has been double reporting because we  
17 hadn't been able to segregate it. And your staff doesn't  
18 like us to comment and say well, these are overlapping  
19 rights, you only count them once.

20 I'm going to try and do it for all of my future  
21 reports and try and get that sorted out so you don't  
22 accidentally end up with this complicated overlap of  
23 rights and a large quantity of water that is being  
24 criticized as being out there.

25 Now, water rights law created appropriations and

1 filings with you people as a hunting license to go out and  
2 try and find water. So if somebody came in and said hey,  
3 in a flood year there's water coming down the river, we  
4 want to try and get a permit to go out there and exercise  
5 our due diligence to perfect that right.

6 So there's lots of filings. The two biggest  
7 examples are the State Water Project and the Federal Water  
8 Project. They asked for an extension from you for their  
9 due diligence. We objected to it and I never heard from  
10 anyone again.

11 They still want to be out there claiming all this  
12 water that doesn't exist or isn't practical to capture.

13 So it's those real problems that I hope you people  
14 will understand. We'll try and work with your staff in  
15 good faith. But to come up with a short timeline and  
16 expect people to respond and fine them to me is bad. You  
17 know, I mean it's just not the right thing do to.

18 CHAIR FELICIA MARCUS: There's something in between  
19 open-ended multiple decades and -- (Unintelligible)

20 DANTE JOHN NOMELLINI: Yeah, I agree with you. It  
21 was your --

22 CHAIR FELICIA MARCUS: We have the authority. As  
23 you can see from what we did last year, we didn't use it  
24 to the full extent. But we have the tools we need --  
25 (Unintelligible)

1 DANTE JOHN NOMELLINI: Yeah, but to me you shouldn't  
2 be using the emergency authority to do this. But I  
3 understand what people are saying, yeah. I just think --  
4 don't think --

5 BOARD MEMBER STEVEN MOORE: 94 percent's a good  
6 number. And we saw the same thing with our partner  
7 agencies, with the water agencies last year. They would  
8 give us 66 percent response on basic information and then  
9 when we required it with these uncomfortable enforcement  
10 provisions, we got 98 percent.

11 DANTE JOHN NOMELLINI: That's okay. If you give me  
12 a gun, you know, and go out and illegally put a gun to  
13 somebody's head and say I'm going to shoot you, then you  
14 may get some compliance. But it's procedural due process  
15 that you hear people talking about and the emergency  
16 authority to get at this.

17 There's no question you can be effective with -- I'm  
18 going to call it an unlawful means. And I'm appealing to  
19 you that that's not a good way to do it.

20 Now, I didn't file the suit against you on the  
21 emergency regulation and I'm thinking of other  
22 litigations, not necessarily against you. But the state  
23 and the federal projects are saying things about the Delta  
24 and all of a sudden they now claim they don't understand  
25 it, there's water in the Delta all the time, and I've

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1 given you their admissions. If we can't win that one, I'm  
2 going to quit.

3 But anyway -- you're hopeful, I realize that. That  
4 that's the case. But don't forget there are appellate  
5 courts, supreme courts and all of this and that. So you  
6 may not -- you may not prevail in that regard.

7 But I would urge you not to get into the detail of  
8 curtailment of water rights if it's possible. You have  
9 the bully pulpit. You have the ability -- people pay  
10 attention to you. I mean we have always paid attention to  
11 you. I pay attention to the chairperson's admonitions  
12 that other people have submitted all their information  
13 about their water rights.

14 I knew it was tough, but we lucked out and found a  
15 database that gave us a good bit of that information. A  
16 lot of people don't have that luck.

17 So anyway, I would appeal to you not to use the  
18 emergency requirements, to be flexible in dealing with the  
19 people with regard to the information.

20 I would caution your staff, although they're all  
21 very competent, aggressive people, that jumping into the  
22 detail of curtailment of water rights is a sticky,  
23 detailed process.

24 And so anyway, those are my comments. And I hope  
25 you don't require us to provide reams of information again

1 on a very short timeline because many of us lost our  
2 weekends and a lot of time. But we think -- we're happy  
3 with the success and we do want to give you the  
4 information you need to do your jobs.

5 So thank you.

6 BOARD MEMBER DORENE D'AMANO: I just have to jump in  
7 here and thank you for that because I think your  
8 leadership has a lot to do with the high numbers that we  
9 saw.

10 DANTE JOHN NOMELLINI: I think my luck has to do  
11 with the problem with the database.

12 BOARD MEMBER DORENE D'AMANO: Yeah, but even before  
13 you knew about that tool last year when we were here, you  
14 did say that you would comply.

15 DANTE JOHN NOMELLINI: Well, we want to comply.  
16 Why do we want to not comply with you guys? We got so  
17 many people to fight with. Why do we want to fight with  
18 you?

19 BOARD MEMBER STEVEN MOORE: I really don't want you  
20 to quit because I just really enjoy such a coherent  
21 description of the puzzle that's out there about the issue  
22 of overlapping water rights, and I thought your  
23 explanation was really easy to understand. It was a good  
24 teaching moment.

25 Thank you.

1 CHAIR FELICIA MARCUS: Mr. Erlewine, followed by  
2 George Hartman of District 2030.

3 TERRY ERLEWINE: Thank you. Good evening. Terry  
4 Erlewine, State Water Contractors.

5 I just wanted to say that the State Water  
6 Contractors support the resolution. We actually think  
7 that you don't need the emergency basis or emergency basis  
8 for passing the resolution. We think you could do it  
9 under the regular -- your regular authority, but we  
10 support the use of the emergency authority.

11 We think that this is a good step toward providing  
12 additional information that's needed to administer water  
13 rights, and particularly towards protecting stored water  
14 because we had some discussion of excess water over the  
15 last year. We had -- during the irrigation season when we  
16 were water short, it was project water that was going  
17 towards meeting all of the outflow and supporting a lot of  
18 the upstream use.

19 So I wanted to make sure that's on the record and  
20 reiterate that we are supportive of this resolution.

21 Thank you.

22 CHAIR FELICIA MARCUS: Thank you very much.

23 Mr. Hartman, followed by Jeannie Zolezzi. Jeanne  
24 Zolezzi.

25 GEORGE HARTMAN: Hi, George Hartman, representing

1 the Reclamation Districts 2030 and 2074. It's late.

2 Hello, everybody. Madam Chair, Board members.

3 I -- I have two concerns: First, as some of you  
4 know, I'd really like to change this dialog. I'd really  
5 like to see a different way of talking about these issues  
6 and hopefully an effort that we're working on will make a  
7 dent in that and set a precedent. We don't know. We're  
8 still working on it.

9 So I've got a couple of concerns. Number one is the  
10 attorney for staff -- I'm sorry. I don't know your name,  
11 sir. You talked about how staff vets these complaints  
12 before it takes action.

13 I don't think that's embodied in the regulations. I  
14 think that's an in-house safeguard that you have adopted  
15 to verify that a complaint has enough merit to warrant  
16 further action.

17 Is that about right?

18 ANDREW TAURIAINEN: Andrew Tauriainen.

19 GEORGE HARTMAN: I didn't know your name. I'm  
20 sorry.

21 ANDREW TAURIAINEN: Not necessarily in the way  
22 you're putting it. Maybe the way I explained it wasn't  
23 quite the way it is anyway.

24 An Information Order or even an inspection just on a  
25 complaint that comes in through the Internet, let's say,

1 by nature gets some vetting and some determination as to  
2 its efficacy, and those that have more get more  
3 investigation and they all result in something, an  
4 investigation report --

5 GEORGE HARTMAN: Who makes that decision? Who makes  
6 the decision as to whether it has efficacy or not?

7 ANDREW TAURIAINEN: The staff.

8 GEORGE HARTMAN: Under what guidelines?

9 ANDREW TAURIAINEN: Under their expert opinion.

10 GEORGE HARTMAN: That is set by what? I mean, where  
11 can I find a written description of what qualifications  
12 they have to have in order to render an expert opinion?

13 CHAIR FELICIA MARCUS: Staff does the best they can,  
14 based on their experience and judgment. They don't chase  
15 every complaint because there's not time to chase every  
16 complaint. We're not funded to chase every complaint.  
17 There's a certain amount of judgment involved.

18 If you're asking for us to put out every -- you're  
19 creating a giant mousetrap in which really nothing would  
20 ever happen. So I'm not quite sure the point you're  
21 trying to make.

22 GEORGE HARTMAN: Well, that would be okay with me  
23 but --

24 CHAIR FELICIA MARCUS: Well, it shouldn't be okay  
25 with you.

1           GEORGE HARTMAN: No, but --

2           CHAIR FELICIA MARCUS: People have lived in this  
3 agonizing finger pointing for years and years and years,  
4 and maybe some people enjoy living in it. I don't think  
5 you do.

6           BOARD MEMBER DORENE D'AMANO: I imagine you're  
7 getting to the suggestion that I think Jeanne Zolezzi has  
8 in her letter to tighten up the language.

9           GEORGE HARTMAN: Yeah, I think --

10          BOARD MEMBER DORENE D'AMANO: Just so we can be --

11          GEORGE HARTMAN: Yeah. I don't doubt the staff --

12          BOARD MEMBER DORENE D'AMATO: -- more specific on  
13 the point you're raising. I'm looking for that language.

14          ANDREW TAURIAINEN: I have one more point, I'm  
15 sorry, and that is specific to the regulations and the  
16 Information Orders that would be issued under the  
17 regulation.

18          Those orders -- every order of the Board requires  
19 findings to support the order. Those findings in every  
20 case will describe both the evidence and the reason --

21          GEORGE HARTMAN: Sure.

22          ANDREW TAURIAINEN -- for issuing the order. That's  
23 the safeguard that -- that, I think, is what you're  
24 looking for.

25          GEORGE HARTMAN: That's the consummate safeguard.

1           What I'm worried about is Mr. Nomellini described to  
2 you the great luck and fortune that he had in finding a  
3 State Lands database that has all the information that  
4 enabled his office and the engineers to really give you  
5 great compliance. And a lot of that involved my clients.  
6 They did an amazing job.

7           But it was -- there was fortune in that. It was  
8 luck. But it was a burdensome task that without finding a  
9 database I think would have been near impossible.

10           And so what I'm worried about is -- the trigger is a  
11 complaint. Someone files a complaint. That's a trigger.  
12 The staff is the first level of safeguard.

13           And -- and the gentleman talked about how they make  
14 an effort to determine the materiality or substantiality  
15 of that complaint before it goes any further. But when it  
16 goes further and an Informational Order gets issued --  
17 it's like a very nice client of mine, a lady who is not in  
18 Central Delta, who operates a dairy whose husband passed  
19 away a few years ago and she's doing it on her own. Came  
20 into my office on March 1 with the Informational Order.

21           And I had looked at the list attached to the order  
22 to see if her name was on it, and it wasn't. At least not  
23 alphabetically. Her deceased husband's name was on it  
24 indexed by his first name, and I didn't see it. She came  
25 in with it and said what do I do?

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1 She is not in Central Delta. She's in North Delta.  
2 And it was only because of all the work Dante and his  
3 folks had done, Ann Kelsey and Baker and on and on, we  
4 were able to get her information put together for her two  
5 points of diversion and be submitted to you.

6 Absent that, she would have been in violation and it  
7 would have been a very expensive burden for her to meet to  
8 ferret out the information that you were requesting.

9 I'm concerned about the fact that there's no  
10 threshold for filing a complaint. Anyone can file a  
11 complaint.

12 BOARD MEMBER DORENE D'AMANO: Well, if I could?

13 GEORGE HARTMAN: Yes.

14 BOARD MEMBER DORENE D'AMANO: It seems to me that  
15 there are two issues. One is whether or not the language  
16 should be tightened up. And I would just refer everyone  
17 to -- Jennifer Spaletta has a suggestion on the first page  
18 of her letter, and Jeanne Zolezzi, I'm sure she'll speak  
19 to this. Different language but language to tighten up  
20 the provision on the complaint.

21 But I'm just wondering if you're speaking to yet a  
22 separate issue. We have heard that there was just a lot  
23 of confusion when that order went out, and staff after --  
24 I think we had -- I don't remember when the Board meeting  
25 was, if it was maybe a month ago. Staff was very

1 responsive in putting additional information out on the  
2 form so that people could comment.

3 But this issue about finding out where you are on  
4 the list by first name, I just heard from a lot of people.  
5 They were very frustrated by this.

6 And so I'm just -- would like to hear from staff on  
7 in the event that you go forward again with another order,  
8 what can you do to commit to work with stakeholders in  
9 advance so that they can see a copy of the form in advance  
10 and provide suggestions?

11 Because I think a lot of the -- the criticisms that  
12 came in were not just we don't want to fill this out but  
13 they were frustrated. It was difficult for them to figure  
14 out how to fill it out and who it applied to and all those  
15 sorts of questions.

16 So could you respond to what your plans are in the  
17 event that you issue another order?

18 BRIAN COATS: Yeah. As far as the informational  
19 order form, we did provide a template on our website which  
20 had all three pages outlined as to what the questions were  
21 supposed to be asked. And they could download that and  
22 just at their leisure go about filling it out and then  
23 they can go to the actual form and fill it out.

24 BOARD MEMBER DORENE D'AMANO: Well, I'm referring to  
25 in the event that you do this again, what can you commit

1 to do to work with stakeholders in advance so that they  
2 can see what you plan on having people fill out so that  
3 they can make comments? You know, maybe it could be  
4 simplified or, you know, since they're out on the ground  
5 they may see some options that you all wouldn't have  
6 thought of.

7           And then the other issue that comes to mind is the  
8 website. I heard a lot of complaints about your website.  
9 It was too difficult for them to finally get to the place  
10 where they could get the information.

11           BRIAN COATS: Right. Yeah. On the first issue, I  
12 don't think management has any objection to providing the  
13 form in advance. I don't think there's a problem there.

14           As far as finding the link on the form, the  
15 hyperlink to the web form was referenced in the letter.  
16 So if they received the letter, the URL address was there  
17 on page 2, I think it was paragraph three.

18           As far as going to the website and finding it, yeah,  
19 we only had it listed on one particular area because at  
20 the time we were planning on doing a website revamp to a  
21 new format, tab style, and that never came to fruition.

22           But when we did receive enough people commenting on  
23 the fact that the link on the actual Informational Order  
24 that we posted on the website wasn't clickable, we went  
25 ahead and made the adjustments and everything seemed to be

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1 fine at that point.

2 CAREN TRGOVCICH: Just to reference, we are doing an  
3 upgrade of the website now. The tab form that Brian  
4 mentioned is going to go live hopefully soon. We've just  
5 had to work it through all the programs that have drought  
6 activities.

7 And the other thing is we are very happy to put out  
8 the form, and if there's a group of stakeholders that  
9 would like to provide input, that would like to sit down  
10 and talk to us about it, we're very happy to do that. It  
11 only helps us to do our job better.

12 GEORGE HARTMAN: Let me wrap up. I don't want to  
13 prolong this.

14 Had two other concerns. One is a client in the Los  
15 Banos area I met with yesterday was -- who's 86 years old,  
16 knows all the folks down in that area quite well. His  
17 property abuts the California aqueduct.

18 And he said how do these people get away with  
19 pumping groundwater and pumping it and putting it in the  
20 canal and getting paid for it?

21 Now, I'm going to dig into it a little further and  
22 find out what's going on, but as long as you're getting  
23 into abuse and reasonable or unreasonable uses of water,  
24 I've heard other rivers that that's happening, that people  
25 are selling groundwater somehow through some contrivance.

1 I'd like to know more about that, and if I find anything  
2 -- if there's materiality to it, I'll investigate it  
3 before I file a complaint.

4 And the other thing is one slide showed that it was  
5 costing a thousand dollars per report for public agencies  
6 to respond to your informational requests.

7 I think because there's no barrier to a person  
8 filing a complaint, if their complaint is found to be  
9 without merit, there ought to be some way to charge them  
10 with -- with the cost of a person having to prove that  
11 they have the right all along.

12 So I'll just throw in the old English system, loser  
13 pays, something like that.

14 So I think that's pretty much -- pretty much all I  
15 have to say, but I want to thank all the folks who helped  
16 us meet your order. They did a great job and I hope  
17 you're pleased with them.

18 Thank you.

19 CHAIR FELICIA MARCUS: Great. Thank you very much.  
20 I know we'll hear from more speakers, but we do have some  
21 suggestions on ways to clarify the comparing that might  
22 give people some comfort to allay their wildest fears  
23 about it or fear of use about it.

24 So I just want to encourage you guys to think about  
25 which -- because some of them sound kind of reasonable;

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1 some require too much. But I want you to be thinking  
2 about that because I know we're going to be hearing -- I  
3 just want you to think about language, separate language,  
4 on that one because, again, people do -- they -- they fear  
5 an extreme in the absence. I don't think you can button  
6 it down all the way, but some of the suggestions are  
7 pretty reasonable.

8 BOARD MEMBER STEVEN MOORE: Is it true that with the  
9 development of the form that maybe we're refining that,  
10 and so future actions you feel would resolve some of the  
11 concerns?

12 DAVID COATS: Yeah. And when we actually developed  
13 a form through stakeholder comments, we made some  
14 revisions and some updates and we're continuing to refine  
15 it. So I imagine in the event that this were approved and  
16 we were -- got the go-ahead to issue more informational  
17 orders, we would consult with them and hopefully get our  
18 IT department to put a -- like a more robust password  
19 system into place because that was one of the complaints  
20 that they brought up.

21 But, yeah, we'll continue to refine it.

22 CHAIR FELICIA MARCUS: Thank you. Ms. Zolezzi,  
23 followed by Danny Merkle.

24 JEANNE ZOLEZZI: Thank you. Jeanne Zolezzi,  
25 representing Banta-Carbona Irrigation District and

1 Patterson --

2 CHAIR FELICIA MARCUS: I always want to call you  
3 Jeannie. Just the way it's spelled. Jeanne Zolezzi.

4 JEANNE ZOLEZZI: It's -- yeah. Either way.

5 CHAIR FELICIA MARCUS: I do it wrong all the time.

6 JEANNE ZOLEZZI: And Patterson Irrigation District.  
7 And obviously my letter's on file. I just have two issues  
8 that I want to hit that we think are the most important.

9 And the first is what a lot of people have  
10 mentioned, and that is our fear of an unsubstantiated  
11 complaint or I think to me, more importantly, the other  
12 requirement of information being provided. Because to me,  
13 it's just an opportunity for abuse.

14 The reason we're really concerned is because we saw  
15 what happened with the last Information Order that went  
16 out. And I won't belabor that. You've seen our Petition  
17 for Reconsideration.

18 But basically you got a letter with no information  
19 and no substantiating information saying someone's  
20 stealing my water and I think they're in the Delta. And  
21 you sent out a thousand Information Orders from, you know,  
22 way south on the San Joaquin River all through the Delta  
23 trying to investigate that. We don't think that was  
24 sufficient information on which to make people do all  
25 that.

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1           So my language, or Ms. Spaletta's language, I think  
2 something saying that that information or the complaint  
3 needs to be supported by at least some evidence determined  
4 by staff to be reasonable is a reasonable requirement, and  
5 with all due respect, as your staff mentioned, if they do  
6 that anyway then they really shouldn't mind if it's in the  
7 regulation. That would give us some protection, something  
8 to fall back on.

9           The second thing that we're very concerned about is  
10 the expansion of the regulation. We know that you needed  
11 the information. I agree with everyone else. We didn't  
12 think you needed to do it by emergency regulation. We  
13 didn't think you needed to do it by regulation. We have  
14 been volunteering that information since early last year  
15 saying that you needed that to make good curtailment  
16 decisions. And obviously you can see the impact that it  
17 makes, so we're glad about that.

18           We're very concerned with the expansion because we  
19 think it goes beyond information that you need and beyond  
20 your jurisdiction.

21           Two sections in the proposed regulation in  
22 particular expand the requirement to require information  
23 of compliance with transfer laws and information about  
24 transfers that haven't been approved by the Board and, as  
25 staff in its presentation said, unverified or previously

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1 unnoticed transfers. And makes it sound like it's  
2 something bad.

3 Those are transfers that are in compliance with law  
4 and outside of the State Board's jurisdiction.

5 And we have a serious concern that by requesting  
6 information on that you are going to somehow insert  
7 yourself into the legality of those transfers, and  
8 obviously that's a concern.

9 We acknowledge -- while we don't agree with it, we  
10 acknowledge that the courts have said that the State Board  
11 can determine the validity of a pre-'14 right. We just  
12 don't think that that court case went further than that  
13 and said and once you determine that validity you can then  
14 regulate that right and tell them when they can change  
15 their place of use, purpose of use and accomplish a  
16 transfer.

17 Because that's regulating that right and you don't  
18 have that authority. And the law already provides the  
19 standard for that transfer, and the method to object is to  
20 bring a lawsuit on that.

21 So that's our main concern with the regulation is  
22 the whole issue of verifying those transfers that haven't  
23 been noticed or approved by the Board.

24 So that and clarification of the complaints or  
25 information is what we would request. Thank you.

1 BOARD MEMBER DORENE D'AMANO: I'm sorry. You  
2 mentioned -- Jeanne, you mentioned transfers a couple  
3 times here in your letter. So is there one code section  
4 in particular you're wanting us to look at?

5 JEANNE ZOLEZZI: Yeah. It's 879(c)(1)(C) and  
6 879(c)(2).

7 There's two places in the regulation that transfers  
8 are mentioned. One is I think they can ask someone for  
9 information if they're basing their right on a transfer or  
10 a contract. They can ask for information on that.

11 And then you can also, I believe, in (C) ask for  
12 information for any transfer that hasn't been previously  
13 approved or noticed by the Board.

14 CHAIR FELICIA MARCUS: Right. And your concern is  
15 that we would then insert ourselves in regulating it.

16 JEANNE ZOLEZZI: That transfer.

17 CHAIR FELICIA MARCUS: I think the purpose is not to  
18 regulate it, but to actually understand the validity of  
19 the numbers we get from folks we do regulate because we  
20 are getting information that someone says they got it from  
21 a transfer and then we have no way of knowing what that  
22 transfer was. You guys can say it more concisely than I  
23 can.

24 MARIANNA AUE: Yeah, so --

25 CHAIR FELICIA MARCUS: So that I can understand it.

1 MARIANNA AUE: Yeah. The issue is that similarly to  
2 when we sent a curtailment notice and then investigated  
3 and the response is oh, I'm using a riparian right for  
4 which I never filed a statement

5 JEANNE ZOLEZZI: That's totally different. We  
6 support that part of the regulation.

7 MARIANNA AUE: Okay. But with transfers there can  
8 also be a similar -- if it's something we've never heard  
9 of, then there's that same question of did somebody really  
10 do this.

11 And so being able to follow up and say okay, now,  
12 who did you get -- whose water right are you talking about  
13 and being able to look at their water right and say things  
14 like yes, it is for June and, yes, it is at a place where  
15 you could conceivably divert it here, allows us to look at  
16 that and decide is this something that needs to be  
17 investigated or is this something that -- that we just  
18 want to throw into the calculation of where the demand is  
19 on this stream system? Is it way up at the top? Is it  
20 down at the bottom?

21 JEANNE ZOLEZZI: Well, the information that the  
22 regulation says you can ask for is not narrowed in the way  
23 that you've just described it. Because if you said, you  
24 know, you have to provide us with how much you're  
25 diverting under that right and what right it is, then

1 that's different. But it goes way beyond that.

2 It says we can ask for all information upon it and  
3 we can ensure that it complies with transfer criteria.  
4 That's a whole different level of analysis that is not  
5 required under the law currently.

6 BOARD MEMBER DORENE D'AMANO: But could you  
7 recommend some language, as you did with --

8 JEANNE ZOLEZZI: Well, our recommendation would be  
9 taking it out.

10 BOARD MEMBER DORENE D'AMANO: Well, yeah. No. But  
11 -- but if we're going to move forward with trying to  
12 compile the information for a potential curtailment, I  
13 could see why we would need that information.

14 JEANNE ZOLEZZI: Well, you know, with all due  
15 respect, I think it's already encompassed in what you  
16 have. I'm just thinking of some of the transfers that I  
17 know are going on.

18 You are asking for -- already under the reg you  
19 would ask for how much they're pumping every month. So  
20 you have the amount they're pumping. You know that  
21 they're curtailed, so everything they're pumping has to be  
22 under that transfer that they're talking about.

23 You can obviously ask them who the transfer's from  
24 under your existing regulation. You can call that other  
25 diverter and say did you transfer to so and so? And you

1 know what that other diverter's right is because you can  
2 ask for that information as well.

3 So all you need is the total information. If that  
4 pre-'14 user has the right to pump 200 and there's 50  
5 being pumped at both points of diversion, you have enough  
6 information right there.

7 And that's all available under your existing  
8 regulation, so you don't really have to expand it to say  
9 we need all the information about your transfer so that we  
10 can go through and make sure it complies with transfer  
11 criteria. That's a whole different level.

12 So I think you already have the ability to get the  
13 information that you need to verify. I can't provide you  
14 language other than what's already in there.

15 DAVID ROSE: We're looking at it. Certainly.

16 CHAIR FELICIA MARCUS: My understanding is we had  
17 people who would say I got it from so and so, but we had  
18 no ability to get any awareness of whether so and so  
19 transferred the water and fallowed or did something to  
20 reduce their use by the amount they transferred. We're  
21 just trying to make sure --

22 DAVID ROSE: We are definitely intending to leave  
23 that in. But whether the language specifically of (c)(2)  
24 regarding compliance with transfer law could be narrowed,  
25 that's what we're trying to decide right now.

1           Because what you're talking about, the existence of  
2 the right whether it was in fact transferred, that goes to  
3 whether there was an unauthorized diversion, not  
4 regulating a pre-'14 or riparian water right. But we're  
5 trying to see -- we're working on that right now.

6           CHAIR FELICIA MARCUS: Okay. Thank you.

7           MARIANNA AUE: Because I think there's a little bit  
8 of a -- to assume that we can -- that someone says oh, I'm  
9 using water transfer for so and so means that we should  
10 immediately go investigate so and so because we can assume  
11 that there's an unlawful diversion, I think that's the  
12 kind of logical leap we were trying to avoid --

13          CHAIR FELICIA MARCUS: Right.

14          MARIANNA AUE: -- having to make every time. But I  
15 think that it is possible to get at everything we're  
16 trying to get at using more words that describe exactly  
17 the type of information we're looking for rather than just  
18 sort of the pithy, you know, was this transfer okay.

19          CHAIR FELICIA MARCUS: Yeah.

20          MARIANNA AUE: So I think we'll go for more detail  
21 and then run something by you guys.

22          CHAIR FELICIA MARCUS: Think about that one.

23          Mr. Merkley, followed by Deirdre DesJardins.

24          DANIEL MERKLEY: Thank you, Chair Marcus, members of  
25 the Board. Danny Merkley, with the California Farm Bureau

1 Federation.

2 I'm going to go real quick because I'm going to  
3 repeat some things that you've already heard. But I want  
4 to start with if this is truly about collecting data for  
5 managing the system better, then every effort needs to be  
6 made to convey that in a -- in a clear and better way.

7 I thought that was -- that was a very good point.  
8 It was up on the Power Point earlier by staff. And that's  
9 something that isn't necessarily conveyed to folks in a  
10 clear way. And, quite honestly, when this stuff comes, it  
11 comes across to people that are out there in a very  
12 threatening and scary way.

13 CHAIR FELICIA MARCUS: People read the most negative  
14 thing into something unless --

15 DANIEL MERKLEY: So anything we can do to help that  
16 tone in letters and notices like that, but then also when  
17 staff is reaching out to them. And as we all know, we're  
18 human beings and some of us are better at that than  
19 others, and some of us are better some days than other  
20 days, too.

21 Moving on, the information request is spelled out in  
22 this, seemed to be without the same careful triggers that  
23 were in the emergency regulations last year.

24 And that's a concern for us. It seems to be almost  
25 asking for information without cause. So -- so that's a

1 concern and something -- you know, we weren't real  
2 thrilled with the emergency regulations last year. We're  
3 even more so concerned with what we're seeing this opening  
4 up and the changes this year.

5         Also -- and I led into this a little bit. Please  
6 understand the unfamiliarity with this stuff for some of  
7 these folks out there. I mean you heard stories about  
8 some of the older ones and folks that really don't  
9 understand this stuff.

10         We're dealing with that every day with our members.  
11 I'm getting calls, far more calls than I can handle. I've  
12 probably got a bunch today, but I don't know because I've  
13 been here most of the day.

14         So -- so that's important. It's -- for the most  
15 part you're looking at very honest, hard-working people  
16 that are dealing with Mother Nature in a way that most of  
17 us have never had to deal with it, and they got to get it  
18 done or it doesn't get done and there are no excuses.

19         Maybe you can make a little excuse to the Water  
20 Board or ask for a little forgiveness or a little extra  
21 time to get something done and, if you're showing good  
22 effort, that works. But with Mother Nature it doesn't  
23 work. Doesn't at all. Especially if you have a dad  
24 you're working with on the ranch.

25         But I digress.

1           Also, want to be real clear about the ask. Why  
2 we're asking for this. A little bit what I said earlier  
3 and what we're asking for so that we really do understand.  
4 And I think that goes a long way to helping people realize  
5 that well, this is actually good information. It's going  
6 to help us with the curtailment notices so that we're not  
7 curtailing --

8           CHAIR FELICIA MARCUS: Right.

9           DANIEL MERKLEY: -- users that aren't necessary.  
10 And that's not necessarily put out there.

11           And I want to -- I was really concerned about the  
12 slides I saw talking about the fiscal impact. It -- maybe  
13 I missed something. Maybe I glazed over for a minute.  
14 But in talking about the fiscal impact to local  
15 governments and other governmental agencies, there's a  
16 huge fiscal impact and -- and resource burden on a lot of  
17 these folks in trying to get this stuff figured out.

18           Because it's information that -- that they assume  
19 they have. Whether that's correct or not, it takes time  
20 for them to go back and research this.

21           You heard some of this from -- from previous  
22 presenters. And that's -- that's a real challenge. We  
23 have worked -- Farm Bureau has worked very hard to try to  
24 help folks with the information to help them comply.

25           There's a number of things that have passed, laws

1 and regulations, that we were opposed to, we didn't like,  
2 but when they passed we're out there trying to help our  
3 members comply.

4       Every time a curtailment notice went out this last  
5 year, that very same day we sent information out to all of  
6 our members immediately to help them understand what was  
7 going on, to help them be in compliance, and we're  
8 continuing to try to do that.

9       But we need a little help helping you, if you will,  
10 with that and helping our members be in compliance with  
11 something that's new and difficult and very hard for them  
12 to do.

13       I'm going to end there because the buzzer just went  
14 off and it's late. Thank you.

15       CHAIR FELICIA MARCUS: Thank you very much. And  
16 thank you for the help when that happens. We actually do  
17 need all that, the help we can get that way.

18       DEIRDRE DES JARDINS: Thank you. I know it's real  
19 --

20       CHAIR FELICIA MARCUS: One second. After you will  
21 be Julie Ann Phillips.

22       DEIRDRE DES JARDINS: Thank you. I know it's late.  
23 I just had an observation about the Delta curtailment  
24 generally, and that's -- I know the method that DWR is  
25 using for the curtailment analysis, and they're not

1 considering -- there's a 55-year-old requirement for the  
2 Bureau of Reclamation to provide water for salinity  
3 control in the Delta. And the Board has required that  
4 since D-990 was instituted.

5 And I just want to -- you know, this is fundamental  
6 and this is what they said.

7 "Throughout these proceedings the Bureau's  
8 representatives have consistently affirmed their policy to  
9 recognize and protect all water rights on the Sacramento  
10 Watershed and in the Delta existing under state law at the  
11 time these applications were filed including riparian,  
12 appropriateness and others.

13 "Unfortunately, these rights have never been  
14 comprehensively defined. It is imperative, therefore,  
15 that the holders of existing rights and the United States  
16 reach agreement concerning these rights and the  
17 supplemental water required to provide the holders with a  
18 firm and adequate water supply, if a lengthy and extremely  
19 costly adjudication of the waters of the Sacramento River  
20 and its tributaries is to be avoided."

21 And as we know, they did reach that agreement with  
22 the Sacramento Watershed settlement contractors but not  
23 with the users in the Delta.

24 Skipping to -- there was a specific term included in  
25 the contracts.

1 "The State Water Rights Board reserves continued  
2 jurisdiction over permits issued pursuant to applications  
3 5625 --" yada, yada -- "until March 1, 1964, or such  
4 additional time as may be prescribed by the Board for the  
5 purpose of formulating terms and conditions relative to  
6 salinity control in the Sacramento/San Joaquin Delta.

7 "Permittee shall on or before 1962 and each six  
8 months thereafter submit to the Board a written report as  
9 to the progress of negotiations relative to agreement  
10 between permittees and the State of California and/or the  
11 permittee and water users in the Delta and in northern  
12 Contra Costa County."

13 They're not submitting these progress reports, and I  
14 don't -- it just seems like cooperative efforts have  
15 broken down. But I just wanted to urge the Board to think  
16 about this in the context of this curtailment proceeding  
17 because this was an interpretation of the area-of-origin  
18 rights by the Board when they initially issued this  
19 permit.

20 I calculated that they needed 2,000 CFS of  
21 supplemental water in June. Most -- they didn't -- 1,500  
22 CFS came from the Bureau, and that was exactly the amount  
23 that their engineers estimated they would need for  
24 salinity repulsion back in 1960.

25 It may not be that there's any extra water for

1 salinity. But are we going to shift the burden for  
2 salinity control onto the riparian users or not?

3 So thank you.

4 CHAIR FELICIA MARCUS: Thank you.

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6 (Whereupon, end of file 10)

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**BBID**  
**EXHIBIT 316**

STATE WATER RESOURCES CONTROL BOARD  
BOARD MEETING/HEARING  
(Portion)

APRIL 21, 2015

Coastal Hearing Room - Second Floor  
1001 I Street  
Sacramento California 95814

scribed by: Kathryn Davis CSR No. 3808

kathryndavis & associates  
deposition reporting

555 University Avenue, Suite 116 Sacramento, California 95825 916.567.4211 [www.kdareporting.com](http://www.kdareporting.com)

BBID Exh. 316

STATE WATER RESOURCES CONTROL BOARD  
BOARD MEETING/HEARING  
(Portion)

APRIL 21, 2015

Coastal Hearing Room - Second Floor  
1001 I Street  
Sacramento California 95814

Transcribed by: Kathryn Davis CSR No. 3808

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STATE WATER RESOURCES CONTROL BOARD

BOARD MEMBERS

Chair Felicia Marcus

Vice-Chair Frances Spivy-Weber

Board Member Tam M. Doduc

Board Member Steven Moore

Board Member Dorene D'Amamo

1 PORTION OF TRANSCRIPT OF PROCEEDINGS.

2 (9:00 - 27:40)

3 --oOo--

4 CHAIR FELICIA MARCUS: We are on to Item No. 9,  
5 California's drought emergency. Bill, I just want to  
6 give you some advance warning. I'm going to be asking  
7 you about the blog.

8 JOHN O'HAGAN: Good morning. I'm John O'Hagan  
9 with the Division of Water Rights. I'm going to give  
10 you a brief update for transfers and curtailments. Any  
11 water transfers that we had before the Division include  
12 the consolidated place of use of the Central Valley  
13 Project and State Water Project. This transfer requests  
14 exchange or transfer of over 335,000 acre feet of water.

15 A notice was posted on April 6th for this  
16 transfer and comments are due today. If no comments are  
17 received, we should be issuing an order by April 27th.  
18 If we get substantial comments, then, of course, that  
19 will delay that decision further.

20 CHAIR FELICIA MARCUS: The transfer was that I  
21 was distracted by the picture --

22 JOHN O'HAGAN: It is the consolidated place of  
23 use for the Central Valley Project and the State Water  
24 Project.

25 The next two transfers -- they are kind of on

1 the same track -- are the Garden Highway Mutual Water  
2 Company for 7,500 acre feet to the state water  
3 contractors; and then the Plumas Mutual Water Company  
4 for 4,828 acre feet. Both of those were transfers we  
5 noticed on the sixth and comments are due today. Again,  
6 if no comments are received, then orders will be issued  
7 next week.

8 As far as curtailments, at the last Board  
9 meeting, we identified that the Deputy Director for  
10 Water Rights had issued a curtailment order on Antelope  
11 Creek for fishery protection.

12 Since that time on April 17th, a second fishery  
13 protection curtailment order has been issued for the  
14 Deer Creek Watershed. And I believe that affects about  
15 50 water right holders. So those are the two  
16 curtailment orders issued subsequent to the emergency  
17 regulations.

18 For the curtailment process, we have had  
19 meetings with stakeholders from the San Joaquin  
20 Watershed and also the Sacramento River Watershed. We  
21 shared our analysis with the San Joaquin River Group,  
22 which includes the South Delta and Central Delta  
23 representation and the exchange contractors.

24 They felt that the Department of Water Resources  
25 unimpaired flow calculations could be improved. They

1 thought they had better data. So we were waiting to see  
2 if we would get it. They said they would send it to us.  
3 We did not get the data, but I did call their  
4 representative and they informed me that they felt that  
5 it wasn't a big enough significant difference to provide  
6 the data. So we are still going to be using the  
7 Department of Water Resources full natural flow  
8 calculations for our analysis.

9 In the Sacramento River Watershed, we met with  
10 the stakeholders there. They also identified some  
11 deficiencies in our analysis for flows. And then also  
12 an issue dealing with the demand data that we are using,  
13 the 2014 demand data and the average demand data.

14 Because this year there were some state water  
15 contractors that were cut further than previously, they  
16 felt that that should be reflected in our demand  
17 analysis. So we are looking at that to see if a demand  
18 should be reduced for those state water contractors.  
19 And we are also looking at the increased potential flows  
20 that we are missing in our analysis.

21 In both cases, we plan to be issuing a  
22 curtailment notice to post-1914 water right holders in  
23 the San Joaquin by the end of this week or early next  
24 week. That will affect over 1,500 water right holders.

25 During the same timeline, we were planning to

1 issue a curtailment notice for the Scott River in  
2 Siskiyou County. Last year we had issued the same type  
3 of notice. Those water rights are under an  
4 adjudication, but there is conditions in that  
5 adjudication to make certain flows for satisfying senior  
6 rights. The flow conditions are below the standards, so  
7 we are now going to be issuing that curtailment notice  
8 and that affects over 200 water right holders.

9 The Sacramento River Watershed we expect to be,  
10 by May 1st, issuing follow-up curtailment notices for  
11 post-14 water rights in those watersheds. And that  
12 would be roughly 2,900 water right holders.

13 And that is all I have. Is there any question?

14 CHAIR FELICIA MARCUS: When do you think you are  
15 going to start having to curtail senior water right  
16 holders in the San Joaquin or the Sacramento in the  
17 season? How far up and would you be doing it in trances  
18 or what would your increments be?

19 JOHN O'HAGAN: What we are doing for the further  
20 analyses is looking at tributary level demands on by  
21 senior right water holders. And our analysis shows that  
22 in mid-May, we will likely have to curtail senior water  
23 rights in certain tributaries of the watershed and  
24 perhaps even further.

25 And the same thing will be going on in the

1 Sacramento River Watershed because of inadequate flows.  
2 As you can imagine, the Sacramento is a little better  
3 off.

4 Term 91, on the Sacramento side, has still not  
5 been activated. So the curtailments under that are  
6 still not in place, but those should be coming in  
7 mid-May.

8 CHAIR FELICIA MARCUS: The second part of the  
9 question is just when you go up, are you saying you'd be  
10 curtailing all of the seniors or going up to year "X"?

11 JOHN O'HAGAN: It will be by priority date. It  
12 is similar to the post-1914 water rights. We are going  
13 to be looking at the demand and supplies by priority  
14 date of pre-14 water rights based upon the information  
15 that we have in our data set.

16 CHAIR FELICIA MARCUS: Right. Do you think that  
17 means you might have it on a rolling weekly basis going  
18 further up? I'm just trying to think of the increments.  
19 I'm not going to hold you to it, but just some measure  
20 of increment that you are going to be looking at.

21 JOHN O'HAGAN: I believe that they will be -- if  
22 we do curtail, it will be for the summer season because  
23 the supply continues to diminish. So we are at a  
24 diminishing supply but an increasing demand as you go  
25 into June and July. So we will be cutting off the tops

1 of those demands by priority, as necessary.

2 CHAIR FELICIA MARCUS: Right. Maybe I'm not  
3 asking this right. Help me, Tom. It is like when you  
4 go up the watershed to, you know, 1905 or --

5 THOMAS HOWARD: Up on the San Joaquin River, I  
6 think that, at least the supply/demand curve projections  
7 that I've seen at the 90 percent exceedance, all  
8 pre-1914s would be curtailed.

9 Is that approximately correct, John?

10 JOHN O'HAGAN: Yeah. But by the date --

11 THOMAS HOWARD: By the summer, yes.

12 JOHN O'HAGAN: It is not a date certain. As we  
13 move along, you know, we would cut and see how it goes.  
14 I don't want to speculate that all of them will be by,  
15 you know, June 1st. I want to make sure that we are  
16 being careful and tracking this, so that we do not  
17 curtail when unnecessary.

18 THOMAS HOWARD: But we will do them by tranches,  
19 as John is indicating. But at the 90 percent  
20 exceedance, the supply/demand curves indicate that all  
21 the pre-1914 in the San Joaquin Basin would be curtailed  
22 during the summer season sometime.

23 CHAIR FELICIA MARCUS: Okay. That is what I'm  
24 trying to get. They are not all going to be curtailed  
25 at the same moment. They will be curtailed as it goes

<http://www.yreba.net/hdhp>

1 up. So I was thinking you are not going to have -- if  
2 you have got thousands of them, you are not going to be  
3 making decisions by every, you know, three hours every  
4 day.

5 THOMAS HOWARD: No, no.

6 CHAIR FELICIA MARCUS: So that is what I'm  
7 getting at, which is you would probably do --

8 THOMAS HOWARD: Every couple of weeks probably,  
9 we would put out a few updated -- a few people every  
10 couple of weeks approximately.

11 BOARD MEMBER DORENE D'AMANO: Well, but the  
12 biggest impact would be the irrigation districts, the  
13 larger users. Whenever that happens, even though it may  
14 hit one water right holder, it will affect hundreds,  
15 thousands.

16 JOHN O'HAGAN: Yeah. If a senior water right  
17 holder is a major district, which most of them hold  
18 prior rights, yes. If we curtail that right, it will  
19 affect many agricultural users in that district.

20 BOARD MEMBER DORENE D'AMANO: I had a couple.  
21 Okay. Could you talk about the relationship between  
22 Term 91 and post-1914?

23 JOHN O'HAGAN: Term 91 is --

24 Board MEMBER D'AMANO: In terms of the dates.

25 JOHN O'HAGAN: Well, Term 91 would be, in most

1 post-1914 water rights with a priority date of 1969, I  
2 believe it is --

3 THOMAS HOWARD: '65.

4 JOHN O'HAGAN: '65. So those would be curtailed  
5 right off the bat when we are doing this initial  
6 curtailment coming up.

7 So Term 91, however, is triggered by a  
8 calculation on the project releases of stored water to  
9 make Delta demands. And that is a different trigger in  
10 the Delta calculations.

11 So that is coming soon. At the same time we are  
12 doing this, they will probably occur near the same time  
13 but we will be going deeper than Term 91 on our initial  
14 curtailment.

15 BOARD MEMBER DORENE D'AMANO: And then  
16 consolidated place of use -- that was adopted last year,  
17 that was approved last year as well?

18 JOHN O'HAGAN: That is correct.

19 BOARD MEMBER DORENE D'AMANO: Right. Not that  
20 you would be expected to have all this information  
21 today, but a little bit on the history of adoption of  
22 consolidated place of use.

23 Is it something that comes before us frequently  
24 or comes before staff frequently for approval? Or is  
25 this something that, typically, just comes before the

1 Board in dry years?

2 JOHN O'HAGAN: I know it came before us last  
3 year. I'm not sure about previously. I wasn't leading  
4 the program in prior years.

5 THOMAS HOWARD: I have a vague recollection of  
6 it having come in one other year, but it is not  
7 something that we do on an annual basis historically.

8 2009 Michael tells me.

9 JOHN O'HAGAN: There you go.

10 BOARD MEMBER DORENE D'AMANO: The historian.  
11 Okay. Thank you.

12 BOARD MEMBER STEVEN MOORE: I am just interested  
13 in how your work earlier this year, in conducting the  
14 Information Order and gathering that information has  
15 improved our ability to do the demand forecasts and  
16 refine this process of selecting, you know, cut-off  
17 points for the curtailments and the timing of it.

18 Has it improved our efficiency and our accuracy?  
19 Also in terms of the documentation of pre-1914 rights,  
20 has that part of the Information Order improved our  
21 process?

22 JOHN O'HAGAN: We definitely have now got dates  
23 in which we had ranges of dates, for example. So that  
24 improves the priority date that people are claiming. We  
25 got good data for 2014 which reflects a dry year

http://www.judicial.net/hsap

1 situation in which we are utilizing, for those  
2 thousand-plus parties that got the Information Order,  
3 that's the data that we are utilizing for our demand for  
4 those water rights.

5 And you saw in the last presentation, they  
6 dropped those demands significantly. And that is to the  
7 benefit of all the water right holders. Before we  
8 initiate curtailments, it has dropped the demand curve.  
9 So we feel that that Information Order was a great value  
10 to us for better information, but also to the  
11 stakeholders.

12 BOARD MEMBER STEVEN MOORE: Thank you. I think  
13 that is worth highlighting and repeating a lot; that  
14 this is our effort to try to make the system more  
15 orderly and efficient and equitable.

16 So thanks for your hard work on that.

17 BOARD MEMBER DORENE D'AMANO: Could I follow up  
18 on that? I know I already went, but thank you. That is  
19 a good question. Would you be able to quantify it in  
20 terms of amount of time delay for invoking the  
21 curtailment?

22 JOHN O'HAGAN: We could look at that. We don't  
23 have that right now because we immediately move to  
24 utilize that data. We didn't look at it. We would be  
25 able to put in the existing data that we were going to

1 use before the information, and then see what the shift  
2 would be. So we could provide that data.

3 BOARD MEMBER DORENE D'AMANO: I just think, you  
4 know, that makes it a little more real for the water  
5 rights holders, particularly those that aren't  
6 comfortable with the Information Order and it would help  
7 for them to see the actual benefit.

8 LES GROBER: My name is Les Grober. I'm  
9 Assistant Deputy Director for Water Rights, the other  
10 one. I have a very brief update and I'm going to  
11 introduce staff from the Department of Water Resources  
12 and Bureau of Reclamation to provide an expanded drought  
13 update, in general, in terms of the hydrology but also  
14 the operations under the Temporary Urgency Change  
15 Petition Order.

16 My brief update is following up to the update  
17 that I provided two weeks ago. We had just issued  
18 another TUCP order, the Executive Director issued the  
19 order. Two of the key issues at that time were  
20 discussions of and receipt of operations plans for New  
21 Melones on the Stanislaus, and Shasta on the Sacramento,  
22 principally whether the operations needed to provide  
23 temperature control through the summer. And then also  
24 then answering the water supply issue. It was critical  
25 to kind of get to some resolutions.

<http://www.yreka.net/hs3p>

1           So there were discussions and negotiations going  
2 on at that time. I'm happy to report that there is  
3 provisional agreement and provisional approval by the  
4 Executive Director of Plans for the operations of both  
5 New Melones and Shasta.

6           We are waiting now on the submittal of those  
7 final plans, some of the delay from the dates of the  
8 TUCP. But the important point is just getting that  
9 certainty with regard to how to operate, and also water  
10 supply, and then to make transfers and such.

11           So these are plans intended to be able to  
12 maintain temperature control on those rivers through the  
13 summer period. And those plans were prepared in  
14 consultation with the fish agencies.

15           We also on Friday received the application --  
16 and stakeholders as well, yes. There were a lot of  
17 discussions taking place at all levels over the last two  
18 weeks. We received the application for the water  
19 quality certification for the barriers on Friday. And  
20 this is now just for one barrier at West Falls River.

21           In discussions with the applicants at the Corps  
22 of Engineers, we are attempting to issue a water quality  
23 certification by May 4th because there is a need to  
24 start construction in May in order to have them in place  
25 for June, so that the project can operate consistent

1 with their TUCP-adjusted operations for Delta outflow  
2 through the summer months.

3 And so with that -- and if you have questions  
4 for me now, or I could ask the Department and the Bureau  
5 staff to join me up here, and then you could ask  
6 questions throughout -- or if you have anything now.

7 CHAIR FELICIA MARCUS: A quick question on the  
8 barriers. You said something -- the barrier -- to  
9 understand. Is that something that at some point you  
10 are going to show us the pictures and slides? Maybe it  
11 is even in here. Thank you. For those of us who are  
12 graph-impaired that like pictures --

13 LES GROBER: West Falls River, doesn't everybody  
14 know where that is?

15 CHAIR FELICIA MARCUS: I know where the Old and  
16 Middle River are pretty well but --

17 BOARD MEMBER STEVEN MOORE: Thanks for your hard  
18 work. And also to our partner agencies and stakeholders  
19 on those processes of fairly-rapid agreements that have  
20 been made to react to the challenges of the TUCP and  
21 those deadlines.

22 It was real important to me to see the system  
23 respond to what we learned from last year. And I just  
24 want to indicate my appreciation for all that hard work  
25 to get to this point.

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BOARD MEMBER DORENE D'AMANO: I would like to  
chime in on that as well. Thank you, and Mr. Howard and  
all the agencies. I think that having those expanding  
discussions to the stakeholders I think really helped.  
And we would have a lot more people here today if it  
weren't for your ability to pull this all together.

So thank you.

(Whereupon, end of transcribed portion.)

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REPORTER'S CERTIFICATE

State of California     )  
                                  ) ss.  
County of Sacramento    )

I certify that the statements in the foregoing hearing were transcribed in the within-entitled cause by audio; that said hearing was taken at the time and place therein named; that the testimony of said witnesses was reported by me, a duly Certified Shorthand Reporter of the State of California authorized to administer oaths and affirmations, and said testimony was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for either or any of the parties to said hearing, nor in any way interested in the outcome of the cause named in said hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this 28th day of August, 2015.

\_\_\_\_\_  
KATHRYN DAVIS  
Certified Shorthand Reporter  
Certificate No. 3808

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**BBID**  
**EXHIBIT 318**

STATE WATER RESOURCES CONTROL BOARD  
BOARD MEETING/HEARING  
(Portion)

MAY 5, 2015

Coastal Hearing Room - Second Floor  
1001 I Street  
Sacramento California 95814

scribed by: Kathryn Davis CSR No. 3808

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BBID Exh. 318

STATE WATER RESOURCES CONTROL BOARD  
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Transcribed by: Kathryn Davis CSR No. 3808

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STATE WATER RESOURCES CONTROL BOARD

BOARD MEMBERS

Chair Felicia Marcus

Vice-Chair Frances Spivy-Weber

Board Member Tam M. Doduc

Board Member Steven Moore

Board Member Dorene D'Amamo

1 PORTION OF TRANSCRIPT OF PROCEEDINGS

2 (23:35 - 33:56)

3 --oOo--

4 CHAIR FELICIA MARCUS: Item No. 5. Mr. Howard,  
5 would you introduce the item. Thank you all.

6 THOMAS HOWARD: John O'Hagan will provide the  
7 drought update for the Board.

8 CHAIR FELICIA MARCUS: Well, the rainy season is  
9 over.

10 JOHN O'HAGAN: Actually, it is going to rain a  
11 little bit this week.

12 CHAIR FELICIA MARCUS: Well, that will be  
13 delightful. How much will it rain?

14 VICE-CHAIR FRANCES SPIVY-WEBER: A slight chance  
15 of rain.

16 CHAIR FELICIA MARCUS: I'll take it.

17 JOHN O'HAGAN: We are always optimistic.

18 Good morning. My name is John O'Hagan. I'm the  
19 Assistant Division -- I forgot what I am. Anyway, I'm  
20 going to give a drought update for the Board here today.

21 First off, I want to remind the Board that we  
22 are going to be having the public workshop on May 20th.  
23 That is for receiving comments on Bay-Delta issues.

24 In that workshop, we will be getting information  
25 on the Bay-Delta Temporary Urgency Change from the

1 project. We also will be discussing Delta barriers,  
2 curtailment and transfers by the projects. So a lot of  
3 the update I'm going to be giving you will be short  
4 today because of the items that will be discussed at  
5 that workshop.

6 BOARD MEMBER STEVEN MOORE: Also temperatures,  
7 right? Sacramento River temperatures?

8 JOHN O'HAGAN: That is correct.

9 CHAIR FELICIA MARCUS: That is part of it.

10 JOHN O'HAGAN: So yesterday, the Executive  
11 Director approved the 401 certification for installation  
12 of one Delta barrier on the West False River. With that  
13 approval, construction is scheduled to start tomorrow.  
14 It will be operational in June and then it will be  
15 removed in October. So that is the planned schedule for  
16 the Delta barrier on West False River.

17 VICE-CHAIR FRANCES SPIVY-WEBER: I have a  
18 question. Will that May 20th workshop, it will also  
19 cover wildlife that is being affected by these  
20 activities; is that correct or not?

21 JOHN O'HAGAN: I believe that the discussions  
22 could include those as well because the notice isn't  
23 restricted and comments can come in.

24 CHAIR FELICIA MARCUS: Can you make sure that  
25 Fish and Wildlife and the other fishing agencies would

1 be here? They would be anyway, right?

2 VICE-CHAIR FRANCES SPIVY-WEBER: I would hope  
3 so.

4 JOHN O'HAGAN: They have all been invited.

5 VICE-CHAIR FRANCES SPIVY-WEBER: They are going  
6 to be here and they are planning to talk about fish and  
7 wildlife issues, including birds and giant garter snakes  
8 and all the other concerns.

9 CHAIR FELICIA MARCUS: Bears and baker shells?  
10 That is my favorite wildlife urban interface. Sorry.

11 JOHN O'HAGAN: Okay. On water transfers, as I  
12 mentioned on our last update, we had received the  
13 petition from the U.S. Bureau of Reclamation, Department  
14 of Water Resources for the consolidated place use. That  
15 order was approved on April 27th for an exchange or  
16 transfer of 335,000 acre feet of water.

17 Additionally, we have approved a Temporary  
18 Urgency Change Order for the Sonoma County Water Agency  
19 on the Russian River at Lake Mendocino. That order  
20 reduces flows in the upper and lower Russian River to  
21 allow more storage in Lake Mendocino. And according to  
22 Sonoma County Water Agency, roughly 6,300 acre feet of  
23 stored water in Lake Mendocino may be saved through this  
24 order.

25 CHAIR FELICIA MARCUS: I have a question on this

1 because this comes up every year and ends up being  
2 particular challenging, given the nature of the  
3 different water agencies there.

4 I would love -- and later, if either one of the  
5 other Board members who's focus on the Russian River  
6 would join me or if they want to take it on themselves  
7 -- I would like to have a conversation in the long term  
8 about how to manage that, so that every year we don't  
9 end up with who is going to apply, are they going to  
10 apply, are they not going to apply, et cetera. Because  
11 it just seems time intensive. So I would just as soon  
12 see if we can come up with a multi-year framework.

13 JOHN O'HAGAN: For the long-term plan, we do  
14 have a long-term change petition for this. That is  
15 always ongoing. But in the interim, the TUCs are  
16 necessary for the yearly actions, if needed. So we do  
17 have a long-term change petition on file with us from  
18 the Sonoma County Water Agency.

19 CHAIR FELICIA MARCUS: Is that newly filed?

20 JOHN O'HAGAN: It's -- I don't know the exact  
21 date of file. I can get that information to you.

22 CHAIR FELICIA MARCUS: Is it this year?

23 JOHN O'HAGAN: No, no.

24 CHAIR FELICIA MARCUS: I think both Sonoma  
25 County and some of the upper watershed agencies don't

1 love this process. So that is what I want to talk  
2 about, figuring out a way to make it less labor  
3 intensive by spending a little time on the topic.

4 JOHN O'HAGAN: Okay. We will take care of that.

5 We do also have some pending Temporary Urgency  
6 Changes. Merced Irrigation has filed a Temporary  
7 Urgency Change Petition to allow relief from a minimal  
8 pool schedule for Lake McClure to allow Lake Don Pedro  
9 Community Service District to take 600 acre feet of  
10 water from the dead storage pool, and also to reduce  
11 their April through May bypasses from 60 CFS to 40 CFS.

12 We also have a TUC from June Lane Public Utility  
13 District that doesn't require approval until June 1st.  
14 And then also the City of Healdsburg. And that is for  
15 initial review by the Division staff. And then approval  
16 by July 1st. So we have those actions.

17 On curtailment, we discussed curtailment. As  
18 you know, we did the Antelope and Deer Creek  
19 curtailments for ensuring flow protections previously.  
20 On the Scott River, post-1914 rights and also surplus  
21 class rights have been curtailed. That is the same as  
22 we did last year.

23 In the Sacramento/San Joaquin River Watershed on  
24 April 23rd, we curtailed the San Joaquin side. And as  
25 of May 1st, the Sacramento and Delta post-1914 water

1 rights have all been curtailed. So we are at a level of  
2 curtailment in the Sacramento, San Joaquin and Delta  
3 area that we were about nearly a month ahead of last  
4 year on curtailments.

5 CHAIR FELICIA MARCUS: That is what I was going  
6 to ask you, as to what the differences were between this  
7 year and last year.

8 JOHN O'HAGAN: Last year, it would be --  
9 curtailments were issued on May 28th. This year,  
10 May 1st. So that is 27 days. Term 91 was also kicked  
11 in the day before, April 30th. And that's the condition  
12 in which supplemental project waters being released by  
13 the Department and the Bureau can meet the Delta  
14 standards downstream. And all of our monitoring of that  
15 is posted on the website, as well as our curtailment  
16 analysis.

17 For future curtailments, we are continuing to  
18 monitor other watersheds. For the need at this time, we  
19 don't see that. But in the Sacramento/San Joaquin, we  
20 plan on meeting with the stakeholders of the San Joaquin  
21 River Watershed to discuss the possibility of  
22 curtailments of pre-1914 and riparian rights.

23 At that meeting, we will also be having the  
24 Department of Water Resources come in and present their  
25 calculations of full natural flow that was requested by

1 stakeholders.

2 VICE-CHAIR FRANCES SPIVY-WEBER: When will that  
3 meeting be held?

4 JOHN O'HAGAN: I believe that is scheduled for  
5 next Tuesday. And that all I have for right now.

6 CHAIR FELICIA MARCUS: For the stakeholders, I  
7 know it has been helpful on a lot of fronts. So thanks  
8 for all your efforts and updates from you and your  
9 colleagues.

10 Are there any questions? Do you have the  
11 actions?

12 BOARD MEMBER STEVEN MOORE: There is a lot.

13 There are a few cases that we heard about last  
14 year that I haven't heard you mention. For instance,  
15 the El Dorado issue with the wastewater flows that  
16 provide for fish and wildlife. Was that an arrangement  
17 that had a longer time scale or has that come up?

18 JOHN O'HAGAN: That may come up again, yes. I'm  
19 not familiar with the exact stage of that, whether we  
20 received anything like that, but it wasn't on my notes  
21 from my staff.

22 BOARD MEMBER STEVEN MOORE: Okay. Thanks for  
23 the update. I think it highlights that the agricultural  
24 users in our state are taking a huge hit. And it is  
25 good for the folks that are in the audience to hear

<http://www.yndlaw.net/hisp>

1 about those real numbers; that this is a shared  
2 challenge throughout our state.

3 JOHN O'HAGAN: Yeah. I believe that the  
4 curtailments, that of the Post-14, affects 70 percent of  
5 the water rights that are listed that have been  
6 curtailed include agricultural use.

7 VICE-CHAIR FRANCES SPIVY-WEBER: On the workshop  
8 that you have on May 20th, because we haven't heard very  
9 much about fish and wildlife issues, I don't want that  
10 to be at the very end. I guess that is my request.

11 Figure out when best to do it. But do it  
12 earlier so that that issue does get front and center, as  
13 we discuss these other things that we have gone over  
14 regularly.

15 JOHN O'HAGAN: Okay.

16 CHAIR FELICIA MARCUS: It is sort of a parade of  
17 horrors all around.

18 (Whereupon, end of transcribed portion.)  
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REPORTER'S CERTIFICATE

State of California     )  
                                  ) ss.  
County of Sacramento    )

I certify that the statements in the foregoing hearing were transcribed in the within-entitled cause by audio; that said hearing was taken at the time and place therein named; that the testimony of said witnesses was reported by me, a duly Certified Shorthand Reporter of the State of California authorized to administer oaths and affirmations, and said testimony was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for either or any of the parties to said hearing, nor in any way interested in the outcome of the cause named in said hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this 30th day of August, 2015.

\_\_\_\_\_  
KATHRYN DAVIS  
Certified Shorthand Reporter  
Certificate No. 3808

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**BBID**  
**EXHIBIT 322**

STATE WATER RESOURCES CONTROL BOARD  
BOARD MEETING/HEARING  
(Portion)

MAY 20, 2015

Coastal Hearing Room - Second Floor  
1001 I Street  
Sacramento, California 95814

scribed by: Thresha Spencer, CSR No. 11788

kathryndavis & associates  
deposition reporting

555 University Avenue, Suite 116 Sacramento, California 95825 916.567.4211 [www.kdareporting.com](http://www.kdareporting.com)

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STATE WATER RESOURCES CONTROL BOARD  
BOARD MEMBERS

- Chair Felicia Marcus
- Vice-Chair Frances Spivy-Weber
- Board Member Tam M. Doduc
- Board Member Steven Moore
- Board Member Dorene D'Adamo

1 PORTION OF TRANSCRIPT OF PROCEEDINGS

2 (File 10 - 00:45 to end)

3 --o0o--

4 CHAIR FELICIA MARCUS: This workshop is being held  
5 in accordance with the public notice dated May 1st, 2015,  
6 and revised on May 18th.

7 This is an informal workshop. The State Water Board  
8 will not take any formal action and there will be no sworn  
9 testimony or cross-examination of participants.

10 The Board Members and its staff may, however, ask  
11 clarifying questions of speakers. After receiving comments  
12 at this workshop, The State Water Board may provide  
13 direction to staff regarding future activities.

14 We will be focusing on drought-related water right  
15 curtailment in the Delta watershed. We'll start with an  
16 introduction from the State Water Board staff, and that will  
17 be followed by public comments -- really, conversation  
18 amongst us and with you.

19 And we'll -- the number of comment cards at the  
20 moment, people will have five minutes when we get to that,  
21 but anticipate that we'll probably ask you a lot of  
22 questions as well.

23 And, with that, I'm going to turn right to staff.

24 KATHERINE MROWKA: Hi. I'm Kathy Mrowka. I'm with  
25 the Division of Water Rights. I'm the program manager for

1 enforcement, and the curtailment program is coordinated  
2 through my program.

3           So I wanted to talk to you today about the  
4 drought-related curtailments. Curtailments can be issued  
5 for three reasons: They can be issued because a water right  
6 has a term in it that requires parties to cease using water  
7 under specific conditions.

8           We have Term 91 in the San Francisco/San Joaquin Bay  
9 Delta. It can be issued due to overall watershed  
10 conditions, or it can be issued because of specific fishery  
11 needs.

12           Thus far this year we've seen a number of  
13 curtailments issued. We've seen three fishery needs  
14 curtailments, Scott River, Deer Creek, and Antelope Creek.  
15 We've seen two of the watershed wide, Sacramento River and  
16 Delta and San Joaquin River, and those were for the  
17 post-1914 water rights. And we've seen one curtailment for  
18 our permanent condition, Term 91.

19           So the interesting thing is how many people has this  
20 affected? I think that's a more difficult statistic because  
21 we are counting 8,942 water rights curtailed thus far.

22           When you look at how this breaks out and you say,  
23 "Oh, is it a lot of fishery curtailments, is it the general  
24 watershed conditions?"

25           And, frankly, the fishery curtailments are only

1 numbering roughly 300 parties affected. The rest of this is  
2 due to the horrific watershed-wide conditions.

3 Now, when we issue a curtailment notice, we ask  
4 parties to respond back to us and tell us if they are  
5 complying with that curtailment. And I wanted to talk to  
6 you briefly about our success ratio, and I wanted to say it  
7 is really poor. We've only received 20 percent response  
8 rate for the San Joaquin River, and we've seen a 29 percent  
9 response rate for the Sacramento River curtailed rights.

10 So we've gotten very poor responses. I wanted to  
11 tell you briefly about how we've used information from our  
12 prior informational orders to try and help us on our  
13 curtailment efforts.

14 CHAIR FELICIA MARCUS: Can I -- is this going to  
15 follow on the poor response? Or if I have a question on the  
16 poor response?

17 KATHERINE MROWKA: I just wanted to report on the  
18 poor response rate.

19 CHAIR FELICIA MARCUS: But how does that compare  
20 with last year?

21 KATHERINE MROWKA: Last year we had a better  
22 response rate, at least ten percent better on the response  
23 rate. This year it's somewhat worse.

24 CHAIR FELICIA MARCUS: That's interesting.

25 KATHERINE MROWKA: And it's particularly bad on the

1 fishery-related curtailments. So, last year,  
2 fishery-related curtailments could send paper forms in.  
3 This year they have to send in data electronically.

4 For Scott River, we're only at a nine percent  
5 response rate. So although we didn't see a lot of parties  
6 affected, we also saw very, very poor response rate.

7 So what that means to me on coordinating our  
8 enforcement efforts, it means that I need to target  
9 resources to those areas where we have poor response rates  
10 to determine whether parties are complying with the  
11 compliance -- I mean, with the curtailment.

12 And the next deals with how we prioritize those  
13 inspections, but I did want to finish first with the general  
14 information.

15 CHAIR FELICIA MARCUS: Okay.

16 BOARD MEMBER DORENE D'ADAMO: Can you tell if there  
17 might be an issue about electronic reporting? Are you  
18 getting the people to, you know, send in a written report  
19 saying they don't have access?

20 KATHERINE MROWKA: Well, the interesting thing about  
21 electronic reporting is it's our sole method of reporting  
22 for water right holders when they report their yearly water  
23 use. We no longer have any paper reporting allowed.

24 BOARD MEMBER DORENE D'ADAMO: So they should be able  
25 to then?

1 KATHERINE MROWKA: Yes. And we've done a lot of  
2 outreach to -- through farm bureaus and others to try and  
3 teach people how to do our forms.

4 What we looked at this year was streamlining and  
5 whether we could, you know, relieve some of the burden on  
6 the water-using community.

7 Last year there were two different kinds of  
8 curtailment forms you had to fill out. One to tell us if  
9 you had stopped using water and one to tell us if you --  
10 there was an applicable health and safety claim.

11 So this year everything is on one form, we tried to  
12 help out on that. We tried to make it a simpler form to  
13 navigate, you know, we tried to do what we could with  
14 respect to that so that would be a little less burden on the  
15 water-using community.

16 Earlier this year we had issued an informational  
17 order to the top 90 percent of water diverters in the Delta  
18 and 90 percent of the remaining San Francisco -- I mean,  
19 Sacramento and San Joaquin basins, and we have used the  
20 data, the 2014 data on their water diversion and use in our  
21 modeling, so we had already incorporated it in curtailment  
22 model.

23 What I haven't reported to you previously is what do  
24 we see and how does it compare the 2015 initial reporting  
25 versus 2014 data. So now we've got two months of 2015 data

1 that's come to us. And what we're showing is that, you  
2 know, we had asked these people to project what they thought  
3 they used in 2015; now we're getting the actual numbers.

4 March was 14 percent less -- the actual was  
5 14 percent less for 2015. April, the actual use was  
6 23 percent less than the projected.

7 So we're seeing that people are using less than they  
8 thought they were going to need to use for 2015. Way less  
9 than the face value. And the 2014 data we had seen that  
10 where parties reported to us and said that they had used a  
11 lot less.

12 But our last year's experience, you know, we sat --  
13 we went out and did 950 field inspections on curtailment  
14 last year, and our number one finding from those in field  
15 inspections was that people were complying with the  
16 curtailment because their streams were dry. I mean, that  
17 was the most frequent thing, go out, look, they were  
18 complying, but it's because conditions are so bad.

19 CHAIR FELICIA MARCUS: (Inaudible.)

20 KATHERINE MROWKA: Yes. So, you know, we found a  
21 high compliance rate, but it's for the worst darn reason.

22 So this year we're getting our field crews out in  
23 the field, we started May 1st, and we're using the same  
24 criteria that we used last year to prioritize who we look  
25 at. Failure to respond to the curtailment certification

<http://www.yestaw.net/hcdp>

1 form, size of diversion, is it currently their diversion's  
2 season, where are they located geographically, and flow  
3 conditions.

4 CHAIR FELICIA MARCUS: That's just because you're  
5 being -- I remember this from last year -- being efficient  
6 when you send the team out, you're looking in one geography.

7 KATHERINE MROWKA: Yeah. We are looking at that  
8 too. Last year we experienced a tripling of the water right  
9 complaints. And so, you know, we have some areas that we  
10 like to focus this year. We wanted to try and see, you  
11 know, what's going on in specific areas.

12 More than that, we want efficient investigations, we  
13 want them -- to cluster them so that their day's effort is  
14 meaningful. You know, if there's certain things we do, core  
15 efficiencies within the program.

16 And I really thank the Department of Water  
17 Resources. They are loaning us eight staff persons to  
18 assist with this effort, so very, very appreciative of that.  
19 And other divisions here at the State Water Board are also  
20 loaning us staff, and so we're very appreciative of that  
21 assistance.

22 Future curtailments. The San Joaquin River  
23 watershed, pre-1914 rights. We are expecting to issue  
24 curtailment this Friday.

25 San Joaquin River watershed, the riparian rights by

1 June 15th, and we're still reviewing the Sacramento River  
2 watershed and Delta pre-1914 water rights, and we don't have  
3 a recommendation yet on that.

4 Now, there are special circumstances that apply to  
5 the curtailments. For hydropower projects, if the diversion  
6 is for hydroelectric generation by direct diversion only and  
7 all water diverted is returned to the same stream system,  
8 continued diversion is allowed because, basically, you're  
9 putting back what you take out; you're not affecting  
10 someone.

11 For all diverters, water collected to storage prior  
12 to curtailment may still be beneficially used.

13 And then we have another category because there's  
14 only a health and safety exception for fishery-related  
15 curtailments. There is one there, but there's not one for  
16 general watershed-based curtailments.

17 What we are doing, though, is on the compliance  
18 certificate, we're asking parties, "Are you needing to  
19 comply with directives issued by the Division of Drinking  
20 Water or local health or drinking water regulations to  
21 provide water to meet human health and safety needs?" And  
22 these we evaluate on a case-by-case basis. Because although  
23 there are no exceptions for this, there are certainly  
24 enforcement discretion, and we want to know about those  
25 cases so we know when we need to use our enforcement

<http://www.yeslaw.net/htmlp>

1 discretion.

2 CHAIR FELICIA MARCUS: Right. And in those orders,  
3 as I understand it, there are very strict conservation  
4 limits. No watering outdoors, program oratorium and the  
5 like.

6 KATHERINE MROWKA: It's very minimal use. That's  
7 correct.

8 So that concludes my presentation on this topic. I  
9 will be doing another presentation on another topic.

10 Did you have questions for us? I think there will  
11 be a number of questions from other speakers.

12 So now I wanted to talk briefly about the hydropower  
13 program. Okay. We have a role in the hydropower, because  
14 we act under Section 401 of the federal Clean Water Act to  
15 determine conditions in FERC licenses, and licensees have  
16 requested temporary variances to the conditions in their  
17 water quality certifications for affected FERC projects.

18 Most variance requests are to reduce minimum  
19 in-stream flows, increasing water in storage benefits summer  
20 peak power generation, and helps satisfy water supply and  
21 maintain in-stream flow releases later in the year.

22 As background under Section 401 of the Clean Water  
23 Act, water quality certifications outline conditions to  
24 protect water quality and beneficial uses. The State Water  
25 Board has received and acted upon several requests for

1 variances. And just to point out two of them, Pacific Gas &  
2 Electric Company and Tri-Dam Projects on the Middle Fork  
3 Stanislaus River asked us to allow them to forego  
4 supplemental flows and recreational flows to maintain  
5 storage for use later in the summer for power demands and  
6 continued in-stream flow releases.

7 Another example is El Dorado Irrigation District's  
8 project on the South Fork American River. The State Water  
9 Board approved reduced minimum stream flow requirements so  
10 that EID could preserve storage and satisfy water supply  
11 demand.

12 We are anticipating that there will be additional  
13 requests for variances, and the variances are normally  
14 approved by the Executive Director and, in some cases, by  
15 the Deputy Director for Water Rights. Some variances are  
16 occurring without the State Water Board's approval as there  
17 is no certification in place for the project. So if we  
18 don't have a certification, we don't have a nexus for any  
19 action on our part.

20 BOARD MEMBER STEVEN MOORE: I guess on that point, a  
21 variance from what, then, if there's no condition in a --

22 KATHERINE MROWKA: They'll still have to go to FERC  
23 and ask for variance in their operating conditions.

24 BOARD MEMBER STEVEN MOORE: From FERC?

25 KATHERINE MROWKA: But we wouldn't have anything but

1 an advisory role.

2 BOARD MEMBER STEVEN MOORE: Okay. Thank you.

3 KATHERINE MROWKA: Okay. And then I did want to  
4 mention that the Governor has a hydropower working group.  
5 This is multi-agency coordination. Since early 2014, staff  
6 from the California Energy Commission, California Public  
7 Utilities Commission, Department of Water Resources, State  
8 Water Board, and the California Independent System Operator  
9 have been coordinating weekly to monitor and assess drought  
10 impacts on hydroelectric and other sources of power  
11 generation.

12 This working group extends beyond hydropower as  
13 other sources of generation, such as gas-fired power plants  
14 also rely on stable water supplies to generate power. The  
15 working group is continuously assessing California's  
16 electric grid capabilities under the drought and proactively  
17 following up on potential areas of concern.

18 So, in 2015, it's always fun, you know, to take a  
19 look, see what we're estimating. We're estimating grid  
20 reliability reminding good overall. The 2015 projection for  
21 hydropower generation is 49 percent of the annual average.  
22 But, you know, some of the loss in hydropower generation is  
23 being made up for by additional capacity from new  
24 generation, transmission upgrades, increased reserve margins  
25 to meet peak summer conditions, and moderate load growth.

<http://www.yeslaw.net/hclp>

1 And that concludes this set presentation.

2 CHAIR FELICIA MARCUS: That's it?

3 KATHERINE MROWKA: I'm done.

4 CHAIR FELICIA MARCUS: Okay. So I'm going to ask  
5 you to step in and help me or (inaudible). This is an  
6 opportunity -- this is a little different than the TUCP  
7 workshop that so many of you sat through. I appreciate that  
8 you did. That is an issue on which because there are  
9 petitions, we can't talk to people.

10 On the curtailment issue, we have talked to many of  
11 you, and we appreciate your engagement in, I think, a rather  
12 different way than last year. And I just wanted, at the  
13 outset, to thank people for some of the creative and engaged  
14 things that they tried to do as well as the information that  
15 people have been sharing, so I just wanted to say that.

16 And then the goal of this is just to open it up?  
17 Okay. I don't know why I was expecting more, but I was. No  
18 critique, I just was.

19 All right. With that, our first speaker is Dante  
20 John Nomellini. Yeah, but we don't have that many cards so  
21 I'm not going to be that tough. He can't have 20, but I'm  
22 not going to -- yeah. Wait a minute. I'm going to get --  
23 what I'm going to do is the person after you gets to decide  
24 how many minutes you get. What do you think about Herrick  
25 deciding how many minutes you get?

1 DANTE JOHN NOME LLINI: I don't agree, but we'll work  
2 that out outside.

3 CHAIR FELICIA MARCUS: He's waking up. I was going  
4 to order a cup of coffee for John earlier today. He was  
5 just yawning all morning. I was going to try and share with  
6 you? What?

7 JOHN HERRICK: (Inaudible.)

8 CHAIR FELICIA MARCUS: You were. You were just  
9 yawning to get more oxygen so that you could -- you could  
10 really pay attention.

11 Sorry. Mr. Nomellini, please.

12 DANTE JOHN NOME LLINI: Yes. Dante John Nomellini,  
13 Manager and Co-Counsel for Central Delta Water Agency. We  
14 understood our instruction to combine our comments on both  
15 topics, so I will deal with the curtailment as well as the  
16 temporary urgency change.

17 Of course, our concern is very high with regard to  
18 curtailment of water diversions in the Delta. We believe  
19 the water supply in the Delta not only includes flows from  
20 the east but includes flows from the west, and we have ample  
21 water continue to pump in order to farm and, therefore,  
22 water quality is the concern.

23 Now, I recognize we probably have some legal  
24 disputes on that. Just to let you know, we plan to engage  
25 on that subject. Hopefully, we can get it aired out

1 somewhere along the road so we don't have to fight over it  
2 constantly. But we're at the time where under the threat of  
3 curtailment, if we -- you haven't done it yet, is really  
4 affecting our people and their ability to continue to  
5 function.

6 We're very disappointed that we've transitioned,  
7 even though our agencies haven't been at the forefront of  
8 negotiations over water banking or fallowing in the Delta  
9 for compensation, that fell apart, and now we're dealing  
10 with an avoidance or our landowner's avoidance of  
11 prosecution and penalties in exchange for foregoing their  
12 water use.

13 I view that as a switch from an economic voluntary  
14 banking program to one of reacting to extortion under threat  
15 of curtailment and penalty.

16 Of course, I have no enthusiasm for that as a  
17 lawyer. I think it's wrong and, therefore, we're going to  
18 engage, you know, on whether or not your process is  
19 appropriate for that.

20 I recognize the curtailment of the Delta notice has  
21 not gone out yet for pre-1914s in the Delta or riparians,  
22 and I understand from just the brief presentation that  
23 decision hasn't been made yet. I suspect it's forthcoming.

24 There are a couple of things I'm going to kind of  
25 repeat to you what I've said to you before that, after 2013,

1 I believe in 2013 the reservoir storage was depleted  
2 wrongfully, and the fishery agencies, in my opinion, were a  
3 party to it. They said, you know, let the critical year  
4 criteria dominate for Delta agriculture, even though it was  
5 a dry year rather than critical under D6 -- D41. They  
6 didn't say anything about exports. And exports -- and I  
7 submitted letters to you. Exports, I didn't sue on it. I  
8 was leaving the sword in the closet.

9 But exports were taking the same water that could  
10 have been stored for cold water protection for fish. And  
11 that, to me, was wrong. We hear about water and storage  
12 being allowed after the notice of curtailment or as of the  
13 date of curtailment as if it's a sacred cow. Just because  
14 it's stored in the reservoir doesn't mean it's stored in the  
15 water. The projects have been capturing behind the  
16 reservoir water that would be otherwise natural flow to the  
17 Delta. Particularly important would be, like, in April or  
18 March because it would flush the Delta and, of course, our  
19 concern is water quality, you know, whatever solidity  
20 control is, that you've kind of dictated that.

21 But that water is actually natural flow, in our  
22 view, that would have come down fresh in the source, the  
23 water for our farmers. And we viewed the law to provide for  
24 solidity control and a balancing of that by letting people  
25 store that water in the early spring months in exchange for

1 some benefit, water quality-wise, in the summer. So that's  
2 how we've rationalized that.

3 So if you let them take that away and you curtail it  
4 later, we view that as a serious wrongdoing. And we  
5 understand the law and, of course, we don't have agreement  
6 with all your lawyers, but we think the Delta Protection Act  
7 says you can't export from the Delta unless the Delta is  
8 first provided an adequate supply.

9 Now, exports have been going on without a health and  
10 safety restriction. We haven't jumped in to stop that but,  
11 on the other hand, if they get to do that and then you  
12 curtail us, we think that's really wrong.

13 Your staff presented what I think is factually  
14 correct, that the adjustments from 2014 to 2015 mean greater  
15 exports. If you saw the pie charts, it's bigger.

16 And for the first series of months from January 1st  
17 up to now, the State Water Project has pumped from the Delta  
18 268,779 acre feet more than in the same period last year.  
19 Now, where did that water go? That water is in San Luis.  
20 You know, there's other water in San Luis, but that water is  
21 there.

22 So if all of a sudden we let -- we start curtailing  
23 our Delta diversions, that water, the exporter shouldn't  
24 have been able to take that water. They're taking advantage  
25 of it unfairly, and I'm not going to attribute why it's

1 occurring, I mean, whether there's good reasons or not.

2 The net effect is they've taken water that's in  
3 storage, so that water in storage that came out of the Delta  
4 should be available to meet Delta water quality  
5 requirements. It could come back in the San Joaquin River.  
6 They've done it as a demonstration project, bringing it down  
7 through the Westley Wasteway, so...

8 I view those as examples of what we'd be concerned  
9 about in terms of an equitable adjustment. We're not going  
10 to just sit back and let a process cripple us while others  
11 take advantage, I think, unfairly of it.

12 Now, I've said to you before, I think what we ought  
13 to do, and I think you ought to avoid curtailments. Let us  
14 sort it out, you know, among ourselves, fight over it. It's  
15 not a place for you to go because it's very complicated from  
16 a water right's standpoint. It is very specific to  
17 location.

18 Now, I'm not saying that just with regard to the  
19 Delta. The Delta, I think, is the easiest case because we  
20 have water all the time. But, as you go up river, you're  
21 getting involved in very detailed, very site specific  
22 considerations that I think rightfully have to be addressed  
23 from a water right administration standpoint. So you're  
24 supposed to -- you think you're protecting senior water  
25 rights. What I see is the advantage is to the junior water

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1 right holder who claims stored water, two projects, and they  
2 have statutory obligations that are not purely water right.  
3 That's their statutory rights that regulate what they do.

4 So, in any event, I just wanted to alert you we're  
5 still going to work positively on trying to get a better  
6 handle on understanding water use in the Delta. We're  
7 sending our checks for the two CVA stations. This effort by  
8 our water master to get better information. I found two  
9 sites in the central Delta. We're going to cooperate.  
10 We're going to do that. We're going to try and be  
11 responsive. We thought we helped almost everybody that  
12 needed help respond to these information requests and the  
13 patents and all of that. We'll continue to do that.

14 KATHERINE MROWKA: Oh, I do want to mention --

15 DANTE JOHN NOMELLINI: -- curtailment.

16 KATHERINE MROWKA: -- you did have a 97 -- what was  
17 it, a 97 percent? It was a huge response.

18 DANTE JOHN NOMELLINI: We've tried to help, and we  
19 will continue that.

20 KATHERINE MROWKA: I appreciate that.

21 DANTE JOHN NOMELLINI: But as we have to become more  
22 defensive, we're going to -- we're going to litigate. We  
23 personally think our shot is better in court than it is in  
24 front of you because of the hypertechnical nature of these  
25 questions dominated by staff. We know who staff are, we

1 know what their positions are from past events on these  
2 water right issues, so we're going to try and stay in court.  
3 That doesn't mean we won't be back here.

4 CHAIR FELICIA MARCUS: We would miss you.

5 DANTE JOHN NOMEILLINI: I know you said you thought  
6 the Board ought to do it, but, I mean, quite frankly, we  
7 think our best shot is in the courthouse rather than before  
8 your Board because you're going to defer to staff. Not that  
9 you wouldn't go the other way, but these things are so  
10 complex, I know what you're going to do. I've only been  
11 around all these years. I lost my hair, the gray are  
12 gone --

13 CHAIR FELICIA MARCUS: You have so much faith in the  
14 judicial system, I guess.

15 DANTE JOHN NOMEILLINI: -- and my estimate is that  
16 our best shot is in court.

17 BOARD MEMBER DORENE D'ADAMO: I have a question for  
18 you. So you've outlined here that you think we're going to  
19 go forward, which it appears that that's where we're headed,  
20 but you mentioned that you ought to be able to work it out  
21 yourselves. So how would you structure that?

22 DANTE JOHN NOMEILLINI: Well, I think water right  
23 holders would litigate amongst themselves. I mean, you've  
24 seen the San Joaquin River entities join together, which we  
25 signed on too that said, "Look, you know, stay away from

1 this, wait until you get a formal complaint."

2 We hear John Ruben come in all the time, you know,  
3 "Beat those guys up and this, that, and the other thing."  
4 He hasn't filed anything yet, but he may. And maybe we'll  
5 file something that he's interested in.

6 But the parties are well aware, the water right  
7 holders, I mean, the people in the Sacramento River that are  
8 doing these transfers, we're concerned about the impact of  
9 water -- groundwater substitution. We didn't bring that to  
10 you as a complaint. We mentioned it, but we are litigating  
11 the environmental document on the long-term transfers.

12 I'm just indicating to you that how those things are  
13 going to get sorted out, other than you people jumping into  
14 the fray on what we view as complicated, site specific, even  
15 document-specific challenges. You may want to join them  
16 all, which is okay.

17 But I just wanted to be frank with you, let you know  
18 I do appreciate everybody's interests and the effort that's  
19 gone in, a lot of effort even at staff, but, you know, this  
20 is getting real critical. Our guys, you know, this  
21 25 percent thing, we, in the agencies, are not going to  
22 obstruct it because people have to take that risk and make  
23 that decision as to whether they're going to give up  
24 25 percent in order to get a non-prosecution type of  
25 comfort, I don't know, how could that -- anyway. But we're

1 not going to interfere, of course, because we can't predict  
2 the result. But, conceptually, we think it's wrong. We  
3 think our rights are senior, we think the statutes are set  
4 up to make sure that we come first.

5 If you can't export, you may not be able -- you may  
6 not want to give us the water that we think we need, but you  
7 can't export when we don't have an adequate supply. We  
8 think that's the law. And, of course, that's kind of an  
9 incentive on the projects to try and hammer out this  
10 solution with us.

11 You know, we've tried to get some kind of  
12 contractual situation, because we'd rather have more  
13 security. We've been unsuccessful over the years, and  
14 there's no mechanism for us to force an arbitration or a  
15 good faith negotiation. The statute puts that leverage on  
16 no exploits, we think. That's where the leverage is. That  
17 doesn't mean we're satisfied, but they can't take water out  
18 of the Delta unless this thing is resolved. Anyway --

19 CHAIR FELICIA MARCUS: Thank you.

20 DANTE JOHN NOMELLINI: -- those are my comments.  
21 Thank you very much.

22 CHAIR FELICIA MARCUS: Well, we'll be talking more.

23 John Herrick? South Delta Water Agency followed  
24 by -- sorry -- Deirdre Des Jardins from the California Water  
25 Research.

1 JOHN HERRICK: You said that like you don't know me.

2 CHAIR FELICIA MARCUS: Well, I'm trying to be a  
3 little more formal. (Inaudible.)

4 JOHN HERRICK: Thank you, Madam Chair, Board  
5 Members. John Herrick for the South Delta Water Agency.

6 Again, we appreciate everybody's efforts. There's a  
7 lot going on, very difficult decisions coming. Hopefully,  
8 we can all get through this. My comments are similar to  
9 what I've said before, and that is I really would like to  
10 stress and encourage the Board to -- to take a different  
11 route for the long-term. The short-term is too late, but we  
12 need to have hearings on this stuff.

13 The urgency statutes -- or urgency requirements in  
14 Section -- what is it -- 1425, 35, 25, you know, they're  
15 clearly for an emergency event, and they really don't fit  
16 here. And I think just a cursory look at the criteria there  
17 shows that this is not the appropriate situation for them to  
18 be employed.

19 In order to get an urgency permit change, you have  
20 to show that it does not adversely affect any legal user of  
21 water. Well, if the changes are relaxation of water quality  
22 standards to protect legal users, then it's, by definition,  
23 an injury to them.

24 Now, people may disagree to the extent of that, and  
25 I guess you could couch it in, "Well, it must be an

1 insignificant one so we must not do it," but it's clearly --  
2 it's clearly an injury to legal users.

3           Similarly, it says, "Shall not unreasonably affect  
4 fish and wildlife." Well, obviously, that's in a situation  
5 where something happens, you can do some  
6 previously-unauthorized action as long as you don't really  
7 affect the fisheries or the environment. Well, that's the  
8 opposite we're doing here. We're fundamentally altering the  
9 minimum flows for the fisheries.

10           And then the last criteria, which I've harped on for  
11 five years now, and apparently I can't read or something.  
12 But the last one says, you know, you can get an urgency  
13 change if you've shown diligence in trying to get the change  
14 under the normal procedure rather than the emergency one  
15 because of the emergency one -- because of all the criteria  
16 and the lack of public participation.

17           So I think any honest evaluation of the statute is  
18 that this is not the method by which we would have four  
19 years of Delta and upstream operations determined. And, you  
20 know, it's not my job to, you know, personally attack the  
21 Bureau and DWR. Sometimes it is, but -- you know, we rely  
22 on their presentations at these -- at these meetings, and,  
23 you know, everybody couches things to their best interests  
24 to some degree, and we just don't get to challenge what  
25 they're presenting. We don't even see it until the day of

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1 the hearing.

2 But there's all sorts of information that none of us  
3 have, especially you, dealing with all these things, like  
4 cold water supply and previous storage and what's going on  
5 here. Those things really need to be aired out with idiot  
6 attorneys like me being able to cross-examine so we can  
7 actually see. You know, there are hundreds of questions  
8 raised by this morning's presentations, but we'll never get  
9 to those, literally.

10 So I do encourage the Board to undertake, you know,  
11 the decision, and I don't know who would fight you on this  
12 but there are probably be a lot of people, but you really  
13 need to say this right now, "Okay, starting October 1, we're  
14 going to have ten days of hearings for future drought  
15 operations." It may be too late. I mean, if it doesn't  
16 rain again for another year or two, it may be too late and  
17 there's nothing to do. But we can't operate on this urgency  
18 basis where it's presentations by the people who control the  
19 system, and it's really kind of take it or leave it.

20 You know, "Oh, this is all we can do, you know, and  
21 we don't get to see what the truth is," so I encourage you  
22 to do that. The good news, I think, will be covered by  
23 Ms. Spaletta when she gives you an update on her -- on the  
24 25 percent program that she and others have spent a lot of  
25 time on.

1 So, anyway, thank you very much for your time.

2 CHAIR FELICIA MARCUS: (Inaudible.) Followed by --  
3 sorry. Followed by Steve Arakawa from Met.

4 DEIRDRE DES JARDINS: I wanted to congratulate the  
5 Board because I think this year you are light years beyond  
6 last year in terms of your amount of information about  
7 what's really going on in the Sacramento Valley.

8 CHAIR FELICIA MARCUS: It may not be saying a lot,  
9 but it is a lot.

10 DEIRDRE DES JARDINS: Yeah, no. It's very  
11 significant, and there's this major conflict in the Bureau  
12 said these guys get 75 percent of the water that they  
13 normally would contract it for even if Shasta is a dead  
14 pool. The Bureau is doing their best to meet the contracts,  
15 but they're also trying to maintain cold water pool for  
16 salmon. So that's much more in the light right now, and  
17 it's -- and our whole state is better for it.

18 But I have a more fundamental comment, and I really  
19 thought today, what would I want to talk about? What is the  
20 biggest gap? The biggest gap is DWR is doing -- helping to  
21 do the curtailment analysis, and the projects aren't looking  
22 at the fact that they, themselves, are curtailed.

23 The Coordinated Operating Agreement, the projects  
24 committed in 1986 to always meet all in-basin uses,  
25 including Delta outpost. And, for that reason, the Board

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1 has always given them wide latitude in operations.

2 I don't delve into the COA accounting. The Bureau  
3 publishes monthly reports of the COA accounting and the  
4 Delta output complications, but the COA accounting only  
5 tracks releases of stored water. It aggregates all in-basin  
6 uses, and it only loosely tracks the source of water for  
7 Delta exports. It's never intended for conditions of  
8 curtailment of the CVP and the State Water Project's permits  
9 to divert unstored water.

10 And I really have questioned whether I should bring  
11 this up, but reservoir operations people work so hard, but  
12 curtailment literally construed requires full bypass blows  
13 from all the rundowns, which is not planned for Folsom or  
14 New Melones.

15 And if you're really going to curtail downstream  
16 water rights holders, the projects may be needing to provide  
17 substitute flow for these water rights holders while USBR  
18 has devoted a lot of attention to meeting their contracts,  
19 senior downstream water rights holders, which is those from  
20 Mr. Nomellini and Mr. Herrick may have a stronger claim to  
21 these substitute flows than curtailed USBR contractors who  
22 may have post-1914 appropriative rights.

23 The water balance reports that Mr. Howard  
24 recommended are a really good start, but the information  
25 needs to be pulled together in a more complete report, the

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1 tracks stored, and then stored releases and depletions.  
2 Diversions by curtailed contractors under the Bureau's  
3 permit or State Water Project contracts, they have to be  
4 reported. It should be stored water only, and it needs to  
5 be excessed to other in-basin needs. This affects the  
6 Sacramento and Feather River settlement contractors, the  
7 exchange contractors, and also the City of Sacramento's  
8 permits on the American River.

9 And I know you guys have done a lot of work, but the  
10 Bureau needs to look at this. Finally, the source of water  
11 for exports needs to be tracked.

12 The Water Board has said repeatedly exports are  
13 junior to meeting in-basin needs. During curtailment for  
14 each project, diversions can be no more than upstream  
15 releases less contributions to require outflow.

16 And I know this, according to the Bureau's smart  
17 operations forecast, the State Water Project is planning to  
18 export more than the Feather River releases from October  
19 through January. I don't know when your curtailment project  
20 is, but that's what's planned.

21 Transfers. The Board is doing way better. They've  
22 noticed this year that some of the proposed transfers are  
23 from settlement contractors who are curtailed. Those aren't  
24 approved. But I notice there's a long-term transfer, the  
25 Yuba River transfer -- there was a really big one last year.

1           And I looked closely, and your database seems to say  
2 that all of the Yuba County Water Agency contractors are  
3 post-1914, so the only thing they could transfer is stored  
4 water. And there may have been a little more than that  
5 transferred last year. So less this year, I think there's a  
6 lot less, but it's something to look at.

7           Similarly, south of Delta, Feinstein passed some  
8 language which ended the CVPA requirement that transferred  
9 speed of water that will actually be delivered and  
10 consumptively used for south of Delta transfers.

11           So, obviously, this could cause a lot of problems,  
12 and I just noticed there's a big transfer that was just  
13 proposed, and I apologize because I missed seeing the  
14 notice. But it's saying that Arvin-Edison may transfer up  
15 to 150,000 acre feet of its CVP supplies to Metropolitan  
16 Water District this year. And I'm, like, what supply? The  
17 Bureau hasn't allocated anything. Is that from next year?  
18 Are they going to get any water?

19           You know, so I think, you know, you don't want  
20 Arvin-Edison transferring CVP water to Met until  
21 Arvin-Edison has an allocation. So it's those kinds of  
22 things, I think, need a little more scrutiny, and I'll send  
23 this in writing to the Board as well.

24           CHAIR FELICIA MARCUS: Thank you.

25           Mr. Arakawa followed by Terry Erlewine.

1           TERRY ERLEWINE: Chair Marcus, would it be okay if  
2 we reversed the order?

3           CHAIR FELICIA MARCUS: Yeah, sure.

4           TERRY ERLEWINE: Thank you. Terry Erlewine on  
5 behalf of the State Water Contractors, and I'll be followed  
6 by Steve Arakawa from Metropolitan.

7           I wanted to talk about a couple issues,  
8 curtailments, and then also talk about water conservation  
9 briefly.

10           Before I started to talk about that, though, I  
11 wanted to talk about what's happening in terms of  
12 operations. And what I've been looking at is what's  
13 happening so far in May. And if you just look at the  
14 Bureau's operations reports, which were just talked about,  
15 the Coordinator Operations Agreement accounting, the Delta  
16 outflow accounting, there's been roughly 300,000-acre feet  
17 of water that's been taken out of the project's storage, you  
18 know, in the last -- since the beginning of May. So  
19 300,000 acre feet of water has been taken from Oroville or  
20 Shasta and Folsom, released. Of that, less than 30,000 acre  
21 feet has been exported, so less than ten percent of that  
22 stored water has gone to the export projects.

23           Roughly 200,000 or so, a little bit more, has gone  
24 to outflow, so roughly 60 percent of the stored water  
25 releases has gone to outflow. So if we look at the whole

1 pie, we've got ten percent that's going to exports,  
2 60 percent that's going to outflow, and the remainder is --

3 CHAIR FELICIA MARCUS: Meaning, salinity control,  
4 right? Primarily, salinity control?

5 TERRY ERLEWINE: That's -- yeah. That could be --  
6 yeah. Although we've been hearing a lot of people talk  
7 about one person's salinity control is another person's  
8 fishery protection, so...

9 CHAIR FELICIA MARCUS: For drinking water.

10 TERRY ERLEWINE: Yeah. Yep.

11 CHAIR FELICIA MARCUS: We were already talking about  
12 putting shading into the pie chart.

13 TERRY ERLEWINE: Yep. The point I was trying to  
14 make was just that there's 30 percent of that stored water  
15 release that's not accounted for, and that's naturally what  
16 our focus is on is that where is that going, and our concern  
17 is that there are people that are -- have legitimately  
18 superior water rights that are taking some of that water.

19 There are other parties that have not had their  
20 water rights defined that are also very well likely taking  
21 our water, and that's why we support the actions the State  
22 Board has been taking in terms of curtailments because we  
23 think that's really the way -- that's the process that the  
24 Board needs to go through to make sure that people are  
25 taking the water that's legitimately their's and not taking

1 the water that's being released for outflow needs and other  
2 purposes.

3 We appreciate the Board's responsiveness to the  
4 Bureau and the Department on asking for more information  
5 from water rights holders. We also think it's positive that  
6 we're getting good results, at least in some cases in  
7 responses to the water rights information.

8 We've been pretty interested in the process the  
9 Delta Water Master has initiated to modify and improve the  
10 water right or water use information.

11 That, so far, focused on consumptive use, which is  
12 part of the puzzle that some of the other pieces of the  
13 puzzle are direct measurements of surface diversions, direct  
14 measurements of discharges back to the river, and all -- all  
15 three of those ultimately are things that we believe are  
16 going to be necessary for the State Board to have in their  
17 hands to manage the water rights system. There's also a lot  
18 of that information is needed for the projects to be able to  
19 operate effectively.

20 So we support those activities, we support what the  
21 Delta Water Master is doing, we think that there's --  
22 there's actions that need to be taken beyond that.

23 We've actually had some informal contacts with other  
24 parties, and I think, you know, we're -- we're optimistic  
25 that there may be an approach there that all of us could

1 agree that it's something that collectively meets the needs  
2 of the Board and meets the needs of the operators and is  
3 satisfactory to most parties. So we're hoping to continue  
4 those discussions.

5 I just briefly wanted to mention that many of our --  
6 some of our members are ag water -- ag contractors, ag  
7 agencies, and they are implementing major water management  
8 measures. They are responding to the shortages in water  
9 supply. Kern County Water Agency has got some of the most  
10 efficient water use in the state with a lot of drip and  
11 micro irrigation.

12 We've got other water agencies, Tulare Lake Basin  
13 Water Storage District where they've had 50 percent  
14 fallowing in the last two years, 100,000 acres for both  
15 years, as a result of the water supply shortages.

16 And, with that, I'd like to turn it over to Steve.

17 MR. ARAKAWA: Thank you. My name is Steve Arakawa,  
18 and I'm here representing also the state water contractors,  
19 but I'm also a staff person for the Metropolitan Water  
20 District of Southern California.

21 I wanted to first thank the Board and all of the  
22 time that you're putting in to deal with the situation that  
23 we're faced with. It clearly is a set of terrible choices,  
24 as you said earlier today, and I remember reading the  
25 testimony back in 1976/'77 drought about what they were

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1 confronted with, and the world is so much more complex now.

2 We -- we want to commend you for the early actions  
3 that you've taken with regard to curtailments and  
4 understanding how things are developing in the system so  
5 that you're able to make decisions in a timely way.

6 I think that given the unprecedented nature and the  
7 very severe drought that we're faced with in all parts of  
8 the state, and particularly those that count on the Delta,  
9 are required and faced with dealing with unprecedented type  
10 of things.

11 For example, urban areas in the state project  
12 service area have invested in efforts, programs, facilities  
13 for years to try to drought-proof their service area and the  
14 management of water in their area. But given the severe  
15 situation of the drought, we're all being called on to take  
16 severe -- to take significant actions.

17 Those actions include meeting the emergency  
18 regulations that the state has put forward. Also, in  
19 support of that, implementing supply allocation cutbacks  
20 with penalties.

21 So when you look at the urban areas within the  
22 contractor service area, both in the Bay Area, the Santa  
23 Clara County Water District, and the Zone 7 Agency, those  
24 agencies are implementing their mandatory programs, they're  
25 implementing rebate programs, and other types of messaging

1 to get people to cut back.

2 In Southern California, allocation plans, in  
3 addition to ramping up turf removal programs to try to  
4 reduce the amount of water in the outdoor area as a  
5 long-term trend. We think that it's important as you go  
6 through this decision process to uphold the water rights  
7 priority system particularly in a drought situation.

8 And, even going forward, I think that's going to be  
9 really key that the State Board has a handle on how to  
10 implement these types of actions. And we encourage you to  
11 take the necessary steps in doing so to protect stored water  
12 by the projects. That stored water mainly being used to  
13 protect the Delta environment this year and making sure that  
14 any water that is released out of those reservoirs, if it's  
15 intended to meet the environmental need, that it's doing  
16 that work and not getting lost in the system.

17 We know that you're going to be interested in  
18 looking at all kinds of creative solutions, and I think  
19 that's appropriate. And I think in doing so, just making  
20 sure that the intended -- the intended outcome is actually  
21 occurring, that the water that's being saved is actually  
22 being put to the use that it's intended.

23 We want to thank you for holding this workshop, and  
24 thanks very much.

25 CHAIR FELICIA MARCUS: Alan Lilly. I have a card,

1 but I don't see him. Alan Lilly.

2 Philip Martin -- oh, followed by Jennifer Spaletta.

3 PHILIP MARTIN: Good evening, Madam Chair, Board.

4 My comments, I believe, are going to be focused on  
5 what Jennifer is going to talk about, I believe, the  
6 25 percent reduction program or proposed program.

7 I'm a farmer in the Tracy area, and my concern  
8 regarding this proposed program regards crop insurance, and  
9 it's one of the few tools that farmers have to manage  
10 drought risk.

11 My question regarding this program is whether or not  
12 this voluntary program is compatible with crop insurance,  
13 and I would ask you to try and work the program so that it  
14 is compatible. By doing this, I believe the Board can  
15 reduce the pain to some of us farmers and increase the  
16 participation in this program. Thank you.

17 BOARD MEMBER DORENE D'ADAMO: I need to understand  
18 what you mean by that. You have to be able to plant a crop  
19 in order to even apply for crop insurance.

20 PHILIP MARTIN: No. If I were to prevent planting  
21 because you do not have water, you can file a claim.

22 CHAIR FELICIA MARCUS: So I thought I understood  
23 what he was saying, but just to say -- you're saying this  
24 program, if it evolves into a program --

25 PHILIP MARTIN: Right.

1 CHAIR FELICIA MARCUS: We should try to do it so  
2 that folks can claim the 25 percent on their crop insurance?

3 PHILIP MARTIN: Correct.

4 CHAIR FELICIA MARCUS: I have a feeling a voluntary  
5 program probably won't, but I'll leave that to the folks  
6 trying to figure out how to --

7 PHILIP MARTIN: That's the problem. The fact that  
8 it is worded as voluntary --

9 CHAIR FELICIA MARCUS: Right. Yeah.

10 PHILIP MARTIN: -- would be my -- I'm sure that my  
11 crop insurance company would did not want to pay me if I  
12 voluntarily complied.

13 CHAIR FELICIA MARCUS: That would be my guess,  
14 but --

15 BOARD MEMBER DORENE D'ADAMO: What about with  
16 respect to the fallow ground, though?

17 PHILIP MARTIN: Right. We're planting right now,  
18 and probably in the next ten days we will complete planting.  
19 So any decision the Board makes, I would ask that you make  
20 it quickly because if I'm -- most of the costs with these  
21 crops are incurred upon planting, probably over 50 percent,  
22 and get cut off shortly after planting is (inaudible).

23 CHAIR FELICIA MARCUS: Fair point.

24 PHILIP MARTIN: Thank you.

25 CHAIR FELICIA MARCUS: We do recognize that. Thank

1 you.

2 (Whereupon, end of transcribed portion.)

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REPORTER'S CERTIFICATE

State of California        )  
                                  ) ss.  
County of Sacramento     )

I certify that the statements in the foregoing hearing were transcribed in the within-entitled cause by audio; that said hearing was taken at the time and place therein named; that the testimony of said witnesses was reported by me, a duly Certified Shorthand Reporter of the State of California authorized to administer oaths and affirmations; and said testimony was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for either or any of the parties to said hearing, nor in any way interested in the outcome of the cause named in said hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this 2nd day of September, 2015.

\_\_\_\_\_  
THRESHA SPENCER  
Certified Shorthand Reporter  
Certificate No. 11788

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**EXHIBIT 323**

STATE WATER RESOURCES CONTROL BOARD  
BOARD MEETING/HEARING  
(Portion)

MAY 20, 2015

Coastal Hearing Room - Second Floor  
1001 I Street  
Sacramento, California 95814

scribed by: Thresha Spencer, CSR No. 11788

**kathryndavis** | & associates  
deposition reporting

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STATE WATER RESOURCES CONTROL BOARD  
BOARD MEMBERS

- Chair Felicia Marcus
- Vice-Chair Frances Spivy-Weber
- Board Member Tam M. Doduc
- Board Member Steven Moore
- Board Member Dorene D'Adamo

1 PORTION OF TRANSCRIPT OF PROCEEDINGS

2 (File 11 - all)

3 --o0o--

4 CHAIR FELICIA MARCUS: Jennifer Spaletta followed by  
5 Jeanne Zolezzi.

6 JENNIFER SPALETTA: Thank you. First of all, I want  
7 to thank staff and the Board Members for working very hard  
8 this year to try and get additional information, better  
9 information than we had last year and for encouraging the  
10 regulative water community to do its part through voluntary  
11 agreements, and I think we've made a lot of progress this  
12 year. I know I've had some very good conversations, not  
13 just with people in this room, but with other people  
14 associated with the export projects and the contractors that  
15 we hadn't had before, and I think they've been really,  
16 really good at moving the ball forward on a lot of difficult  
17 factual and legal issues that we can narrow and, I think we  
18 can all agree, need to be resolved.

19 Unfortunately, the more we talk and the more we  
20 learn and even through the process of gathering better data  
21 about water availability, I think the more we realize that  
22 when you get down to the nitty-gritty at any individual  
23 point of diversion, the risk of being wrong with broad brush  
24 analysis is very, very high.

25 And that's why, regardless of these big legal

1 issues, that we know we need to resolve. We also know they  
2 won't be resolved this week, and they probably won't be  
3 resolved this summer.

4 And that's why many of us in the Delta who have  
5 clients who are sitting here biting their nails wondering if  
6 they're going to plant something and cultivate it for three  
7 months only to receive a curtailment order have said, "Can  
8 we offer something voluntarily that saves water, helps us  
9 all get through the summer collectively," moves the ball  
10 forward without waving our rights on these bigger legal  
11 issues. And that is what we've proposed at this 25 percent  
12 voluntary program.

13 And we've worked with Michael George, obviously, and  
14 Tom Howard to put kind of the meat on what the program would  
15 look like. But, essentially, it would be farmers who say,  
16 "Okay. I'm still at a point in my cropping planning for the  
17 summer where I can make adjustments. I can either do some  
18 water conservation here, I can choose a different crop or I  
19 can plow a certain land and achieve a 25 percent reduction.  
20 We'll keep track of it, we'll document it, we'll make sure  
21 that it can be verified. We may actually learn something  
22 about the way the Delta works for those that participate in  
23 the program.

24 You, in exchange, will get four months of 25 percent  
25 reduction, which is a lot of water, if we're talking about

1 the system.

2 And they, in exchange, of course, receive some  
3 regulatory certainty that they can irrigate their other  
4 acreage, as they have been, and get through the summer from  
5 a business perspective. So it's really a practical  
6 solution.

7 It's a voluntary program, obviously, we hope get a  
8 lot of growers to sign up, but it's a practical solution.  
9 It's an on-the-ground practical solution to get people  
10 through the summer, achieve water savings, which is  
11 important to the system, and save this dialogue and these  
12 important legal issues to be resolved, but to a time where  
13 they can be resolved properly.

14 CHAIR FELICIA MARCUS: It's -- it's interesting.  
15 And again, not an opinion yet, but interesting to  
16 contemplate. We are in this funny -- funny is not the right  
17 word. We are in this challenging -- I think the word  
18 "unprecedented" has been used a lot, and recently a  
19 situation both hydrologically but also in terms of actually  
20 exercising the water right system to an extent it has not  
21 been exercised before. And so the challenge is on all sorts  
22 of fronts. So it's interesting to think interestingly about  
23 it and look at other options.

24 But I have a specific question that's sort of  
25 prompted by Mr. Nomellini's point. Which is one of the

1 things, at least for me, that I'd like to see is that we do  
2 resolve some of these issues that have been hanging around.  
3 Because my perspective, just dancing in and out of it over  
4 the decades, is that there's a -- there are very  
5 strongly-held views about the law or -- and other things,  
6 even the hydrology, about the law, let alone what's right  
7 and wrong. And those same arguments have gone for decades  
8 without helping us resolve anything.

9 And it strikes me that there's a moment where when I  
10 left, people seemed very comfortable in their rhetorical  
11 certainty and they take their chances on what might happen  
12 out in the world, and that seemed to be in a place of  
13 comfort. What I'm seeing in this crisis is people saying,  
14 "Let's resolve some of these things finally and move on."

15 But I guess I'd like us to resolve them in a way.  
16 One thing I'd be concerned about is buying time and then  
17 punting. So in your conversation --

18 JENNIFER SPALETTA: We don't want to do that, no.

19 CHAIR FELICIA MARCUS: -- there has been a strategy  
20 for how to lay out -- maybe there's ten, maybe there's  
21 twenty, maybe there's seven key issues that need to be  
22 resolved. And I'm hoping -- I'm hoping certainly with the  
23 assistance of our Delta Water Master and his acumen and  
24 energy on this, to be able to tee up those issues for  
25 discussion in the nearer future rather than the later

1 future.

2 Is that a part of your conversation?

3 JENNIFER SPALETTA: I would like to meet today,  
4 frankly. I wish that we -- I wish that there's evidentiary  
5 hearing and that I could have asked questions of the people  
6 who put the charts up on your screen today.

7 I mean, frankly, we have to get to the bottom of it  
8 because there's a lot of people who put up information, but  
9 we've never had the opportunity to ask each other the hard  
10 questions about those graphs and really get down to the  
11 nitty-gritty of the spreadsheet.

12 I mean, I heard what Terry said about missing  
13 35 percent of the stored water, and we need to get to the  
14 bottom of that. The projects have to be able to operate and  
15 account for their stored water. And if they can't account  
16 for it now, there's a problem, we need to understand it.

17 So the way I view this voluntary program and any  
18 voluntary program that you would enter into to get through  
19 this year is it is just that. It is an emergency agreement  
20 to get operations through this year that operates on a  
21 parallel track with resolving these tough issues. And they  
22 really are two different things. One is operations, making  
23 a difference on the ground to get us through the year. And  
24 then the second is rolling up our sleeves and digging in on  
25 the tough legal and factual issues. We should be doing

1 both; we should be doing both at the same time.

2           The reason that we like these practical voluntary  
3 programs is there are literally hundreds of individual  
4 farmers who are having a very hard time this year making  
5 basic decisions, and I have a fear that if you roll out a  
6 curtailment in the middle of the summer, that the compliance  
7 with that curtailment will be sparse. And, frankly, that's  
8 not good for the system. It's not good for their mental  
9 health, it's not good for the economy of the area, and it  
10 doesn't achieve your goal. It may help us resolve the legal  
11 issues, but it doesn't actually do what we need to do, which  
12 is save water and make the system work better.

13           So I think what we're offering with this program is  
14 an opportunity to do both, to actually do some water savings  
15 and allow these people to operate in a way that makes some  
16 business sense. And, at the same time, let's dig in on  
17 these legal and factual issues and get to the bottom of them  
18 one way or the other.

19           CHAIR FELICIA MARCUS: Thank you.

20           JENNIFER SPALETTA: Thank you.

21           CHAIR FELICIA MARCUS: Question, Tam?

22           BOARD MEMBER TAM M. DODUC: Actually, I do have a  
23 few questions. Actually, the proposal is very intriguing.  
24 So just a couple of questions just to clarify in my mind.  
25 I'm sure I will get the details later on, but as far as what

1 you are thinking.

2 A voluntary 25 percent in, I guess I understand it,  
3 either reduction in diversion or 25 percent fallowing of  
4 land that would normally be put into production in the  
5 critical three months.

6 So with respect to the first one, a 25 percent  
7 reduction in diversion, are you thinking that will be  
8 25 percent less -- I think you're talking about a 2013  
9 baseline, so that would be reduction from actual diversion  
10 or reduction from the water rights of diversion?

11 JENNIFER SPALETTA: Well, I don't think there will  
12 be an impact on water rights with just one year's activity,  
13 but there will be an impact on how much water is actually  
14 taken out of the river, I guess.

15 BOARD MEMBER TAM M. DODUC: No, no, no. I meant,  
16 were you doing the calculation of the 25 percent --

17 CHAIR FELICIA MARCUS: 25 percent of what?

18 JENNIFER SPALETTA: Of the riparian rights.

19 THOMAS HOWARD: Perhaps I can answer because we're  
20 the ones that are actually writing it up, and I had  
21 discussions with staff about that issue. And it seemed to  
22 me that what we do is this year in the information order, we  
23 asked the 90 percent largest diverters to tell us what they  
24 intended to use this year.

25 And so we have, for a large fraction of the

1 diverters in the Central Valley, an estimate that they  
2 provided us saying, "Here's what we intend to use."

3 We also have some of the data of 2013 use, and we  
4 will certainly have more as these statements roll in over  
5 the year. So we'll ask the parties, "If you want the  
6 25 percent reduction, you should have two numbers available  
7 to you. You should have what you already told us you were  
8 going to do last year -- that you were going to do this year  
9 as you were projecting this year's diversions, and you have  
10 what you did in 2013, take the lower of those two and take  
11 off 25 percent." That's what the form said.

12 JENNIFER SPALETTA: And that would be a major  
13 problem if that's what the form said because the projected  
14 numbers for this year, in many cases, already accounted for  
15 conservation measures that were being implemented by the  
16 farmers. So that, of course, would be very unfair.

17 But if we're talking about a 2013 baseline --

18 CHAIR FELICIA MARCUS: Uh-huh. That's what I  
19 assume.

20 JENNIFER SPALETTA: It's a very basic concept. If  
21 you had a 100-acre field that was irrigated in alfalfa and  
22 they put on five acre feet of water during the summer month  
23 period, and since that time they have invested in drip  
24 irrigation and they are planting a shorter crop, maybe  
25 cucumbers for 60 days on drip, there's going to be obviously

1 a substantial difference in the amount of water that's  
2 diverted and used on that property, probably more than  
3 25 percent savings on that particular property.

4 So we would have to compare apples to apples with  
5 what was -- how they computed their diversions in use in  
6 2013 with how they compute their diversions in use in 2015.  
7 If there's measurement devices in place, that's relatively  
8 easy, otherwise we have to use the same methodology, you know,  
9 to make it an apples-to-apples comparison.

10 CHAIR FELICIA MARCUS: You would have to have some  
11 kind of real number to base it on?

12 JENNIFER SPALETTA: Correct.

13 BOARD MEMBER TAM M. DODUC: And --

14 CHAIR FELICIA MARCUS: And I want to talk about  
15 that. Taking the lower -- that doesn't seem right to me.  
16 I'm sorry, Tom. It doesn't seem fair. I'm not saying that  
17 it's 2013/2014 -- but it doesn't -- I'm not getting it,  
18 so...

19 JENNIFER SPALETTA: Yeah. That was the first I'd  
20 heard of that. We previously had talked about doing a  
21 baseline of 2013 or 2014, certainly not using the  
22 projections from 2015 as a baseline, because many of those  
23 projections, of course, did include plans, you know, for  
24 fallowing or reductions in use already.

25 BOARD MEMBER DORENE D'ADAMO: Yeah. I would think

1 just stick with it. I really appreciate your energy and --  
2 all of you that are working on this, so stick with it and  
3 hopefully something can be worked out.

4 I have a question for staff. So Slide 25.

5 BOARD MEMBER TAM M. DODUC: Actually, if I could  
6 finish my question --

7 BOARD MEMBER DORENE D'ADAMO: Oh, sorry.

8 BOARD MEMBER TAM M. DODUC: -- before you move off  
9 the topic.

10 So I think it probably can be said -- can be said --  
11 understood without saying, but just so I have it perfectly  
12 cleared.

13 So the water savings through fallowing or reduced  
14 diversions would be water then that would not be available  
15 for transfer or other uses?

16 JENNIFER SPALETTA: The water will basically remain  
17 in the stream, okay?

18 BOARD MEMBER TAM M. DODUC: Okay.

19 JENNIFER SPALETTA: Now, I will tell you --

20 CHAIR FELICIA MARCUS: It's got to be real water or  
21 it doesn't make sense.

22 JENNIFER SPALETTA: It has to be real water,  
23 absolutely. And I wouldn't propose this program, and I know  
24 that my landowners wouldn't propose it unless it was real  
25 water. It just doesn't make sense.

1           The other thing --

2           BOARD MEMBER TAM M. DODUC: And I guess -- oh, go  
3 ahead.

4           JENNIFER SPALETTA: So I was going to say, though,  
5 but this type of program is going to teach us a lot about  
6 the effect of taking these activities in the Delta, which I  
7 think could actually be a springboard for other programs  
8 that maybe could lead to ideas about how to change stream  
9 flow or how to effectuate transfers, you know, using the  
10 Delta. And so it's an opportunity to learn for the future  
11 as well.

12          BOARD MEMBER TAM M. DODUC: And my last question is,  
13 to help me understand this in context, and so will you just  
14 say your growers, how many are we talking about, how much  
15 water are we talking about potentially?

16          JENNIFER SPALETTA: Yep. So --

17          BOARD MEMBER TAM M. DODUC: Do you have a rough  
18 estimate?

19          JENNIFER SPALETTA: So I have absolutely no idea. I  
20 will tell, you know, I personally, on a weekly basis, talk  
21 to growers who farm about 40,000 acres in the Delta, and  
22 they're all very interested in the program. There are other  
23 people who have expressed a strong interest who represent  
24 probably a like amount of acres.

25          Between the south and central Delta, there are about

1 \$300,000 acres. Do I think that all of them will sign up  
2 for this program? Probably not. It's just, frankly, too  
3 late to do that kind of outreach and accomplish that result.

4 But I do think that we'll get a critical number to  
5 sign up, and that's real -- that's real water. That's a lot  
6 of water, you know. Even if we had 10 or 10,000 acres sign  
7 up, it's still real water.

8 So I think that the program will achieve water  
9 savings if we get it moving so we can get people signed up.  
10 It's really a matter, though, of days here and getting it  
11 moving, because farmers are still making some planting  
12 decisions for the summer and they need to be able to figure  
13 out what they're doing so that we can achieve some savings.

14 Thank you all very much.

15 BOARD MEMBER DORENE D'ADAMO: Well, hang on just one  
16 second. Because the point that I was going to make is just  
17 the ability to glean additional information as a result of  
18 this, the whole issue of consumptive use in the Delta and  
19 that sort of thing.

20 And looking at what staff had suggested on Slide 25  
21 as far as going forward with curtailment inspections, at the  
22 top of the list is Nonresponsive to Curtailment  
23 Certification Form.

24 So assuming that the growers that would be  
25 participating in this would have some sort of certification

1 form on file, not that they would be ignored, but the focus  
2 would really be in other areas allowing -- allowing its  
3 staff to move forward perhaps in some of these issues that  
4 we're trying to get to the bottom of. So it's just a way to  
5 narrow down the focus.

6 KATHERINE MROWKA: As I understand, the focus would  
7 shift to obtaining the information that the fallowing had  
8 occurred, that the reductions had occurred, so that there  
9 would be a shift in focus.

10 BOARD MEMBER DORENE D'ADAMO: The monitoring.

11 JENNIFER SPALETTA: All right. Thank you.

12 THOMAS HOWARD: Chair Marcus, just for  
13 clarification. I've been telling staff that we have to make  
14 a decision on this and get it out by Friday because it's  
15 supposed to start on June 1st. And, you know, every day  
16 that we wait, as the previous speaker had indicated, you  
17 know, people are making their decisions. And so this isn't  
18 something that I think is going to age well, and we need to  
19 make a decision and --

20 CHAIR FELICIA MARCUS: Right. And then you -- so  
21 you need to put in front of us individually, since it won't  
22 be tonight, what the -- what the parameters are and let us  
23 give you feedback.

24 THOMAS HOWARD: Sure. Of course --

25 CHAIR FELICIA MARCUS: Between now and then.

1 THOMAS HOWARD: I've sent you a couple of things  
2 already, but --

3 CHAIR FELICIA MARCUS: I mean, we've had a general  
4 conversation, but we got into a set of details that we need  
5 to understand if you want our feedback, otherwise someone --  
6 someone is going to challenge it.

7 THOMAS HOWARD: Sure.

8 CHAIR FELICIA MARCUS: And then it will come back,  
9 so I just -- I think the onus is on you all collectively to  
10 lay it out, give us the details, pros and cons where the  
11 warts are, et cetera.

12 I mean, in general concept I'll say I'm intrigued by  
13 it given that we're not going to resolve everything. But I  
14 do want to hear what the blow back will be or the cons. And  
15 we've had a general conversation, but we -- the devil is in  
16 the details, so -- you know, I'll look forward to seeing it.

17 BOARD MEMBER STEVEN MOORE: That's fine. Yeah. I  
18 don't -- I don't mind discussing it a little bit, my  
19 impressions of it are, you know, there's a choice we need to  
20 make about the baseline and maybe one of the -- you know, in  
21 thinking out loud -- if we wanted to really accomplish real  
22 water savings in this context, you know, it's tempting to  
23 use 2013 because we've used that for our urban water  
24 conservation targets and -- but I realize, you know, in  
25 terms of realizing real water savings in an emergency

1 situation, what is an appropriate baseline, you know, how do  
2 we -- you know, will we make a measurable difference  
3 comparing to what was predicted a few months back and  
4 reported or comparing to 2014, you know, these are the  
5 questions in terms of what's going to get us an outcome in  
6 terms of, you know, helping fish and wildlife, making more  
7 water available to senior water right holders and those  
8 questions.

9           So, you know, I'm at a point where, you know, I  
10 really realize the time sensitive nature of this, and I'm  
11 willing to, you know, take on some risk in setting up kind  
12 of a system to encourage this voluntary approach. You know,  
13 in terms of when I say that, I mean, knowing that I don't  
14 have all the answers to those questions, but there's a  
15 timeliness to this.

16           So I think, on the one hand, 2013, there's  
17 compelling reasons to use that for consistency in a  
18 state-wide story about conservation relative to a couple  
19 years back. And then, you know, then I ask staff, you know,  
20 is that giving too much credit for things that have happened  
21 already, and it won't make a significant difference this  
22 year in terms of making critical acre feet of water  
23 available.

24           BOARD MEMBER DORENE D'ADAMO: Well, isn't -- isn't  
25 part of it based on calculations of the supply and demand

1 curves that John O'Hagan is working on? I mean, whether  
2 it's 25 percent or whatever the number is, the idea is to  
3 get roughly equivalent savings as what would have occurred  
4 with a correlative reduction for riparians.

5 THOMAS HOWARD: That is information that is used to  
6 inform the question of whether it is reasonable to offer a  
7 25 percent reduction, but it's not necessarily the sole  
8 determining factor. I can't guarantee -- because, for  
9 example, if we did a reduction, and it could very possibly  
10 be we'd send out curtailment notices in August or even the  
11 beginning of September --

12 BOARD MEMBER DORENE D'ADAMO: Uh-huh.

13 THOMAS HOWARD: -- for riparians, and it might be a  
14 much larger reduction. And so, you know, you're looking at,  
15 well, you have four months now of a reduction as opposed to,  
16 you know, maybe the two months you'd have if you sent out a  
17 riparian notice.

18 And so if you're somewhere in the area of 25 to  
19 50 percent of the supply/demand curves, then, you know, it  
20 seems as though this is a reasonable thing to offer for the  
21 purpose of ensuring that we, you know, we provide assurances  
22 to people and the assurance that we actually see some real  
23 water.

24 BOARD MEMBER DORENE D'ADAMO: And I guess what I'm  
25 saying is you could compare that number to the various

1 baselines --

2 THOMAS HOWARD: Of course.

3 BOARD MEMBER DORENE D'ADAMO: -- you're talking  
4 about.

5 THOMAS HOWARD: That's exactly what I was doing,  
6 yes.

7 BOARD MEMBER STEVEN MOORE: Yeah. I, like Board  
8 Member D'Adamo, I think this is a very healthy exercise, but  
9 there's a time sensitivity to it. And I'm comfortable  
10 moving forward not having all the answers, but knowing if  
11 you do a reasonably quick analysis of water savings, that --  
12 that it's worthwhile in building the team effort and -- and  
13 then keeping an eye on it. The monitoring will be  
14 important. I'm very favorable to moving forward with  
15 something this week.

16 CHAIR FELICIA MARCUS: Thank you. Ms. Zolezzi  
17 followed by Jennifer Buckman.

18 JEANNE ZOLEZZI: Good evening, Board Members.  
19 Jeanne Zolezzi representing Patterson Irrigation District  
20 and Banta-Carbona Irrigation District. And I just want to  
21 mention those are both pre-1914 water right holders on the  
22 San Joaquin River. We have also been talking to the Delta  
23 Water Master and your staff about a potential voluntary  
24 curtailment agreement. We'd very much like to explore that.  
25 We're waiting for numbers because we feel very strongly that

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1 a voluntary curtailment is much preferred to the chaos and  
2 the litigation that would follow a mandatory curtailment.

3 And I agree with Ms. Spaletta that we'd like to have  
4 something voluntary for this year while we still pursue  
5 getting answers to those legal questions that must be  
6 answered for us to continue in this venue.

7 I just wanted to go through a few of the reasons why  
8 we don't believe that pre-'14 curtailments across the board  
9 are appropriate at this time or legal at this time, just  
10 some things for you to think about.

11 Regarding data, I think everyone has done it that's  
12 come up here. We really do want to commend your staff.  
13 They have taken the information we have provided and they  
14 have just made extraordinary efforts in trying to take those  
15 comments into consideration and come up with the best data  
16 they can come up with. It's been a herculean effort, and  
17 they've done a great job.

18 The problem is in the San Joaquin River System there  
19 are just no answers to some of the anomalies that we're  
20 finding. Even the top experts on the San Joaquin system who  
21 usually have all the answers don't have those answers this  
22 time.

23 For example, just looking at the seven-day running  
24 average from last week working with the experts on the San  
25 Joaquin River we went through, we looked at all the gauges,

1 we looked at all the reservoir releases, and we looked at  
2 actual diversions from the river that were taking place,  
3 came up with the number that we expected to see at Vernalis.

4 Well, that wasn't the number that showed up. The  
5 number at Vernalis was 200 CFSS higher than that. And  
6 nobody, including the expert on the San Joaquin River, can  
7 explain why that is the case at this point.

8 So there are things that simply cannot be answered  
9 in the San Joaquin River. And when you enforce a  
10 curtailment against a water right holder, you have the  
11 burden to demonstrate that no water is available. And when  
12 we don't have the answers as to what water is there and  
13 where it comes from, we can't make those conclusions.

14 Regarding the right to divert, again, imposing  
15 curtailments based on an assumption that a senior water  
16 right holder is being injured somewhere downstream, it's  
17 simply not authorized and not within the State Board's  
18 power, frankly. A junior water right appropriator in  
19 California has the right to continue to divert as long as  
20 there is water at their facility and a senior water right  
21 holder is not being significantly injured.

22 It's not enough to say -- it's not enough for the  
23 State Water Project contractors to get up here and say, "We  
24 are losing 30 percent of our water, curtail everyone." It  
25 just doesn't work that way. They have some burden of

1 showing where that 30 percent is going. They have no idea.  
2 Frankly, that's why we need data, that's why we need some  
3 questions answered.

4 And as Dante mentioned, curtailments are based upon  
5 site specific and time specific determinations, and they  
6 also depend upon specific priority at a specific location.  
7 We simply don't have those facts. We haven't even attempted  
8 to get those facts, and we haven't had a factual hearing --  
9 we haven't had an evidentiary hearing to glean those.

10 Just as an example, if you have a senior water right  
11 holder in the Delta who has a certain water right for a CFS  
12 diversion and it's for irrigation. They don't divert water  
13 30 days out of the month; they divert water a few days to  
14 irrigate and then a few days later in the month to irrigate.

15 When they are not irrigating, the junior water right  
16 holder has the opportunity to take that very same water  
17 legally. Your staff's information is based on a 30-day use  
18 of that water that's been reported. That's not correct.  
19 That's not the way junior and senior water rights work. If  
20 it was, it would never work. Even in the wet years we  
21 couldn't get that done. It's because we have seniors  
22 turning on and off and juniors using that this whole system  
23 we have with the over appropriations that you keep hearing  
24 about, that's how it works.

25 Another issue. When you're talking about my

1 client's pre-'14 water right holders in the San Joaquin  
2 River being curtailed to protect more senior "pre-1914 water  
3 right users in the Delta," you have a real difficulty,  
4 because those pre-'14 water right users in the Delta are  
5 simply claimants. No one has determined whether or not they  
6 have valid pre-'14 water rights. They -- they very well  
7 may. No one has determined that.

8 So to curtail upstream pre-'14s in favor of  
9 downstream more senior pre-'14s who have not established  
10 their rights, it's simply not equitable, it's not legal,  
11 and, of course, it will be challenged.

12 CHAIR FELICIA MARCUS: So I follow the logics of  
13 that. Basically, it would be an argument that we can't do  
14 curtailments because we haven't adjudicated the whole  
15 system?

16 JEANNE ZOLEZZI: No. You -- you have -- you have no  
17 idea if someone has a valid right. When you're dealing with  
18 post '14s, you have a --

19 CHAIR FELICIA MARCUS: But you say we could never  
20 curtail seniors because we haven't adjudicated it fully the  
21 way other western states have. Or, in some cases we have --  
22 in some cases perhaps we have.

23 JEANNE ZOLEZZI: If you had determined.

24 CHAIR FELICIA MARCUS: But I'm trying to understand  
25 how what you're saying doesn't mean we just can't do it at

1 all ever until we adjudicate the whole system.

2 JEANNE ZOLEZZI: That would be my legal conclusion.

3 CHAIR FELICIA MARCUS: I'm trying to understand what  
4 you're saying, that you have no authority over pre-'14s.

5 JEANNE ZOLEZZI: And that's one of the reasons is  
6 that you don't have a permit that you can look to and say,  
7 "This pre-'14 has a right to take this water at this time."

8 The courts have very clearly said very recently that  
9 you do have the authority to determine if a pre-'14 is  
10 valid. They have said that you have to do that in order to  
11 determine if they're legally taking water, but the court  
12 also said, "You can't go beyond that. You can't regulate  
13 that water right."

14 And once you determine a pre-'14's right vis-a-vis  
15 another pre-'14, you're regulating. Once you tell that  
16 pre-'14, "Okay, you have a valid right, but you have to stop  
17 taking it because other water right holders need the water,  
18 you're regulating." And I would ask you to ask the hard  
19 questions of your staff because we know that your legal  
20 counsel is telling you something different, that you do have  
21 that authority.

22 And, obviously, we will get the answer to that  
23 because, you know, if we have broad brush curtailments, we  
24 will bring that up and have the legal answer.

25 CHAIR FELICIA MARCUS: Right. I'm assuming that one

1 is on the list?

2 JEANNE ZOLEZZI: It is.

3 CHAIR FELICIA MARCUS: But I don't want to see the  
4 list, frankly.

5 JEANNE ZOLEZZI: And that's how you get to it,  
6 because how can you curtail me as a pre-'14 when I have  
7 data, I have a posted notice from 1911 that shows I have a  
8 valid right to divert, and someone else just says, "Oh, I  
9 have a pre-'14 right" with -- with no proof and no  
10 determination or fact finding by this Board that that's the  
11 case.

12 BOARD MEMBER DORENE D'ADAMO: So what you're saying  
13 is that we don't have jurisdiction over pre's, and that, in  
14 addition, that we need to wait until we get a complaint?  
15 Someone has to be injured --

16 JEANNE ZOLEZZI: Well, as to pre, absolutely. That  
17 is the law as well. You could -- if you could determine  
18 without a complaint that there's an injury, obviously you  
19 could perceive that way.

20 But again, the courts have been very specific, and  
21 the California Supreme Court has stated that a threat of  
22 harm, which is what we are hearing staff telling us, that we  
23 are curtailing in order to protect, John O'Hagan told us,  
24 "Well, there's a threat that these senior water right  
25 holders will be injured because you're taking their water."

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1           The California Supreme Court has said a threat is  
2 not enough. You have to prove that the senior water right  
3 holder has actually been substantially injured or materially  
4 injured.

5           So if you're just taking water that they weren't  
6 going to divert that day, you're legally entitled to it. If  
7 you've inconvenienced them, you're entitled to it. If we  
8 have taken, you know, one acre foot from the projects,  
9 that's not a substantial injury, and they cannot show what  
10 water we're taking, if any, that we're not entitled to. So,  
11 yes, our point is that you simply don't have the site  
12 specific information that's needed to do this.

13           And again, as we've said it before, it's also the  
14 due process issue. You know, we're getting double-speak,  
15 very frankly, from your staff. We receive in the mail --  
16 the post-'14s received a letter that said, "You are  
17 immediately to cease diverting, and within seven days you  
18 will file under penalty of perjury a certification that you  
19 have stopped diverting. But it's just a notice and it's not  
20 enforceable."

21           You know, we can't have it both ways. It's either a  
22 binding notice to cease diverting or it's just a letter  
23 saying, "There might not be enough water for you, you better  
24 consider what you do or we'll come after you."

25           What you sent out is a notice. It is an order to

1 stop diverting, and you cannot do that without a due process  
2 hearing. You can't do that without an evidentiary hearing.

3 And that's why your staff is not calling it an  
4 order; it's just a notice. Because, as you well know, you  
5 can't have a binding order affecting your property rights  
6 without some kind of due process, without a hearing, right  
7 to be heard evidence, which we've had none of. We simply  
8 have staff, based upon a graph that we haven't been able to  
9 cross-examine or correctly verify saying, "Someone might be  
10 injured in the future. You have to stop diverting."

11 It simply doesn't work, which is why we are asking,  
12 "Let's see if we can work out something voluntary and still  
13 pursue these legal issues to get them answered," or let's  
14 take a different approach and wait until we have complaints  
15 and you can do that site specific determination through a  
16 hearing. And then we'll get our answers and we'll know who  
17 needs to be curtailed and who doesn't need to be, so --

18 But we hope -- we hope to get some numbers from your  
19 staff and, hopefully, we can work out some voluntary  
20 curtailment so that we don't have the chaos that follows and  
21 we can come up with some kind of orderly way to get these  
22 questions answered. I know that Mr. George has been working  
23 very hard on that to try to get some of these questions  
24 answered in an orderly way rather than the chaos result. So  
25 I do thank your staff for its efforts. Thank you.

1 CHAIR FELICIA MARCUS: Okay.

2 BOARD MEMBER DORENE D'ADAMO: I just wish my  
3 housekeeper vacuumed that well.

4 CHAIR FELICIA MARCUS: Some -- can you hear that?  
5 It's like someone is vacuuming in the hallway behind us for  
6 15 minutes. I don't know. Sorry. We are listening, it's  
7 just --

8 JENNIFER BUCKMAN: And, for some reason, I'm always  
9 last at these things. Jennifer Buckman. I'm here on behalf  
10 of the Friant Water Authority.

11 And I just wanted to clear up -- I want to -- it's  
12 late, and I don't want to repeat any of the comments and be  
13 repetitive of comments that have already been made for us by  
14 others, but I did want to clear up the comment in reference  
15 to Arvin-Edison Water Storage District, which is a Friant  
16 Division contractor and a member of the Friant Water  
17 Authority.

18 They are not transferring 150,000-acre feet of CVP  
19 water this year. The Friant Division contractors, as this  
20 Board is painfully aware, got a zero allocation this year  
21 like we got last year. They don't -- we didn't, as a whole  
22 division, we didn't get 150,000-acre feet of water either  
23 this year or last year or the two years in combination.

24 So our hydrology this year is even more challenging  
25 than it was last year because the local streams have

1 basically very, very little supply to augment.

2 So the folks in our division that have other sources  
3 of supply are in an even worse situation this year than they  
4 were last year. As a result of that, we put together a  
5 complicated package of exchanges and transfers in order to  
6 develop a water supply for the Friant Division contractors.

7 And as you all know from some of the prior workshops  
8 and such we've had on the TUCPs, within our service area, we  
9 have thousands of families who are still out of water 10,  
10 12 months later after their wells ran out. It's primarily  
11 impacting low-income families, folks who can't afford to  
12 drill the well deeper or move.

13 And in response to the comment earlier that there  
14 are no endangered farmers, well, there are in our area in  
15 Terra Bella and Lindsey and Strathmore and Orange Cove. I  
16 know plenty of endangered farmers. A lot of our guys are  
17 growers that have been on the same land for multiple  
18 generations, and right now their lives and livelihoods are  
19 on the line. We've got 15,000 small family farms. Within  
20 the Friant Division, the average farm size is less than 200  
21 acres. These aren't guys that can weather a long multi-year  
22 drought like that.

23 As I've mentioned to the Board before, within the  
24 Friant Division is a little bit unique in the fact that we  
25 are a conjunctive use system, planned that way under the

1 California Water Plan and operated that way, which means  
2 that our M&I contractors, those who have municipal and  
3 industrial needs within the Friant Division are served by a  
4 Class 1 contract, not a specific M&I contract.

5 So it's critically important for us to develop some  
6 Class 1 supply for those contractors this year because we've  
7 got six cities, including the City of Fresno, that are  
8 Friant contractors and need that water.

9 A lot of people worked very, very hard to get what  
10 is essentially a replacement of the Class 1 supply we would  
11 otherwise get, and it's not just Arvin-Edison, we have other  
12 Friant Division contractors who worked on that. Delano  
13 Earlimart and Kern and Tulare were both involved in the  
14 transactions, as were a number of our neighbors, the  
15 exchange contractors and Westlands Water District was very  
16 helpful to us in making some water and deferring -- taking  
17 some water out of San Luis so that we could avoid a low  
18 point problem and make the water available behind Millerton,  
19 we were able to back it up through a multi-party exchange.

20 It's a really complicated package of transactions  
21 that we've put together, and that's why it may be confusing  
22 to folks who just read, "Oh, there's 150,000-acre feet of  
23 water that's going to change hands at some point, but that's  
24 not this year and it's not CVP supply."

25 We're developing a minimal supply for the Friant

1 Division contractors. We're getting a total of less than  
2 30,000-acre feet for the entire division.

3 So I also want to echo the comments that a bunch of  
4 other folks have made about how the State Board staff has  
5 been really helpful this year, and we appreciate that. It's  
6 a much more iterative process this year than last, and we're  
7 very thankful for the, you know, discussions we've been able  
8 to have with Kathy and Michael and a bunch of other folks.

9 CHAIR FELICIA MARCUS: Thank you very much.

10 (Whereupon, end of transcribed portion.)

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1 REPORTER'S CERTIFICATE

2  
3 State of California )  
4 County of Sacramento ) ss.

5  
6 I certify that the statements in the foregoing  
7 hearing were transcribed in the within-entitled cause by  
8 audio; that said hearing was taken at the time and place  
9 therein named; that the testimony of said witnesses was  
10 reported by me, a duly Certified Shorthand Reporter of the  
11 State of California authorized to administer oaths and  
12 affirmations; and said testimony was thereafter transcribed  
13 into typewriting.

14 I further certify that I am not of counsel or  
15 attorney for either or any of the parties to said hearing,  
16 nor in any way interested in the outcome of the cause named  
17 in said hearing.

18 IN WITNESS WHEREOF, I have hereunto set my hand this  
19 2nd day of September, 2015.

20  
21 \_\_\_\_\_  
22 THRESHA SPENCER  
23 Certified Shorthand Reporter  
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**BBID**  
**EXHIBIT 324**

STATE WATER RESOURCES CONTROL BOARD  
BOARD MEETING/HEARING  
(Portion)

MAY 20, 2015

Coastal Hearing Room - Second Floor  
1001 I Street  
Sacramento, California 95814

scribed by: Thresha Spencer, CSR No. 11788

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Transcribed by: Thresha Spencer, CSR No. 11788

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STATE WATER RESOURCES CONTROL BOARD  
BOARD MEMBERS

- Chair Felicia Marcus
- Vice-Chair Frances Spivy-Weber
- Board Member Tam M. Doduc
- Board Member Steven Moore
- Board Member Dorene D'Adamo

1 PORTION OF TRANSCRIPT OF PROCEEDINGS

2 (File 12 - all)

3 --o0o--

4 CHAIR FELICIA MARCUS: Thank you. I know folks have  
5 worked very hard to try and actually converse and work these  
6 things through, and it's much better -- it doesn't take away  
7 from the fact that it's a horrible drought and a horrible  
8 situation (inaudible). So figuring what to do is the  
9 challenge.

10 I'm trying to figure out what the most useful thing  
11 for us to do right now would be. I found this actually  
12 quite helpful, believe it or not.

13 What?

14 (Inaudible.)

15 CHAIR FELICIA MARCUS: Oh, Tim? Oh, yeah. I didn't  
16 bring -- your card is over there.

17 Tim, last word. You'll just wrap it all up for us?

18 (Inaudible.)

19 CHAIR FELICIA MARCUS: That's fine.

20 TIM O'LAUGHLIN: Tim O'Laughlin, representing the  
21 San Joaquin Tributaries Authority. I have a question for  
22 staff, and maybe they can answer it. So on the chart that  
23 was put up on the screen, it said "San Joaquin River Basin  
24 Curtailment this Friday."

25 Do we know, is that the San Joaquin River Basin from

1 Vernalis all the way to Friant, and if -- what's the  
2 geographic boundary of it? And also is there a start date?  
3 Is it 1906 or 1908? What's -- what's the game plan?

4 KATHERINE MROWKA: Yes. Staff has done the analysis  
5 for the individual tributaries, the Stanislaus, Merced, and  
6 Tuolumne, and right now they're combining data for the basin  
7 as a whole to give us a common date at a common location. I  
8 believe it's Mossdale Bridge.

9 TIMOTHY O'LAUGHLIN: So -- but does that -- but will  
10 that include the -- if it's Mossdale Bridge, you're going to  
11 curtail on the mainstay on San Joaquin River on Friday too?

12 KATHERINE MROWKA: It's common curtailment.

13 TIMOTHY O'LAUGHLIN: All right. Thank you.

14 CHAIR FELICIA MARCUS: Say that again.

15 KATHERINE MROWKA: So, basically, it would be a  
16 watershed-based curtailment like all of our others have been  
17 this year.

18 TIMOTHY O'LAUGHLIN: Well, okay. So it's just going  
19 to be the Stanislaus, Tuolumne, and the Merced?

20 KATHERINE MROWKA: No. We've run all the data for  
21 the individual -- those are the tributaries.

22 TIMOTHY O'LAUGHLIN: I just need to know is it all  
23 three of them --

24 KATHERINE MROWKA: Plus, we're running right now the  
25 data for the major -- for, like, the combined whole

1 watershed picture, so...

2 TIMOTHY O'LAUGHLIN: So is the curtailment going to  
3 include the mainstem San Joaquin?

4 KATHERINE MROWKA: At this time.

5 TIMOTHY O'LAUGHLIN: Perfect. That's all I need.  
6 Thanks. I appreciate that.

7 I just have two real quick points. I am struck by  
8 the irony of this, and actually Terry Erlewine tee'd this up  
9 earlier, and it came in the letter that you received last  
10 year which started these discussions going forward. Which  
11 was the exporters say 35 percent of their water is being  
12 mysteriously disappearing in the system. We think it's in  
13 the Delta but we need to find out where it's -- where it's  
14 currently.

15 And you got that letter and then you folks started  
16 your process to go forward and collect information to do  
17 what you do.

18 So I find it strange that we're in this process now,  
19 and the first curtailment that's going to be issued is on  
20 the San Joaquin River above Vernalis. And I'm wondering why  
21 that is because there's no way that anyone on the mainstem  
22 of the San Joaquin River or on the three tribs could ever  
23 take stored water from the projects.

24 So I'm sitting here, and here's my question to you  
25 folks, because you're the policy people. And when you do

1 policy, in my mind, you have a goal in effect. Or what's  
2 the goal?

3 So I've been asking your staff and people, "What is  
4 the goal?" And I hear it's to protect senior rights. Well,  
5 that's really not the goal. The goal is, is to protect  
6 stored water being released by the projects into the Delta  
7 so you can back more water up into Shasta and Oroville and  
8 the American River. I have no problem with that. Totally  
9 down with that.

10 So why is a curtailment being issued on San Joaquin  
11 because we don't take their stored water and we can't  
12 possibly take their stored water? And so it's kind of  
13 ironic to us that this is occurring in the fashion that it's  
14 going to occur.

15 The other thing that's ironic is, to me, is there's  
16 this discussion, and I applaud Ms. Spaletta on moving  
17 forward or trying to get some reduction in Delta water use.

18 My clients have already been reduced somewhere  
19 between 40 and 90 percent. So if the -- if the goal is that  
20 we've taken these reductions and you get a hall pass on  
21 curtailment and enforcement, then why are we issuing  
22 curtailment notices at all of the San Joaquin River of the  
23 tribes? We've already reduced. We took those -- we took  
24 those voluntary measures already in February and March. So  
25 how are you going to do that? And one of the oxymoronic

1 things --

2 CHAIR FELICIA MARCUS: Wait. What do you mean --  
3 what do you mean by that?

4 TIMOTHY O'LAUGHLIN: Well, all the districts  
5 voluntarily reduce their water supply to their growers and  
6 have pushed water up into storage and are -- and are taking  
7 conservation measurements and, therefore, so why is that any  
8 different --

9 CHAIR FELICIA MARCUS: But that's the stored --  
10 that's the stored water.

11 TIMOTHY O'LAUGHLIN: But it doesn't matter. If  
12 they're taking -- I mean, think about it this way. If the  
13 statement is -- here's the funny thing about this.

14 If the goal is that, based on the curtailment that  
15 we were going to protect stored water in the Delta, and  
16 people in the Delta aren't taking water without -- without  
17 right, just because you reduce it 25 percent and they're  
18 taking 75 percent without right doesn't make it right.

19 So my question to you and your staff is, who are  
20 you -- what is the goal here? Because in the her -- Kathy's  
21 presentation, it was ironic. I mean, there is no water in  
22 the San Joaquin River system. There is nothing. And, like  
23 she said, you go out and do these inspections and it's dry.  
24 Like we said last year and we said this year again, people  
25 upstream of our reservoirs, we're not concerned about them

<http://www.yrba.net/facp>

1 diverting. There is no water to divert.

2           So what -- what are -- I'm asking you. What are you  
3 trying to accomplish here? I mean, I get -- I have no  
4 problem because I've been fighting this battle for 25 years.  
5 I have no problem tee'ing up legal issues that need to be  
6 resolved in the Delta, okay? I am fully supportive of that.  
7 There's some major -- like, is stored water released to meet  
8 Delta outflow protected? I don't know. I've never seen a  
9 1707 on it, I've never seen a State Board Order on it. If  
10 that water goes into the X2 zone and it's abandoned, is it  
11 subject to appropriation?

12           I mean, there are great questions to ask, okay? But  
13 if you go about it with a curtailment, here's my fear: My  
14 fear is we're going to be in a legal procedural morass,  
15 which has nothing to do with the substantive issues.  
16 Because it's all going to go to whether you have a notice,  
17 whether you have an order, whether you've taken a final  
18 action, whether it's an administrative action, can we seek a  
19 stay? Can you seek -- can we have a TRO? Are you going to  
20 say we have to exhaust our administrative perimeters and  
21 come back here and file motions for reconsideration?

22           I mean, we're going to be playing that dance, and  
23 especially if your staff rolls this out in a sequential  
24 order where we're going to have curtailments for -- I don't  
25 know -- are you going to go all pre-'14 rights all the way

1 back to, like, 1850, or are you just going to do like 1906?

2 KATHERINE MROWKA: Staff is still doing that math  
3 for me.

4 TIMOTHY O'LAUGHLIN: Okay. So -- but let's say you  
5 do half of them now and half of them later. So now we're  
6 going to be staggering these people through these processes  
7 with various complaints, then you're going to do riparians,  
8 now you're going to do Sacramento.

9 Now, my clients have claims that they have pre-'14  
10 rights that are superior to pre-'14 rights in the Delta, and  
11 you're going to -- so I get the issue and the legal issues  
12 involved, but the process by which you're trying to -- and I  
13 keep telling your staff this -- the process by which you're  
14 trying to get to the point to put the legal issues in play  
15 isn't going to get you there.

16 CHAIR FELICIA MARCUS: And what's your suggestion?

17 TIMOTHY O'LAUGHLIN: My suggestion is that if you  
18 truly feel that you want to do -- get to these legal issues,  
19 and I've told your Water Master this and I've told your  
20 staff this, you issue CDOs and ACLs on specific properties  
21 or interests in which you think parties are taking water  
22 without right. It's pretty simple. Because the broad brush  
23 isn't going to get you there and it's not going to give you  
24 the fact patterns and it's not going to give you the issues  
25 that you want.

1 BOARD MEMBER DORENE D'ADAMO: But that just seems to  
2 be one aspect of it. So if we were to focus on -- I guess  
3 you're talking about the Delta diverters that may or may not  
4 have a right, but the issues are broader than that. And  
5 just --

6 TIMOTHY O'LAUGHLIN: Are they?

7 BOARD MEMBER DORENE D'ADAMO: Well, and -- okay. So  
8 when you say protecting -- that we're protecting -- we,  
9 staff, is wanting to protect senior water right holders.

10 TIMOTHY O'LAUGHLIN: Okay.

11 BOARD MEMBER DORENE D'ADAMO: So the Delta diverters  
12 are also in the San Joaquin watershed.

13 TIMOTHY O'LAUGHLIN: Yes, they are.

14 BOARD MEMBER DORENE D'ADAMO: And so one would think  
15 that, in anticipation of a claim that they would have, is  
16 what about folks upstream, such as your folks?

17 TIMOTHY O'LAUGHLIN: And if Mr. Herrick --  
18 Mr. Herrick is sitting right behind me. If Mr. Herrick ever  
19 has a claim that we are improperly diverting his water  
20 downstream, bring it on.

21 BOARD MEMBER DORENE D'ADAMO: Well, I just --

22 TIMOTHY O'LAUGHLIN: But that's not -- but that's  
23 not what happened here. The claim that was made was made by  
24 the projects that the restored water was being illegally  
25 diverted. It wasn't that the upstream -- Mr. Herrick didn't

1 make a claim last year that we were improperly taking his  
2 water upstream. That claim wasn't made. And if he wanted  
3 to make that claim, I think that would be a fine claim to  
4 bring to the State Board or to a court and we can go through  
5 that, but that's not what this curtailment is about.

6 The curtailment is -- the curtailment is to push  
7 more water into the Delta, okay, so that the Delta people  
8 can get their water needs met and, therefore, back off  
9 taking water that's being released by the projects. That's  
10 what's happening, okay? And it's under the guise that they  
11 have senior rights.

12 Now, Mr. Herrick and I have had numerous long  
13 discussions about who has what senior rights in the Delta,  
14 but like even your staff admits, when the forms came in,  
15 people in the Delta claim pre-'14 and riparian rights. Your  
16 Water Master sent them a letter and said "Which one is it?"  
17 Your staff analysis treats everybody like a riparian. Well,  
18 we already know under the Phelps case that everybody isn't a  
19 riparian. So that's the issue.

20 And if you go this route, the problem is going to be  
21 you're going to get stuck in this legal mumbo-jumbo world,  
22 and you're not going to get to the substantive issues. And  
23 the curtailment isn't going to give you additional water in  
24 the Delta, if that's what you're hoping for. I don't know  
25 if you're hoping for additional water in the Delta or if

<http://www.yeslaw.net/help>

1 you're hoping to cut off or reduce the amount of loss to the  
2 exporters. I don't know which one it is. I go back and  
3 forth every other day about which one it is.

4 CHAIR FELICIA MARCUS: (Inaudible.)

5 TIMOTHY O'LAUGHLIN: It isn't? So is it to protect  
6 stored water?

7 CHAIR FELICIA MARCUS: It's to implement the system.

8 BOARD MEMBER STEVEN MOORE: Yeah, you know. We look  
9 at --

10 CHAIR FELICIA MARCUS: It's fair to point out -- I  
11 mean, this is helpful to point out what we need to think --

12 BOARD MEMBER STEVEN MOORE: In terms of outcome but,  
13 you know, there is a ministerial function that, you know, we  
14 have to confront when there's -- when the demand outstrips  
15 the supply. So there's a ministerial function that we're  
16 trying to, you know, in good faith, implement.

17 TIMOTHY O'LAUGHLIN: Well, now see that's -- now I  
18 take you at your word -- and I take you at your word and I  
19 agree entirely with what you say, and I understand that  
20 regulators wants to regulate and I understand this desire --  
21 well, no, because here's the problem.

22 We presented to you last year -- we presented to you  
23 last year in the San Joaquin River. We had all the major  
24 water right holders, and we had the South Delta signed up.  
25 And we said, "You do not curtail us. You don't need to

1 curtail us. You didn't curtail us. You had no complaints.  
2 You had no allegation of water right infringements. You had  
3 nothing on the San Joaquin, except some BS little things  
4 down on the mainstem of the -- on the Friant. Those were,  
5 like, three complaints.

6 So we operate -- because, you see, actually, I  
7 disagree with you. The water rights system is a  
8 self-effectuating system. And if you have a water right,  
9 you and your neighbors get together and figure out how that  
10 water is going to move through the stream, how it's going to  
11 operate, who is going to divert, and when.

12 So -- so that's the basis. You don't see  
13 curtailment notices because you don't need them.

14 So -- and if you try to do it in the San Joaquin  
15 River system, which is this big, then you're just going to  
16 run into all these little nuances and problems.

17 So my statement is, don't issue it, and if you think  
18 somebody is illegally diverting water, issue a CDO and an  
19 ACL, and you'll be in a much better position.

20 CHAIR FELICIA MARCUS: Clearly.

21 JOHN HERRICK: If I may. This is the sort of thing  
22 that we need to discuss more than, you know, no offense but,  
23 you know, at 7:00 o'clock at night at the last minute.

24 CHAIR FELICIA MARCUS: No. Agreed.

25 JOHN HERRICK: This is very important, and I'm not

1 trying to isolate my clients so everybody else is fine. But  
2 Tim has brought up the crux of the issue. Curtailments on  
3 the Tuolumne and the Merced and the Stanislaus in a year  
4 when there's zero water, really, that's not protecting South  
5 Delta.

6 The intent of this program is to protect exported  
7 stored water. Now, we could find ways to tee that up, we  
8 could go after somebody, but that's who is being protected.  
9 It's the stored water for future use, whether that's fish or  
10 X2 or exports, that's the intent of this process.

11 Now, I don't know if that's what you think or I  
12 don't know if that's what staff thinks to themselves, but  
13 nobody's -- there's no senior right holder that's going  
14 "Phew, you curtailed everybody from Mossdale up" -- and  
15 besides, it can't be Mossdale, it has to Vernalis. Mossdale  
16 is in the title zone.

17 But -- but this is the issue. And it all boils back  
18 down to the poor South Delta, which is should they be  
19 diverting water when somebody is releasing stored water to  
20 meet obligations? Well, we think the answer is clear, but  
21 everybody else apparently doesn't. So if you want to tee  
22 that up, let's figure it out.

23 But you're embarking upon a curtailment of, I don't  
24 know how many, hundreds or thousands of diverters for no  
25 benefit when there's no complaint.

1           Now, I would say if somebody is complaining that the  
2 Delta is -- these illegal diverters, it's odd that they  
3 don't bring a complaint for that. They just write a letter  
4 that says, "You know, I think they're evil" and then --

5           CHAIR FELICIA MARCUS: But, see now you're making  
6 caricature of it.

7           JOHN HERRICK: And then the Board repeats that for  
8 two years, but be that as it may.

9           CHAIR FELICIA MARCUS: Right. Look, I see what  
10 you're saying and, you're right, this isn't the best time to  
11 have this conversation. What we've been struggling to do is  
12 figure out how to tee that conversation up. Because what  
13 happens is a caricature of people caricaturing other  
14 people's legitimate interests.

15           So we have two sets of problems, and they are real  
16 problems. One is the unsettled legal decisions. Some think  
17 they're settled, some think they aren't, the whole set of  
18 those. And then there's this issue of the data and the  
19 information we have, some of which we don't have because  
20 people haven't given it to us and some of which they have  
21 now given to us. And so there's a whole hassle of things  
22 that people are doing a Rashomon on, and we have to figure  
23 out what to do about it.

24           JOHN HERRICK: But we are not having workshops or  
25 hearings to find that.

1 CHAIR FELICIA MARCUS: Right. And what we need is  
2 help in tee-ing up those issues, which is what I was trying  
3 to get at before versus a restatement of people's positions  
4 and what somebody else's intent is and why they're bad.  
5 Which I know is a human thing to do, I just don't find it  
6 that useful.

7 BOARD MEMBER DORENE D'ADAMO: How would you suggest  
8 we tee it up on stored water?

9 JOHN HERRICK: Well, I've been asked -- we, not I.  
10 We've been asking for a couple years if you -- if you, as  
11 the Board or staff, will give us your factual  
12 thought/factual determination of how water works in the  
13 Delta and tell us why you think the law that we've quoted to  
14 you is wrong, then we could have a workshop and see where,  
15 you know, somebody is making something up or not or if it's  
16 clear or if it's not resolved or if there's issues or  
17 there's conflicting law. And then, from that, we can figure  
18 out what to do.

19 And I've suggested before, you guys will never agree  
20 to it, not because of you but because of the Attorney  
21 General's Office and your own counsel, you'll never agree  
22 to, "Here's the set of facts and the law, and let's get a  
23 declaratory relief action quickly."

24 Now, I don't know why that could ever happen, but  
25 that's an easy way to do it, especially if we've all sat

1 down and said, "Okay. That -- we do agree on that." This  
2 one everybody says each other is wrong, and this one is  
3 maybe, boom. I mean, that's the easiest and cleanest way.  
4 So that's your discussion, no offense, with the AG's office  
5 who won't listen to you and your own staff who will listen  
6 to you, so -- there are ways to do it. There are many other  
7 ways too, but those -- those are the issues.

8 BOARD MEMBER DORENE D'ADAMO: I have -- I have a  
9 question for you. Let's just assume that we have that  
10 answer on stored water and that there's the determination  
11 that there's a certain amount of stored water that the Delta  
12 diverters are picking up. Wouldn't it matter to you at that  
13 point about a curtailment process on the San Joaquin and on  
14 the Sacramento? You're at the bottom of the system.

15 JOHN HERICK: Well, stored water is released into  
16 the Delta, but the issue is whether there's natural flow  
17 absent the stored water for people to divert, whether there  
18 are regulatory and statutory obligations on people who are  
19 releasing water to the Delta, and whether there are  
20 regulations that are ordering people to maintain conditions  
21 for those diversions in the Delta. So it's a bigger group  
22 of things and, of course, however it all pans out --

23 BOARD MEMBER DORENE D'ADAMO: Right.

24 JOHN HERRICK: -- then some day it -- some day a  
25 potential curtailment might be important, but it's not now.

1 Anyway, I didn't mean to delay things, but --

2 BOARD MEMBER DORENE D'ADAMO: No. No.

3 JOHN HERRICK: But this is the heart of the matter.

4 Because the exporters don't want Tuolumne River water --

5 well, I said that wrong. I said that wrong.

6 (Laughter from the audience.)

7 JOHN HERRICK: Thank you for your time.

8 UNIDENTIFIED VOICE: They won't sell it.

9 CHAIR FELICIA MARCUS: That was interesting, yeah.

10 Yeah, definitely.

11 Other questions, thoughts?

12 BOARD MEMBER TAM M. DODUC: The three takeaway,

13 that's just I got were, according to Mr. Herrick, no one

14 listens to us, not the AG, not anyone else.

15 According to Mr. Nomellini, staff tells us what to

16 do.

17 And according to, I forget who the third person was,

18 we're actually doing better than we've perceived.

19 (Laughter from the audience.)

20 CHAIR FELICIA MARCUS: All right. A lot to think

21 about. I'm trying to figure out --

22 BOARD MEMBER DORENE D'ADAMO: I would like to better

23 understand, it's interesting, because I can go back and

24 forth on this issue, and there are so many different --

25 CHAIR FELICIA MARCUS: (Inaudible.)

1 BOARD MEMBER DORENE D'ADAMO: Yeah. There are so  
2 many different aspects of it. I -- I do think that, as you  
3 said, that the goal is to implement the water rights system.

4 And one of the things that I am concerned about --  
5 all you have to do is pick up a newspaper and see that there  
6 are people that think that our water rights system doesn't  
7 work and maybe we ought to scrap it and try something else.

8 So we've got to collectively figure out a way --  
9 personally, I think that it can work, but there are these  
10 ongoing issues that haven't been resolved over a period of  
11 decades. So we need to get to the bottom of it and  
12 demonstrate that the water rights system does work.

13 Because for those of you that are looking at  
14 strictly a legal analysis, there's -- you should also be  
15 looking at, you know, the court of public opinion and what  
16 could occur if we don't do our jobs.

17 So I'd like to, you know, maybe, after staff gets  
18 some time to sort through the hydrology, how things are  
19 going forward from, you know, the sort of the perspective of  
20 the math, have a better understanding of if this happens,  
21 then what are the options? If we take this action, what are  
22 the various options?

23 Not just our options, but for those that would be  
24 filing suit or issuing some sort of counter-complaint. What  
25 are the different options as far as how things could play

1 out.

2 CHAIR FELICIA MARCUS: Now, one thing I find  
3 challenging is the notion that some people hold that we  
4 really can't do anything. And the practical impact of doing  
5 what some suggest is that if we did it legally the way they  
6 said we should do it, we could never get anything done in a  
7 drought. Just not -- just not possible because we'd be in  
8 court forever.

9 So it does appeal to me to tee up the issues, and I  
10 know that Mr. George and the team have been working through  
11 it. But I would like to see, sooner than later, that short  
12 list of issues. We won't resolve all 20 of them or 100 of  
13 them that are out there. I'd like to see what are the three  
14 to five greatest hits that would make progress in this  
15 arena, and then where would we make the most progress in  
16 implementing the system?

17 Because just stasis and throwing up our hands is  
18 just not an option. And, I know, again, that there are ways  
19 that we can and that we plan to, but I would like to see  
20 that strategic package for moving forward that we've talked  
21 about for a long time, even if it's just in the next couple  
22 of days, few days.

23 And I would like a clearer sense of the timing on  
24 things so I know which things we need to decide, what we  
25 have to decide before Friday somehow, and what we have to do

1 in the next few weeks so that we make the time to be able to  
2 the -- the team. Because some of the issues we're  
3 discussing today, I know that this is eerily familiar, and  
4 people have brought it up, are the same issues we talked  
5 about last year. And this year is not last year, this year  
6 is worse than last year. And just not acting is not good,  
7 but I want to make sure that what we do is strategic and  
8 thoughtful but has forward motion.

9 Would you like the last word?

10 UNKNOWN PUBLIC SPEAKER: Thank you, Chair Marcus and  
11 Board. I need to make a correction to a comment I made  
12 and -- and I would like to -- as suggestions you consider  
13 what the gentleman said that we have a forum of experts, we  
14 need more growers to show up there. They say no one listens  
15 to them so they don't come to these meetings, but...

16 CHAIR FELICIA MARCUS: We've had a lot at other  
17 meetings, I'll tell you.

18 UNKNOWN PUBLIC SPEAKER: That's good.

19 CHAIR FELICIA MARCUS: Honestly. This was a quiet  
20 meeting compared to our last meeting.

21 UNKNOWN PUBLIC SPEAKER: Yeah. Yeah. My -- it's a  
22 lot of -- the correction is that I'm a good -- I'm a good  
23 news choir singer, and the truth is we do have a dying  
24 redwood tree that's almost 70 years old. We do have --  
25 we're paid by ton, we have less tonnage. I'm told we need

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1 to irrigate more.

2           When I went to county -- a San Joaquin County Board  
3 Meeting a year ago, a lady reported that 11 wells have gone  
4 dry. My father said we can't put -- the well go any deeper,  
5 and our house we have cloudy water and it was clear three  
6 years ago, so we're going to have to pay \$4,000 for a soft  
7 water system.

8           It -- we are feeling the result, and any talk of  
9 diversion is ridiculous. We don't -- what are they talking  
10 about diverting from -- to semi-arid? And the vocabulary.  
11 We haven't heard the word aquifer. I heard riparian.

12           We only have a well. We don't have a canal. And  
13 when people say, "Oh, storage," I know that's the Farm  
14 Bureau. But, for me, I have to say, and some others, who is  
15 controlling the spigots? I mean, I'd like to know more  
16 about the aquifer system that we're relying on and that was  
17 100 years ago, it was three feet with watermelon, now it's  
18 50 feet. And it's because it goes to Oakland from the party  
19 reservoir.

20           So people have been borrowing our water since part E  
21 1906, and later San Francisco had an earthquake. I mean,  
22 playing with water is pretty serious.

23           CHAIR FELICIA MARCUS: It's complicated.

24           UNKNOWN PUBLIC SPEAKER: So thank you for your time  
25 in doing that, and I hope we can consider more press release

1 in good faith and more forums like this and workshops where  
2 people -- because there's a lot of vocabulary. I said,  
3 "What does curtailment mean?" I says, "That's your water  
4 rights."

5 CHAIR FELICIA MARCUS: Surface water rights.

6 UNKNOWN PUBLIC SPEAKER: Oh, well, we have a well.

7 CHAIR FELICIA MARCUS: Not groundwater.

8 UNKNOWN PUBLIC SPEAKER: I didn't even know that.

9 And then we heard some other things. Substitute water.  
10 What do you mean substitute water? We don't want more  
11 cloudy water.

12 Anyway, thanks -- thanks a lot for letting me  
13 correct my earlier comment.

14 CHAIR FELICIA MARCUS: Thanks for spending the day  
15 with us.

16 So we'll be talking a lot the next few days, but can  
17 we -- I really want -- I feel remiss in not having that  
18 schedule laid out, questions tee'd up and figuring out.

19 All right. With that, more to think about than to  
20 resolve in this meeting, but this actually was very helpful  
21 to me, so thank you for the time that you've all spent. I'm  
22 sorry it's so late. It may be an unsatisfactory conclusion  
23 because we haven't wrapped anything up, but it's been  
24 helpful, so thank you.

25 With that, I will adjourn.

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(Whereupon, end of transcribed portion.)

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REPORTER'S CERTIFICATE

State of California        )  
                                  ) ss.  
County of Sacramento     )

I certify that the statements in the foregoing hearing were transcribed in the within-entitled cause by audio; that said hearing was taken at the time and place therein named; that the testimony of said witnesses was reported by me, a duly Certified Shorthand Reporter of the State of California authorized to administer oaths and affirmations; and said testimony was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for either or any of the parties to said hearing, nor in any way interested in the outcome of the cause named in said hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this 2nd day of September, 2015.

\_\_\_\_\_  
THRESHA SPENCER  
Certified Shorthand Reporter  
Certificate No. 11788

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**BBID**  
**EXHIBIT 328**

STATE WATER RESOURCES CONTROL BOARD  
BOARD MEETING/HEARING  
(Portion)  
JUNE 16, 2015  
Coastal Hearing Room - Second Floor  
1001 I Street  
Sacramento, California 95814  
Transcribed By: Diane F. Fattig, CSR No. 3692  
STATE WATER RESOURCES CONTROL BOARD

BOARD MEMBERS

Chair Felicia Marcus

Vice-Chair Frances Spivy-Weber

Board Member Tam M. Doduc

Board Member Steven Moore

Board Member Dorene D'Amamo

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STATE WATER RESOURCES CONTROL BOARD

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BOARD MEMBERS

- Chair Felicia Marcus
- Vice-Chair Frances Spivy-Weber
- Board Member Tam M. Doduc
- Board Member Steven Moore
- Board Member Dorene D'Amamo

1 PORTION OF TRANSCRIPT OF PROCEEDINGS

2 (File 1, 5:05 - 32:01)

3 DIANE RIDDLE: Ready? Hello. Good morning, Chair  
4 Marcus and Board members. I'm Diane Riddle, and I'm an  
5 environmental program manager in the Hearings and  
6 Bay-Delta section. I'm going to provide a brief update  
7 regarding Bay-Delta related drought matters.

8 I think, as you're aware, the Bureau of Reclamation  
9 and the Department of Water Resources submitted a renewal  
10 of their temporary urgency change petition on May 21.  
11 And, again, that's to modify Bay-Delta flow and water  
12 quality standards.

13 And specifically what they're requesting for the  
14 remainder of the year is a modification for Delta outflows  
15 during July, Sacramento River salinity through  
16 August 15th, and Rio Vista flow requirements on the  
17 Sacramento River through November.

18 So we're currently working on an order for those  
19 potential changes, and we should have that order prepared  
20 prior to July 1st when they -- when they need -- start to  
21 need the changes.

22 So, in addition, last week we issued -- or Saturday  
23 specifically, we issued a notice for a workshop on  
24 June 24th to discuss drought-related operations by the  
25 State Water Project and Central Valley Project in the

1 Delta for the remainder of the summer and fall.  
2 Specifically, we intend to discuss Sacramento River  
3 temperature issues and potential needed modifications to  
4 operations as a result of potential changes to the  
5 Sacramento temperature operation activities.

6 So, again, that's January 24th. And we expect that  
7 to be a lively discussion.

8 CHAIR FELICIA MARCUS: I mean -- June?

9 DIANE RIDDLE: Oh, I'm sorry. June. I'm sorry.  
10 June.

11 CHAIR FELICIA MARCUS: But one other thing, backing  
12 up --

13 DIANE RIDDLE: I'm getting ready for next year.

14 CHAIR FELICIA MARCUS: Hard to get those J months  
15 right.

16 But, yeah. No. It's a horrid situation and I know  
17 you're all trying to do your best to juggle with the other  
18 agencies, and we'll look forward to hearing what you've  
19 come up with.

20 I think -- you know, had hoped that this could be  
21 forestalled until next year without rain, so it's pretty  
22 horrifying that we're in this place with no good  
23 solutions. So we'll really look forward to hearing your  
24 thoughts on it.

25 DIANE RIDDLE: With that, if there are no questions,

1 I'll turn it over to Kathy to provide an update on  
2 curtailment.

3 KATHY MROWKA: Good morning, Chair Marcus and Board  
4 members. I'm Kathy Mrowka. I'm program manager for our  
5 enforcement section, and we lead the curtailment efforts.

6 First I wanted to describe the curtailment that we  
7 did on Friday of last week. It was to the Sacramento  
8 River, San Joaquin River Watersheds and Delta, 1903 water  
9 right priority and later. So it's the pre-1914 water  
10 rights, often referred to as senior rights.

11 So we haven't curtailed this class of rights since  
12 the '77-'78 drought. It was quite exceptional that we had  
13 such poor water conditions that we had to do this action.

14 Now, I wanted to make the curtailment program a  
15 little easier for the public to understand, so on your  
16 screens you'll see a new work product that we've just  
17 developed and posted on line. It's a summary so that  
18 everybody knows what water rights are curtailed currently,  
19 which ones the curtailments have been lifted.

20 If you could scroll down a little bit.

21 There have been some water rights -- down a little  
22 bit more -- that you can see like Deer Creek, Antelope  
23 Creek, where we've actually had specific fisheries  
24 curtailments lifted. So in addition to our news on adding  
25 new curtailments based on priority dates of rights, we've

<http://www.yeslaw.net/help>

1 had changes in status of fishery curtailments.

2 CHAIR FELICIA MARCUS: That's because of rain, not  
3 water?

4 KATHY MROWKA: No. It's because the target fish  
5 species are no longer present in those stream reaches, and  
6 so once the fish are not in those stream reaches then we  
7 can lift at that point and then later, as they become  
8 present again, then we would reinstall that curtailment.

9 And fish curtailments are -- they target specific  
10 flow numbers like 35 CFS, 25 CFS, whatever the target  
11 number is for the species to move through that reach.  
12 They just operate differently than a water right  
13 priorities type curtailment, which is where there's not  
14 enough water for the affected water holder classes. So  
15 they just have a different method of operation.

16 But I thought it would be interesting news for you  
17 to let you know that there actually has been some change  
18 to help parties out in those specific watersheds who  
19 wanted to use for their agricultural purposes. So --

20 BOARD MEMBER STEVEN MOORE: As we've discussed,  
21 that's by design.

22 KATHY MROWKA: It is by design. Where we don't --  
23 we use the tools when necessary, and the moment we are  
24 able to provide relief to the water-diverter community, we  
25 provide that relief.

1 BOARD MEMBER STEVEN MOORE: And it's not a matter --  
2 it isn't that people are waiting around for a week to get  
3 the decision.

4 KATHY MROWKA: No. It comes out the minute that we  
5 get the word from the fishery agencies that the species is  
6 no longer present in that stream reach. We blast out  
7 through our e-mail blasts to the parties so that they know  
8 immediately that now they can go ahead and resume  
9 diversion.

10 I want to add a caveat, though. Some of these  
11 watersheds are subject to multiple curtailments. Now, if  
12 you were, you know, the Antelope Creek tributary of the  
13 Sacramento River System, if you happen to have been a  
14 post-1914 water right holder, the fishery curtailment  
15 lifted but your general water availability style  
16 curtailment had remained in place.

17 And so if you were a category of right holder such  
18 as riparian, who wasn't subject to a secondary curtailment  
19 then, yes, you could go ahead and start using for your  
20 agricultural purposes.

21 So because the curtailments stack on each other --  
22 they're different types of curtailments. There's, you  
23 know, as I've explained before, water right condition like  
24 Term 91 curtailments, water availability, general type  
25 curtailments and fish curtailments.

1           So if you're still subject to any of the  
2 curtailments, then you're subject to a curtailment. But  
3 it was good news for some users. So that's my bright spot  
4 for the day.

5           BOARD MEMBER DORENE D'AMANO: Could you scroll back?  
6 So Deer, Antelope, Mill? I didn't see --

7           KATHY MROWKA: Mill was subject to prior agreement,  
8 so we didn't do the curtailment.

9           BOARD MEMBER DORENE D'AMANO: And then how about  
10 other watersheds like the Russian? Isn't there a notice  
11 of potential curtailment that went out?

12          KATHY MROWKA: On the Russian River we are working  
13 on the tributaries for the fishery issues, so, yes, we  
14 provided notice regarding that.

15          This is the -- on our web page previously you had to  
16 go to your specific watershed, click on it and go through  
17 iterations to find out information. So this will -- this  
18 summary is just intended to tell you if you have a  
19 curtailment in place.

20          And because Russian is coming before the Board for  
21 action tomorrow, I don't have a curtailment in place. The  
22 minute we have one in place, it will go on the summary  
23 sheet here.

24          BOARD MEMBER DORENE D'AMANO: Oh, right. And  
25 actually you're not even -- staff isn't even proposing a

1 curtailment at this time?

2 KATHY MROWKA: No. It's a regulation.

3 BOARD MEMBER DORENE D'AMANO: I was referring to  
4 supply/demand, a curtailment placed on -- you know,  
5 regular curtailment.

6 KATHY MROWKA: Right. And the Russian isn't subject  
7 to one yet. It's on our watch list. Their reservoir  
8 storage was better this year than last year. They have  
9 had changes in the upper end of the watershed where  
10 there's less water being imported from Eel River than last  
11 year. And so we're watching it because of this.

12 BOARD MEMBER DORENE D'AMANO: But have you sent out  
13 notice of potential curtailment to those water users yet?

14 KATHY MROWKA: No, not yet.

15 CAREN TRGOVCICH: Let me just clarify. Caren  
16 Trgovcich.

17 We did send out two notices earlier in the year to  
18 all water right holders, an initial notice in January, a  
19 subsequent notice in April as things began looking bleaker  
20 and bleaker. So they have -- they were the recipients, as  
21 it was a general notice of those earlier letters.

22 KATHY MROWKA: Yeah. Just so you know, too, I've  
23 initiated a new staff-level work product to better track  
24 where we're heading on our curtailment. So I have my  
25 staff now reporting in weekly to me for all the watersheds

1 that we've been watching with data on what flows trigger  
2 curtailment and how close we are.

3 And so we're very carefully watching those  
4 watersheds.

5 BOARD MEMBER DORENE D'AMANO: That's helpful. Thank  
6 you.

7 KATHY MROWKA: You're welcome.

8 And then I did want to report back to you as to, you  
9 know, how is our response rate on the curtailment issue?  
10 We are too early yet to have the pre-'14 response rate.  
11 We issued last Friday and they have seven days to respond  
12 to us and file their curtailment certification form. But  
13 I can report on the post 1914s.

14 And so on the post 1914s, if you look at Sacramento,  
15 San Joaquin and Delta combined, we're at an overall  
16 response rate of 31 percent. That breaks down to  
17 Sacramento River watershed and Delta, we have about a  
18 35 percent response rate. And San Joaquin, it's  
19 22 percent response rate.

20 So overall what this means is if you're looking at  
21 the total estimated water demand represented by those  
22 responders -- not the nonresponders, responders -- from  
23 start of curtailment in May through September, that's  
24 7.3 million acre-foot. Represented by the responders.

25 If you were to look at a whole calendar year, it's

1 19.6 million acre-foot. But that's less representative.  
2 We can't tell you what date we'll lift the curtailment.  
3 So the 7.3 million acre-foot gives you a general picture  
4 for the summer months.

5 CHAIR FELICIA MARCUS: But what -- what percentage  
6 is that of the total?

7 KATHY MROWKA: Of the total demand overall  
8 throughout the watersheds, I don't have that in front of  
9 me.

10 CHAIR FELICIA MARCUS: No. I know that's a big  
11 number --

12 KATHY MROWKA: Yes.

13 CHAIR FELICIA MARCUS: -- but it doesn't help us  
14 understand.

15 So I thought we were trying to -- help me understand  
16 this 31 percent. Does the 31 percent cover 90-something  
17 percent of the water or is it closer to 30 percent of the  
18 water?

19 KATHY MROWKA: I don't have that in front of me.  
20 It's 7.3 million acre-foot of the water. So it's very  
21 significant. Because that indicates to me that we had a  
22 large -- a lot of large responders, large size.

23 CHAIR FELICIA MARCUS: Right. Actually, I think we  
24 need those stats to understand --

25 KATHY MROWKA: Happy to do it.

1 CHAIR FELICIA MARCUS: -- what we need on water  
2 enforcement

3 KATHY MROWKA: Happy to do them for you. Yes.  
4 My staff unfortunately last week was incredibly busy  
5 on the curtailment. I have the one modeler running  
6 everything for me. How could he? For the San Joaquin and  
7 Sacramento.

8 CHAIR FELICIA MARCUS: Right. But the key is to let  
9 us know what you need in that situation to be able to do  
10 it just for people's confidence. If all you put out is  
11 that number, it's alarming.

12 KATHY MROWKA: Yeah, it is alarming.

13 CHAIR FELICIA MARCUS: It would suggest you've got  
14 -- I know you're going to do all kind of inspections, but  
15 you want to prioritize them so you're not spending time on  
16 the one-acre-foot person.

17 So those are stats that are actually very important  
18 to have any meaning to us, whether we should be alarmed or  
19 whether this actually covers, you know, the lion -- by far  
20 the lion's share.

21 KATHY MROWKA: You bet ya. And we'll get that for  
22 you.

23 Okay. And then I wanted to talk briefly about how  
24 it's going on our inspection effort.

25 Okay. So this year we got additional authorities

1 from the Governor's office that we can go on unannounced  
2 inspections. We like to call them our knock knock  
3 inspections. Knock, knock. State Water Board.

4 So anyway, what we're doing right now is we do --  
5 staff has expressed some concerns regarding this. They're  
6 worried about some safety issues, so we're testing three  
7 methods of inspection right now, and we're going to get  
8 some statistics together on that.

9 So our traditional method is we phone people to  
10 prearrange inspections.

11 We have a second traditional method where we drop  
12 them a letter and say we're going to be in your  
13 neighborhood, we're going to go and, you know, inspect  
14 your property on so and so date unless you call to  
15 schedule a different date.

16 And then we have the inspection authority, or our  
17 knock knock authority.

18 So we're running a brief test to see how all those  
19 stack up with one another. While we're running the tests  
20 we're doing a lot of phone calling to prearrange  
21 inspections.

22 What we want to find out, part of this is, you know,  
23 how often we'll be -- will we have a meaningful contact  
24 from the unannounced inspection, how often would there be  
25 no one home or no ability to gather information based on

<http://www.judicial.net/help>

1 visual observation from the road, a public road, you know,  
2 as to whether irrigation's occurring. Things like that.

3 So we want better information and we're gathering  
4 that information.

5 So for the week of June the 9th, as of June 9th, we  
6 had done 117 phone notice type inspections. We had done  
7 15 knock inspections, where we showed up unannounced. We  
8 did find that for three of those no one was home. We had  
9 done zero warrant inspections.

10 And so, because this is really the beginning of our  
11 inspection season, we haven't yet mailed out a lot of  
12 letters for contact to respond that way. So --

13 CHAIR FELICIA MARCUS: You start -- I'm trying to go  
14 back to last year. Do you start with a letter to them  
15 saying we haven't heard from you; you really need to  
16 respond?

17 KATHY MROWKA: When there is no phone response, that  
18 is how we did it last year. So we're --

19 CHAIR FELICIA MARCUS: You started with a phone  
20 call?

21 KATHY MROWKA: We started with a phone call as our  
22 exclusive method last year, but this year we're doing the  
23 three methods all at once to test. So we're doing the  
24 contact letter and phone calls and obviously, if there's  
25 no response to phone calls, we do a letter. But we're

1 trying just starting with a letter also to get statistics  
2 on what works.

3 CHAIR FELICIA MARCUS: I presume -- we had a  
4 conversation about this last year. Prioritizing those who  
5 have not responded at all, and then you'll be also doing  
6 geographical spot checks on folks who have responded --

7 KATHY MROWKA: Right.

8 CHAIR FELICIA MARCUS: -- targeting the larger water  
9 rights holders versus the teeny guys.

10 KATHY MROWKA: Yeah. We have a certain target level  
11 that we're going down to in the different watersheds.

12 BOARD MEMBER DORENE D'AMANO: I want to understand,  
13 though. Your question, I thought, was if somebody hadn't  
14 responded, are they automatically receiving --  
15 automatically are they receiving a letter?

16 KATHY MROWKA: We are scheduling our inspections --  
17 prioritizing first by had not responded and then how many  
18 inspectors we have available to launch out in the field.  
19 Because now at this point we're getting most of them  
20 trained up.

21 BOARD MEMBER DORENE D'AMANO: But I guess, yeah.  
22 The issue is --

23 CHAIR FELICIA MARCUS: Why not just send a second  
24 letter?

25 BOARD MEMBER DORENE D'AMANO: A second letter, yeah.

1 But it just reminds me of somebody not paying their  
2 utility bill or someone not paying their credit card bill.  
3 Sometimes you can make a mistake the first round. You  
4 should know, but maybe a second letter with a -- in red,  
5 "You have not responded."

6 CHAIR FELICIA MARCUS: We really mean it.

7 BOARD MEMBER DORENE D'AMANO: Right. You're subject  
8 to inspection authority.

9 KATHY MROWKA: Right. And our letter basically  
10 tells them that, you know, if we don't get response, we  
11 may seek warrant.

12 So, you know, the follow-up to nonresponse is that  
13 it gets a little more racheded up. So we are doing  
14 recontacts for nonresponse. Because, you know there's a  
15 lot of parties don't want to return our phone calls. We  
16 have a poor rate of return on the phone calls, so we do  
17 follow up.

18 BARBARA EVOY: Barbara Evoy, Division of Water  
19 Rights.

20 We certainly can send a follow-up letter that's --  
21 we have thousands of people we have contacted, and mailing  
22 is always a difficult thing to compare against the data  
23 base. But that isn't going to be difficult to --

24 CHAIR FELICIA MARCUS: Easier than making phone  
25 calls.

1 BARBARA EVOY: Right. So we can certainly do that.  
2 We had hoped, of course, that since it was such an easy  
3 process to check the boxes, say you've curtailed, that  
4 people would do that rather quickly and send it in. And,  
5 you know, but we certainly can send another letter.

6 KATHY MROWKA: And that basically kind of in a  
7 nutshell is where we're at right now.

8 Just to let you know, we have been training our  
9 staff on how to conduct inspections. Every two weeks we  
10 were bringing in more staff because all the Department of  
11 Water Resources staff is deployed now and trained, is my  
12 understanding. We had inter-divisional like loaned  
13 resources that we have been taking out in the field.

14 So our program we began in early May with just a few  
15 deployments and now we're looking very good on our  
16 deployment rate.

17 BOARD MEMBER DORENE D'AMANO: How many people do  
18 you -- roughly do you expect to have in the field once  
19 everyone's trained?

20 KATHY MROWKA: Let's see. Eight Department of Water  
21 Resources staff and 21 others I do believe for the  
22 curtailment portion of the effort.

23 Part of our drought effort has to center around  
24 complaints also. Last year we did experience a tripling  
25 of complaints. One of my field units handles just

<http://www.yes2arc.net/help>

1 complaints. They have to share some of those with some of  
2 the other staff, too, because the volume is very high.

3 CARON TRGOVCICH: Chair Marcus, before we move on,  
4 if I could just give a brief conservation update?

5 I want to make sure that everyone's aware that we  
6 did post up on our website last week -- or I believe it  
7 was last week -- the updated tiers. So the list of water  
8 suppliers considered to be urban water suppliers subject  
9 to the tiered conservation standard. We posted up the  
10 revised list, which reflected all of the changes in  
11 residential gallons per capita per day that were submitted  
12 by water -- by urban water suppliers over the last month.

13 We gave them until May 31 to submit any changes  
14 along with documentation that provides the substantiation  
15 behind the claim and the change. We reviewed all of that  
16 information.

17 And so what is now posted on our website reflects  
18 the tiers for the remainder or the duration of the  
19 emergency regulation.

20 CHAIR FELICIA MARCUS: Yesterday was the deadline  
21 for folks turning in their May numbers, correct?

22 CAREN TRGOVCICH: Correct. It would have been the  
23 deadline for the May numbers, and we'll be presenting  
24 those at the first July Board meeting.

25 We are going to -- since June is the first full

1 month of implementation under the new emergency  
2 regulation, we are going to do our best to accelerate our  
3 review of the June figures when they come in mid-July. I  
4 know there will be a lot of interest in that information.

5 VICE-CHAIR FRANCES SPIVY-WEBER: Well, early, early  
6 the -- of course, people who have good numbers are  
7 bragging early.

8 CHAIR FELICIA MARCUS: And the first numbers were  
9 not

10 VICE-CHAIR FRANCES SPIVY-WEBER: But there are some  
11 braggable numbers

12 CAREN TRGOVCICH: Yeah. There are some fabulous  
13 efforts going on out there. I believe I saw that Fresno  
14 has really implemented and made some incredible strides,  
15 and they are even beyond their conservation standard at  
16 this point. So it can be done.

17 CHAIR FELICIA MARCUS: Right. And you'll be seeing  
18 it in the Santa Clara Valley as their target is nearly  
19 twice ours for some of their users because they're trying  
20 to hit groundwater.

21 Can we in the presentation the beginning of next  
22 month, do you mind asking the team to really highlight a  
23 bunch of those efforts? Not just putting names, bullets,  
24 but actually some stories about how they did it to paint a  
25 picture?

1 CAREN TRGOVCICH: We'll certainly do our best.  
2 We're just wrapping up now as well all of the requests for  
3 placement into the four percent tier, if you'll recall.  
4 So they've got a lot of ongoing work.

5 But we will. If you're aware of any stories, if you  
6 can pass them on to us, if anyone's listening that would  
7 be like to be highlighted, feel free to forward us  
8 information. But we'll certainly pull a list together.

9 CHAIR FELICIA MARCUS: We can pull a list. And, you  
10 know, if there are more than a few of them -- and you  
11 could even have a panel of a few of them what, where and  
12 why, and that might be educational for the folks that are  
13 having more challenges in turning their battleships.

14 CAREN TRGOVCICH: And then just a reminder that the  
15 rate and pricing structure workshop is on the 8th

16 CHAIR FELICIA MARCUS: Oh? I thought it was the  
17 7th. The 8th? I'm sorry. I've been telling everybody  
18 the 7th. I'll have to remember who I told. I feel like  
19 Mel Brooks. I'll have to write them a note.

20 VICE-CHAIR FRANCES SPIVY-WEBER: I think we were  
21 voting on something today that we're not. You know.

22 CHAIR FELICIA MARCUS: Well, there's so much going  
23 on but -- all right. Yeah. All right. Well, that's  
24 great. I appreciate that.

25 Also I hope folks saw a very nice op ed by John

1 Coleman and Kathy Tiegs of Aqua in the Sacramento Bee  
2 today. And folks need to remember to go to  
3 saveourwater.com.

4 I'm hoping that we're working with saveourwater.com  
5 given -- for the summer to really focus given that it's so  
6 key to get our major conservation gains now. So we really  
7 need to be doubling down on publicity.

8 Are we doing a coordinated thing with them?

9 CAREN TRGOVCICH: We are coordinating with them  
10 through the Governor's office, and the focus this summer  
11 is really going to be on the areas that have a ways to go.  
12 So that's a lot of our Central Valley communities.

13 So there's a limited amount of funding. There's  
14 additional funding but it is limited and they're looking  
15 to make that really count in the areas that have the  
16 greatest gains to be made.

17 I'd also like to report that we had some really  
18 excellent meetings with the Spanish television stations,  
19 with Univision and Telemundo, and they are very active  
20 within the Hispanic communities and they've reached out to  
21 us and we're working together to try to be able to move  
22 the message out in more ways.

23 CHAIR FELICIA MARCUS: Yeah, when I was down in LA  
24 doing something with the mayor's office, someone from --  
25 one of the anchors from Univision was there. And

1 apparently they did a very -- a very well-received drought  
2 series in Los Angeles that had tremendous viewership.

3 But it sort of tops anything that anyone else has  
4 done, so I'm thrilled to hear that.

5 CAREN TRGOVCICH: There are some very effective  
6 community outreaching tools, and we hope to take advantage  
7 of that.

8 CHAIR FELICIA MARCUS: Great. One other question  
9 before we leave this. I see Mr. George here.

10 Are you up for giving an update on the voluntary? I  
11 know you and I talked about it a bit last week. But on  
12 the subject of curtailments, the voluntary would be  
13 helpful for us to hear about.

14 MICHAEL GEORGE: Thank you. Yes, Michael George,  
15 Delta Watermaster.

16 And we are continuing to process the applications  
17 that we've received, but because of the time it's taking  
18 to catalog them, we've actually started the verification  
19 program ahead of having the entire suite of applications  
20 cataloged.

21 So we are in the field the day after tomorrow with  
22 some scheduled verification inspections.

23 And we will also, as we're out in the field, we'll  
24 be doing what Kathy described as knock knocks. To the  
25 extent that we see something that is of interest or seems

1 to be different than what we were expecting.

2           So we're -- we're in that verification process. But  
3 very significant efforts going on in the Delta which are  
4 having the effect of significantly reducing demands on the  
5 system.

6           BOARD MEMBER STEVEN MOORE: Your efforts earlier  
7 this year to engender a response rate for the information  
8 order were very remarkable. 97 percent response.

9           How is the response rate going with the applications  
10 to participate in the voluntary riparian reductions of  
11 diversions?

12           MICHAEL GEORGE: It's impossible to give you a  
13 percentage because we know how many applications we've  
14 got, but each application may have many statements of  
15 diversion and use and many parcels. So that's why the  
16 cataloging is taking longer than frankly we had  
17 anticipated.

18           It appears to me, though, that we've got a very  
19 substantial majority of all the riparian lands in the  
20 central and south Delta where the program was targeted.  
21 We're getting a high response rate of -- actually in  
22 setting up some of these inspections, we've got people who  
23 are eager to have us out there to see what's going on.  
24 And, in fact, in response to one of the requests that I  
25 made for a meeting on Thursday, we got neighbors calling

<http://www.yeslaw.net/help>

1 and saying well, while you're out there come and see us.  
2 So we're going to try and do that as well.

3 CAREN TRGOVCICH: Knock knock turns into show and  
4 tell.

5 MICHAEL GEORGE: Exactly. People are proud of what  
6 they're doing and they want the story to get out that the  
7 Delta is not just business as usual.

8 Thank you.

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12 (Whereupon, end of transcribed portion)

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**BBID**  
**EXHIBIT 330**

STATE WATER RESOURCES CONTROL BOARD

BOARD MEETING/HEARING

(Portion)

JULY 7, 2015

Coastal Hearing Room - Second Floor  
1001 I Street  
Sacramento California 95814

Transcribed by: Kathryn Davis CSR No. 3808

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STATE WATER RESOURCES CONTROL BOARD  
BOARD MEMBERS

- Chair Felicia Marcus
- Vice-Chair Frances Spivy-Weber
- Board Member Tam M. Doduc
- Board Member Steven Moore
- Board Member Dorene D'Amamo

1 PORTION OF TRANSCRIPT OF PROCEEDINGS

2 (3:27 - 23:46)

3 --oOo--

4 VICE-CHAIR FRANCES SPIVY-WEBER: So we will now  
5 move to the drought, the California ongoing drought.

6 LES GROBER: Good morning. My name is Les  
7 Grober. I am Assistant Deputy Director for Water  
8 Rights. I'll provide the drought update today if we  
9 have any detailed questions about transfers, TUCPs,  
10 curtailments. I also have Cathy Mrowka here and Amanda  
11 Montgomery.

12 The status of curtailments. As of June 26th,  
13 all of the remaining appropriative water rights in the  
14 upper San Joaquin River Watershed with a priority date  
15 junior to 1903 were curtailed. Also on June 26th,  
16 appropriative rights on the Merced Watershed with the  
17 priority date between 1958 and 1902 were curtailed. And  
18 four appropriative rights on the Tuolumne River  
19 Watershed were also curtailed.

20 Brief update on the curtailment certification  
21 form. On June 25th, the State Water Board issued an  
22 email notification to our drought subscribers informing  
23 them that some curtailed parties have not yet submitted  
24 a curtailment certification form. A list of parties  
25 that have not yet filed the form was published on the

1 website. The response rate increased as a result of the  
2 write-up.

3 Although the response rates remain low, these  
4 response rates must be put in context. Post-14 rights  
5 in the Sacramento and Delta curtailment area will  
6 receive responses representing 97 percent of the May to  
7 September demand. Similarly, for the post-14 rights in  
8 the San Joaquin curtailment area, we received responses  
9 totally 95 percent of the demand. For pre-1914 rights,  
10 we received responses representing 62 percent of the  
11 demand.

12 So in other words, if you look at it another  
13 way, we received responses for what cover approximately  
14 9.1 million acre feet of water out of a total of  
15 9.5 million acre feet curtailed.

16 BOARD MEMBER DORENE D'AMAMO: Do you have the  
17 percentages as far as -- not on the demand but in total?

18 LES GROBER: Yeah. The other percentages? The  
19 other percentages are actually a bit lower because that  
20 supports them dipping into some of the smaller ones. So  
21 for the post-14 rights in the Sacramento River, Delta  
22 curtailment area, the response rate was 44 percent. For  
23 post-14 rights in San Joaquin River, curtailment area  
24 was 25 percent. And for pre-14 rights, 49 percent.

25 BOARD MEMBER STEVEN MOORE: Is it 49 percent of

1 the number of water right holders?

2 LES GROBER: That is just based on the raw  
3 number so it doesn't --

4 BOARD MEMBER STEVEN MOORE: That was pre-14.  
5 And for pre-14 total volume, or the demand base number,  
6 it was on the order of 62 percent; is that right?

7 LES GROBER: That is correct. So it is  
8 disproportionate. The bottom line is the big ones are  
9 reporting.

10 BOARD MEMBER DORENE D'AMAMO: How are we  
11 communicating with the little ones?

12 LES GROBER: I'm not sure if we've had any  
13 official -- Cathy?

14 BOARD MEMBER DORENE D'AMAMO: The reason I'm  
15 asking is not so much to pick on the little ones but  
16 just so that there is a fairness issue here.

17 CATHY MROWKA: Right. So our initial  
18 communication was by letter. And the follow-up was our  
19 Lyris list server. And that server has over 7,000  
20 persons on the membership subscription.

21 BOARD MEMBER DORENE D'AMAMO: Along those lines,  
22 if you could give an update, then, on inspection and  
23 enforcement.

24 CATHY MROWKA: Yes. We have had inspections  
25 well over 100 inspections to date. We are continuing to

1 increase the number of inspectors in the field. At this  
2 point now most of our inspectors are fully trained and  
3 out there helping us out.

4 And what was the other item you asked?

5 BOARD MEMBER DORENE D'AMAMO: Well, I asked  
6 about enforcement also.

7 CATHY MROWKA: On enforcement, we have a number  
8 of items pending at this time that are on my desk and we  
9 look forward to issuing items in the near future.

10 BOARD MEMBER DORENE D'AMAMO: Inspectors in the  
11 field?

12 CATHY MROWKA: At this time, for the Division of  
13 Water Rights, our inspectors do both the complaints,  
14 which are up for drought, and they also do the  
15 curtailment inspections. And we have 24 inspectors  
16 doing that. I've got eight Department of Water  
17 Resources' inspectors that are solely on curtailment.  
18 I've got another eight in-house reallocated resources  
19 that are doing curtailment inspections for me. And then  
20 I've got additional reallocated in-house resources that  
21 are providing in-house support services for the  
22 curtailment inspectors.

23 BOARD MEMBER DORENE D'AMAMO: That is a lot --  
24 that is quite a few inspectors but not as many  
25 inspections as what I would have thought.

1 CATHY MROWKA: Yes. The initial weeks we had to  
2 do a lot of training work where we dedicated our staff  
3 to go out a certain number of times with each of the  
4 inspectors to show with them what they are looking for.  
5 We had to do contacts with the water rights to arrange  
6 the inspections. So the forward work of the inspection  
7 work is a little bit slower, and then you pick up speed  
8 as you go.

9 BOARD MEMBER STEVEN MOORE: I remember last year  
10 about this time, the complaint, the number of complaints  
11 was higher in 2014 than 2013. How is that tracking now,  
12 in 2015?

13 CATHY MROWKA: It is the same kind of tracking  
14 that you would expect. We are seeing right now about  
15 triple our usual year volume. So a lot of our in-house,  
16 more trained inspectors are going on those more  
17 complicated matters. We are having to dedicate a lot of  
18 resources to that issue.

19 BOARD MEMBER STEVEN MOORE: Tracking pretty  
20 closer to last year?

21 CATHY MROWKA: It is very much.

22 BOARD MEMBER STEVEN MOORE: Thanks.

23 VICE-CHAIR FRANCES SPIVY-WEBER: Do we have some  
24 cards on this item? No.

25 LES GROBER: Next I'll cover the TUCPs. We

1 received two new transfer petitions since the last Board  
2 meeting, one from Placer County Water Agency seeking to  
3 transfer 12,000 acre feet of water that is currently  
4 stored in the Middle Fork Project in the American River  
5 system, and has to be transferred to East Bay Municipal  
6 Utility District.

7 The transfer was noticed yesterday and it is  
8 expected the water would be moving into Folsom in July  
9 and August and for release in August and September.

10 Another transfer is the El Dorado Irrigation  
11 District. They are seeking to transfer 700 acre feet of  
12 water currently stored in Weber Reservoir to Westland's  
13 Water District. This will be noticed on July 9th. It  
14 is a total of about 3,100 acre feet because it also  
15 includes some pre-14 water and also moving through  
16 Folsom around August/September. I called that out  
17 because of what I'll be discussing in a moment, two  
18 issues having to do with Folsom issues and Folsom  
19 storage.

20 We also approved a transfer order on July 3rd  
21 allowing South Sutter Water District to transfer 6,000  
22 acre feet of water stored in Camp Far West Reservoir to  
23 several state water contractor agencies.

24 No questions on transfers? I'm going to move to  
25 the Delta. On this last Friday, July 3rd, the Executive

1 Director issued the TUCP order. It included the three  
2 major elements that had been requested by the Department  
3 of Water Resources of the United States Bureau of  
4 Reclamation having to do with adjusted operations of the  
5 Delta.

6 One was to adjust the July minimum Delta outflow  
7 requirement from 4,000 CSF to 3,000 CSFs. Also to  
8 adjust -- to continue to adjust the Emmaton Standard to  
9 a revised location resulting in water savings to Three  
10 Mile Slough and finally to reduce Rio Vista flows from  
11 3,000 CSF to 2,500 CSF.

12 And all those changes, of course, as all along  
13 have been attended to provide more water for other  
14 critical needs throughout the system.

15 The order included -- and this is extending the  
16 applicability of the order. It had expired on  
17 June 30th. Now it runs through for another 180 days.

18 Our other new elements of this order, it  
19 includes additional monitoring, including more specific  
20 requirements the United States Bureau of Reclamation,  
21 having to do with Sacramento River temperature control.

22 And I'll speak a little bit more about that as  
23 to what we still now have as outstanding is approval of  
24 their Sacramento River Temperature Plan. We have done  
25 that as a two-step process because the TUCP order

1 actually links -- or 91-5 Order having to do with  
2 operations of Shasta and Sacramento River temperature  
3 control. So we expect in the next day or so to also  
4 approve that temperature plan.

5 As many of you know, the temperature plan has  
6 been critical because it has changed system-wide  
7 operations, which is why I called out Folsom Reservoir  
8 and water moving through the Folsom Reservoir as one of  
9 the critical elements of the TUCP. But, also, that  
10 temperature plan, it is putting more of a burden on  
11 other Central Valley projects, State Water Project  
12 reservoirs, including drawing down Folsom to lower  
13 levels.

14 The current plan has, end-of-September storage  
15 in Folsom going down to 120,000 acre feet which is, of  
16 course, of concern to communities that rely upon Folsom  
17 for water supply. So mindful of that, we are going to  
18 continue to work closely with the Department and the  
19 Bureau to assure that that kind of hard stop is  
20 maintained.

21 We have also included another condition in the  
22 TUCP order that states that: Upon request of  
23 the Executive Director, Reclamation and DWR will  
24 propose adjusted operations to ensure that  
25 critical water supplies are available for

1 commercial and industrial use, including the  
2 cities served by Folsom Lake, and to provide  
3 cooling water maintained to maintain grid  
4 liability."

5 So all of this, as you know, and also as part of  
6 this two-step process, we are considering -- rather than  
7 just kind of tracking and looking at that -- that it  
8 might be a good idea also to ensure these critical water  
9 supply needs are met to actually prescribe and require  
10 that as a hard stop, that 120,000 acre feet.

11 Because the current plan -- getting a little bit  
12 into the details -- the Bureau's plan shows that that is  
13 the low number. Then it goes back up based on inflows,  
14 outflows, some of those transfers that were in process,  
15 back up to 160,000 acre feet through December.

16 But as we heard at our workshop a couple weeks  
17 back, that if you oppose really very critically dry  
18 conditions, the storages would continue to dance around  
19 that 120 and dip actually a little bit below that to  
20 about 113,000, you know, through January.

21 So a hard stop of 120, although low, it provides  
22 some assurance that they can maintain the critical water  
23 supply into the fall months.

24 VICE-CHAIR FRANCES SPIVY-WEBER: Do you do,  
25 like, bells and whistles and, you know, reds -- lights

1 go off, you know, as you get to 125, 124?

2 LES GROBER: You mean other things start  
3 happening even though --

4 VICE-CHAIR FRANCES SPIVY-WEBER: Yeah, I mean,  
5 you can't just kind of -- "Oh, here we are at 120."

6 LES GROBER: Let me answer that question by  
7 actually providing the most recent update in terms of  
8 the Delta operations. The current plan had called for  
9 release schedules from Folsom and Oroville.

10 So, again, the project operator is mindful of  
11 this critical need, have actually adjusted those  
12 releases and operations to release more water currently  
13 from Oroville than was in the plan, and less from  
14 Folsom. So releases from Folsom have actually been 600  
15 to 1,000 CSFs less than the July plan had called. So  
16 all of that is helping with the plan to get to actually  
17 a storage higher than 120,000 acre feet in September.

18 So rather than any lights or whistles going off,  
19 it is just going to be dependent on the operators and us  
20 kind of tracking and saying how are we doing compared to  
21 that plan to make sure that nothing is happening that is  
22 worsening that plan.

23 CHAIR FELICIA MARCUS: We are going to be seen  
24 on the front page of the Bee, too. Folsom is going to  
25 be a true symbol of the "we are all in this together"

1 because we are all in this together. But I appreciate  
2 you doing -- your putting some stuff in there to give  
3 some assurance to the good people of this area that, you  
4 know, they are important.

5 And I think that is going to be incredibly  
6 important. And just from looking at folk's response, in  
7 addition to what they have said here but also in the  
8 media, it is an advertisement for the quality and  
9 effectiveness of the work Sacramento has done over the  
10 past 20 years through the Water Forum, that they  
11 actually have the agreements with each other that they  
12 can weather something like this.

13 So it is a great advertisement for integrated  
14 water management. I mean, it is impressive. Had they  
15 not done that, we couldn't do this.

16 LES GROBER: Not to provide only -- if it can be  
17 seen as "good news" in terms of operating better than  
18 the plan -- although in the moment, we have rising tides  
19 in the Delta. So operations are currently changing to  
20 increase releases to continue to meet salinity control  
21 in the Delta.

22 So that's -- all of these things are always  
23 rough forecasts but releases are likely to go up to the  
24 planned numbers. But still that balancing between  
25 Folsom and Oroville is continuing to keep them at the

1 same levels. And the Bureau and the Department are  
2 going to wait and see what happens with the tides. But  
3 another critical check-in will be about two weeks, at  
4 which point we will have another drought update with the  
5 project operators so it will be another good opportunity  
6 to check in to see how we are doing compared to the  
7 plan.

8 CHAIR FELICIA MARCUS: That is right. Being  
9 able to talk about it every two weeks at these meetings  
10 is a another bell and whistle.

11 BOARD MEMBER DORENE D'AMAMO: I'm just thinking  
12 it would be to get an update on the effectiveness of the  
13 barrier to get a sense, to the extent possible, of what  
14 amount of water that is saved, as far as additional  
15 releases to repel salinity.

16 LES GROBER: That is a great comment because one  
17 of the other elements in the TUCP Order is for the  
18 RTDOMT, the realtime operation team, to evaluate what  
19 other additional monitoring could be done -- beyond what  
20 we are requiring, beyond what is already happening -- to  
21 better understand the effects of that barrier.

22 So it is to get it just that. I think, in  
23 general, the consensus is that it is making things  
24 better than what would have otherwise been the case; but  
25 it is a good question, how much better and what other

1 effects might it have.

2 There have been some unexpected effects, I  
3 guess, some ferries in the area have had trouble talking  
4 because of increased velocities on other channels. But  
5 all those observations and discussions are ongoing.

6 BOARD MEMBER STEVEN MOORE: One follow-up  
7 question from the workshop, or just to put things in  
8 context. We are talking about 120,000 acre feet in  
9 Folsom; 250,000 acre feet or so, or more, withheld in  
10 Shasta affecting, you know, on the order of 100,000 acre  
11 feet going south of the Delta. So there is a lot of  
12 sacrifices being made from these different sectors.

13 How about on the environmental side? If you  
14 take the TUCP numbers and put in the thousands of acre  
15 feet that have been "curtailed" for the environmental  
16 reasons in the Bay Delta, what is a rough estimate?

17 LES GROBER: The combined -- and it always takes  
18 a little bit of time to figure out the exact numbers --  
19 but through the end of May, it appears the conserved  
20 water or redirected water was about a 400,000 acre feet.  
21 And the projection, then, through June/July, the rest of  
22 the year, will bring it up to between 600 and 650,000  
23 acre feet.

24 But that is a combined number that takes into  
25 account not just changes in Delta outflow but also

1 changes in the \* emitant stand of Three Mile, which  
2 isn't strictly an environmental standard. That is for  
3 protecting the ag beneficial use. So we could  
4 potentially figure out the precise numbers; but in  
5 total, combined, it looks like we are headed towards  
6 about 650,000 acre feet of water made available.

7 Thank you.

8 Finally, what we still have coming up, as a  
9 requirement of the TUCP Pre Order, we are expected an  
10 updated New Melones Operations Plan, oddly because  
11 storages are actually a little bit higher in New Melones  
12 than had been planned because of some storms and higher  
13 inflows.

14 They were unable to use the lower-level outlet  
15 to do temperature controls. So we are asking for an  
16 adjusted plan to see, well, how do we get through this  
17 year. And, also, what can we do in subsequent years to  
18 be able to maintain temperature control when we have  
19 lower storages of this type in New Melones.

20 And also upcoming, we are still waiting on the  
21 evaluation of the fishery agencies is a TUCP having to  
22 do with adjusted, dissolved oxygen requirements on the  
23 Stanislaus River also related to lower flows, higher  
24 temperatures, things like that. And that should be in  
25 the next two weeks, I think, as well.

1 And with that, that is all I have.

2 Take any questions.

3 CHAIR FELICIA MARCUS: Any other questions?

4 BOARD MEMBER STEVEN MOORE: Thank you for all  
5 your work in the last few weeks. The Water Rights  
6 Division is working very hard. I want to exercise your  
7 efforts.

8 CHAIR FELICIA MARCUS: You are exercising  
9 muscles that you didn't even know you had, in terms of  
10 how many different cylinders you are having to hit on.  
11 It is like a puzzle. It is the worst final exam  
12 question ever.

13 LES GROBER: Thank you.

14 I've neglected to introduce Nathan Weaver, to my  
15 left here, an attorney with the \* OCC. I don't know if  
16 you've met him but -- thank you.

17 CHAIR FELICIA MARCUS: Thank you very much.  
18 Very sobering and very serious.

19 All right. Now we are onto item four. Where is  
20 the team?

21

22 (Whereupon, end of transcribed portion.)

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REPORTER'S CERTIFICATE

State of California     )  
                                  ) ss.  
County of Sacramento    )

I certify that the statements in the foregoing hearing were transcribed in the within-entitled cause by audio; that said hearing was taken at the time and place therein named; that the testimony of said witnesses was reported by me, a duly Certified Shorthand Reporter of the State of California authorized to administer oaths and affirmations, and said testimony was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for either or any of the parties to said hearing, nor in any way interested in the outcome of the cause named in said hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this 1st day of September, 2015.

\_\_\_\_\_  
KATHRYN DAVIS  
Certified Shorthand Reporter  
Certificate No. 3808

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**BBID**  
**EXHIBIT 332**

STATE WATER RESOURCES CONTROL BOARD  
BOARD MEETING/HEARING  
(Portion)

JULY 21, 2015

Coastal Hearing Room - Second Floor  
1001 I Street  
Sacramento California 95814

scribed by: Kathryn Davis CSR No. 3808

**kathryndavis** & associates  
deposition reporting

555 University Avenue, Suite 116 Sacramento, California 95825 916.567.4211 [www.kdareporting.com](http://www.kdareporting.com)

BBID Exh. 332

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Transcribed by: Kathryn Davis CSR No. 3808

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STATE WATER RESOURCES CONTROL BOARD

BOARD MEMBERS

- Chair Felicia Marcus
- Vice-Chair Frances Spivy-Weber
- Board Member Tam M. Doduc
- Board Member Steven Moore
- Board Member Dorene D'Amamo

1 PORTION OF TRANSCRIPT OF PROCEEDINGS

2 (20:20 - 22:45)

3 --oOo--

4 VICE-CHAIR FRANCES SPIVY-WEBER: Well, actually  
5 we had lots of rain in Southern California. So in light  
6 of that potential, we are now to the informational item  
7 of California's ongoing drought emergency.

8 Cathy is coming up with her correct name this  
9 time, I suspect. And Bill, are you -- okay. Go ahead.

10 CATHY MROWKA: Good morning. It is a very brief  
11 item this morning. During the past two weeks, we did  
12 not issue any additional water shortage notifications.  
13 That was formerly called "curtailment" but now they are  
14 "water shortage notifications." We have been monitoring  
15 different thunderstorm activities, and we did not see  
16 any need for additional notifications.

17 We have conducted now a total of approximately  
18 250 inspections to make sure that parties are complying  
19 with the water shortage notifications. And tallying our  
20 results from those inspections and deciding what  
21 warrants additional actions, things of that nature.

22 We have issued three enforcement items during  
23 these last two weeks. We issued a cease and desist  
24 order to West Side Irrigation District, a draft cease  
25 and desist order. A draft cease and desist order to

1 Hodgetts. That was a water truck filling operation.  
2 And an administrative civil liability action to Byron  
3 Bethany Irrigation District.

4 We issued one Temporary Urgent Change Petition.  
5 That was to El Dorado Irrigation District. It issued on  
6 July the 15th. And it allows a decrease in the minimum  
7 flows to the wastewater into Deer Creek. This will  
8 boost the use of treated wastewater within the El Dorado  
9 Irrigation District service area.

10 The order includes specific monitoring  
11 requirements that were agreed to by the District and  
12 California Department of Fish and Wildlife.

13 VICE-CHAIR FRANCES SPIVY-WEBER: Thank you for  
14 all of those actions. I have been following those. And  
15 I know, particularly in El Dorado, they are quite  
16 anxious to make sure they are using recycled water and  
17 not potable water. So that is good.

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19 (Whereupon, end of transcribed portion.)  
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REPORTER'S CERTIFICATE

State of California     )  
                                  ) ss.  
County of Sacramento    )

I certify that the statements in the foregoing hearing were transcribed in the within-entitled cause by audio; that said hearing was taken at the time and place therein named; that the testimony of said witnesses was reported by me, a duly Certified Shorthand Reporter of the State of California authorized to administer oaths and affirmations, and said testimony was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for either or any of the parties to said hearing, nor in any way interested in the outcome of the cause named in said hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this 1st day of September, 2015.

\_\_\_\_\_  
KATHRYN DAVIS  
Certified Shorthand Reporter  
Certificate No. 3808

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**thunderstorm** 3:15  
**time** 3:9  
**total** 3:17  
**transcribed** 4:19  
**TRANSCRIPT** 3:1

**treated** 4:3  
**truck** 4:1

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**U**

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**Urgent** 4:4

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**V**

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**VICE-CHAIR** 3:4 4:13

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**W**

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**warrants** 3:21  
**wastewater** 4:7,8  
**water** 3:12,14,19 4:1,16,17  
**weeks** 3:11,23  
**West** 3:24  
**Wildlife** 4:12

**BBID**  
**EXHIBIT 334**

STATE WATER RESOURCES CONTROL BOARD  
BOARD MEETING/HEARING  
(Portion)

AUGUST 4, 2015

Coastal Hearing Room - Second Floor  
1001 I Street  
Sacramento California 95814

scribed by: Kathryn Davis CSR No. 3808

kathryndavis | & associates  
deposition reporting

555 University Avenue, Suite 116 Sacramento, California 95825 916.567.4211 [www.kdareporting.com](http://www.kdareporting.com)

BBID Exh. 334

STATE WATER RESOURCES CONTROL BOARD  
BOARD MEETING/HEARING  
(Portion)

AUGUST 4, 2015

Coastal Hearing Room - Second Floor  
1001 I Street  
Sacramento California 95814

Transcribed by: Kathryn Davis CSR No. 3808

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STATE WATER RESOURCES CONTROL BOARD  
BOARD MEMBERS

- Chair Felicia Marcus
- Vice-Chair Frances Spivy-Weber
- Board Member Tam M. Doduc
- Board Member Steven Moore
- Board Member Dorene D'Amamo

1           So I do believe that the issue of a legal  
2 conflict is not presented here. I further believe,  
3 however, that it is very good policy for us as a Board,  
4 for us as the Watermaster's office, to demonstrate that  
5 we can be independent and that we are making our own  
6 decisions, uninfluenced by the project considerations  
7 that are so sensitive in the Delta.

8           CHAIR FELICIA MARCUS: John, since you are  
9 100 percent correct today, will you also clarify for the  
10 folks who are may be in the room, or listening, the  
11 distinction between advisory and prosecution, staff  
12 levels of control and how it is? This is something that  
13 either does make my head want to explode, even though I  
14 have been in this field for a long time, so I suspect  
15 that I'm not alone.

16           JOHN O'HAGAN: Advisory versus prosecution. The  
17 advisory side of the State Water Board is dealing in a  
18 prosecution case. And the advisory side of the Board  
19 would be the members of the hearing team, and counsel  
20 that advises the Board on an enforcement action.

21           The prosecution team has its own attorneys from  
22 the Office of Enforcement that assist us in prosecution  
23 cases. And then our enforcement staff would be on that  
24 prosecution team. Usually it is a staff resource and  
25 senior engineer and Cathy, sitting next to me -- Cathy

1 Mrowka, who is the project manager for Enforcement --  
2 and then myself.

3 And as an item comes up, there is an ethical  
4 wall that is built, that there is no communication  
5 between the advisory team and the prosecution team in  
6 any cases because of the rules of law. And we want to  
7 make sure that integrity is maintained. So we know very  
8 well who is on each side of the wall and we ensure the  
9 communication is not met in between those when a case  
10 comes before hearing.

11 CHAIR FELICIA MARCUS: You remind us of that  
12 constantly.

13 JOHN O'HAGAN: Yes, I do and I remind a lot of  
14 people that.

15 CHAIR FELICIA MARCUS: So, in essence, what  
16 happens, just for the layperson, is you all go out. You  
17 have folks out there investigating. You figure out how  
18 you are going to deal with each instance. Obviously,  
19 you don't start with a CDO. You start with talking to  
20 people or you have been talking to people.

21 And then if you get to the point of enforcement,  
22 then you've made that determination before. And then  
23 those that are doing the draft CDO, or the complaint in  
24 a given situation, are then on the prosecution team.  
25 And then you have a team that is advisory that can help

1 our target for this year. And we feel that we will be  
2 going through October, so we do have more time.

3 And it did take us some time to get started up  
4 and retrain resources. Each year we do this. And when  
5 we have different resources, we invest a lot of time in  
6 training them with -- field safety training is a  
7 mandatory requirement, and all the other activity that  
8 we have to do. And then equip them with the proper  
9 training on using our ERIM system and then also GPS  
10 units.

11 As far as curtailments, if you look at our  
12 curves on the website, we have not issued new  
13 curtailment notices -- I should say water shortage  
14 notices. At this time, the demand in the watersheds are  
15 going slightly down after July is the peak month for  
16 water demand in our analysis. But the supply is not  
17 getting any better.

18 So we are looking at some tributaries of the  
19 Sacramento River and watching those very closely to see  
20 if additional curtailments are necessary. And we are  
21 also looking at other areas of the state to see if there  
22 is a need for further curtailment.

23 San Joaquin, we have -- looking at some of the  
24 other tributaries -- because, as you know, we have done  
25 the Merced River down to a lower level and then also the

1 upper San Joaquin.

2 Overall in the Sacramento/San Joaquin, we are  
3 adding 1903, an earlier priority date. And if you look  
4 at the supply and demand where we are bouncing around  
5 that for the Sacramento, on the San Joaquin, it is  
6 slightly below that but there are some very large  
7 diverters that would take up that space.

8 So we want to make sure that we do curtailments  
9 or notices where necessary and appropriate. So that is  
10 why we are looking at the tributary level on these  
11 issues. And I believe that is all we have.

12

13 (Whereupon, end of transcribed portion.)

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**BBID**  
**EXHIBIT 337**



EDMUND G. BROWN JR.  
GOVERNOR



MATTHEW RODRIGUEZ  
SECRETARY FOR  
ENVIRONMENTAL PROTECTION

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## State Water Resources Control Board

January 17, 2014

### NOTICE OF SURFACE WATER SHORTAGE AND POTENTIAL FOR CURTAILMENT OF WATER RIGHT DIVERSIONS

With California facing water shortfalls in the driest year in recorded state history, Governor Edmund G. Brown Jr. has proclaimed a State of Emergency and directed state officials to take all necessary actions to prepare for these drought conditions.

The State Water Resources Control Board (State Water Board) administers California's water rights system and is closely monitoring water availability. The water rights system is designed to provide for the orderly allocation of water supplies in the event that there is not enough water to satisfy everyone's needs. In the coming weeks and months, if dry weather conditions persist, the State Water Board will notify water right holders in critically dry watersheds of the requirement to limit or stop diversions of water under their water right, based on their priority. The right to divert surface water in California is based on the type of right being claimed and when the right was initiated. In times of drought and limited supply, the most recent ("junior") right holder must be the first to discontinue use. Some riparian<sup>1</sup> and pre-1914<sup>2</sup> water right holders may also receive a notice to stop diverting water if their diversions are downstream of reservoirs releasing stored water and there is no natural flow available for diversion.

If you are in a water short area, you should be looking into alternative water supplies for your water needs. Alternative supplies include groundwater wells, purchased water supplies under contractual arrangements, and recycled wastewater. Water right holders are cautioned that groundwater resources are significantly depleted in some areas. Water right holders in these areas should make planting and other decisions accordingly.

We hope that significant precipitation occurs in the next few months and the need to curtail water diversions is unnecessary. However, this notice is to encourage you to plan ahead. Whether you are a water right holder or a residential or business customer of a water service provider, all of California's water users are urged to conserve and use water wisely.

For more information, go to: [Drought State of Emergency](#)  
[State Water Board Drought Information](#)

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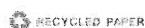
<sup>1</sup> Riparian rights entitle the landowner to use a share of the water flowing past their property. While riparian rights require no permits or licenses, they apply only to the water that would naturally flow in the stream and they do not allow the user to divert water for storage or use it on parcels that are not adjacent to the stream or on land that is outside its watershed.

<sup>2</sup> An appropriative water right is one obtained for the use of water on non-riparian land, for diversion to storage, or otherwise beyond what can be done under a riparian right. An appropriative right claimed before 1914 is referred to as a "pre-1914 appropriative water right" and is not subject to permit or license requirements. Water right permits and licenses issued after 1914 by the State Water Board and its predecessors are referred to as "post-1914 appropriative water rights".

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

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**BBID**  
**EXHIBIT 337**



EDMUND G. BROWN JR.  
GOVERNOR



MATTHEW RODRIGUEZ  
SECRETARY FOR  
ENVIRONMENTAL PROTECTION

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## State Water Resources Control Board

January 17, 2014

### NOTICE OF SURFACE WATER SHORTAGE AND POTENTIAL FOR CURTAILMENT OF WATER RIGHT DIVERSIONS

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The State Water Resources Control Board (State Water Board) administers California's water rights system and is closely monitoring water availability. The water rights system is designed to provide for the orderly allocation of water supplies in the event that there is not enough water to satisfy everyone's needs. In the coming weeks and months, if dry weather conditions persist, the State Water Board will notify water right holders in critically dry watersheds of the requirement to limit or stop diversions of water under their water right, based on their priority. The right to divert surface water in California is based on the type of right being claimed and when the right was initiated. In times of drought and limited supply, the most recent ("junior") right holder must be the first to discontinue use. Some riparian<sup>1</sup> and pre-1914<sup>2</sup> water right holders may also receive a notice to stop diverting water if their diversions are downstream of reservoirs releasing stored water and there is no natural flow available for diversion.

If you are in a water short area, you should be looking into alternative water supplies for your water needs. Alternative supplies include groundwater wells, purchased water supplies under contractual arrangements, and recycled wastewater. Water right holders are cautioned that groundwater resources are significantly depleted in some areas. Water right holders in these areas should make planting and other decisions accordingly.

We hope that significant precipitation occurs in the next few months and the need to curtail water diversions is unnecessary. However, this notice is to encourage you to plan ahead. Whether you are a water right holder or a residential or business customer of a water service provider, all of California's water users are urged to conserve and use water wisely.

For more information, go to: [Drought State of Emergency](#)  
[State Water Board Drought Information](#)

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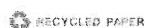
<sup>1</sup> Riparian rights entitle the landowner to use a share of the water flowing past their property. While riparian rights require no permits or licenses, they apply only to the water that would naturally flow in the stream and they do not allow the user to divert water for storage or use it on parcels that are not adjacent to the stream or on land that is outside its watershed.

<sup>2</sup> An appropriative water right is one obtained for the use of water on non-riparian land, for diversion to storage, or otherwise beyond what can be done under a riparian right. An appropriative right claimed before 1914 is referred to as a "pre-1914 appropriative water right" and is not subject to permit or license requirements. Water right permits and licenses issued after 1914 by the State Water Board and its predecessors are referred to as "post-1914 appropriative water rights".

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

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**BBID**  
**EXHIBIT 338**



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## State Water Resources Control Board

May 27, 2014

In Regards to Water Right(s):

### **NOTICE OF UNAVAILABILITY OF WATER AND IMMEDIATE CURTAILMENT FOR THOSE DIVERTING WATER IN THE SACRAMENTO AND SAN JOAQUIN RIVER WATERSHEDS WITH A POST-1914 APPROPRIATIVE RIGHT**

On January 17, 2014, Governor Edmund G. Brown, Jr. proclaimed a State of Emergency (Proclamation) to address the record dry conditions around the State. On the same day, as directed by the Proclamation, the State Water Resources Control Board (State Water Board) issued a statewide notice of water shortages and potential for future curtailment of water right diversions.

#### **Curtailment of Post-1914 Water Rights:**

Based upon the most recent reservoir storage and inflow projections, along with forecasts for future precipitation events, the State Water Board has determined that the existing water supply in the Sacramento and San Joaquin River watersheds is insufficient to meet the needs of all water rights holders. With this notice, the State Water Board is notifying all holders of post-1914 appropriative water rights within the Sacramento and San Joaquin River watersheds of the need to immediately stop diverting under their post-1914 water rights, with the exceptions discussed below. This condition of curtailment will continue until water conditions improve. Even if there is water physically available at your point of diversion, that water is necessary to meet senior water right holders' needs or is water released from storage that you are not entitled to divert. If precipitation occurs in the following weeks or months, you should not commence diversion before being notified by the State Water Board that water is legally available for diversion under your priority of right.

Permission to initiate diversions during or following significant rainfall events may be posted at: [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/index.shtml#notices](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/index.shtml#notices). You can get immediate email updates from the State Water Board about these notices by subscribing to "Drought Updates" at: [http://www.waterboards.ca.gov/resources/email\\_subscriptions/](http://www.waterboards.ca.gov/resources/email_subscriptions/)

#### **Compliance Certification Required:**

Curtailed post-1914 diverters are required to document receipt of this notice by completing an online Curtailment Certification Form (Form) within seven days. The Form confirms cessation of diversion under the specific post-1914 water right, and, if applicable, identifies the alternate water supply to be used in lieu of the curtailed water right. Completion of the Form and identification of alternate rights can avoid unnecessary enforcement proceedings.

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FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

1001 I Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 100, Sacramento, Ca 95812-0100 | [www.waterboards.ca.gov](http://www.waterboards.ca.gov)



Please complete the Form for each post-1914 water right identified through this curtailment at:  
[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/ewrims/curtailment/](http://www.waterboards.ca.gov/waterrights/water_issues/programs/ewrims/curtailment/)

If you are unable to complete the form online, you should download the Form at:  
[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/ewrims/curtailment/curtailment\\_certification\\_form.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/ewrims/curtailment/curtailment_certification_form.pdf)  
and email your response to: [SWRCB-Curtailment-Certification@waterboards.ca.gov](mailto:SWRCB-Curtailment-Certification@waterboards.ca.gov).

**Warning of Potential Future Curtailment of Senior Rights:**

You may have received this notice because the State Water Board's records show you divert water under a riparian or pre-1914 water right. As such, it is important that you conserve water due to declining supplies. If current conditions persist, the State Water Board may curtail some pre-1914 and riparian water rights in the near future. If you are a riparian or pre-1914 water right holder located downstream of major reservoir operations (such as the Central Valley Project or State Water Project) which are releasing water from storage and you do not have a contract or transfer order authorizing diversion of the released water, you are not permitted to divert the released water quantity.

**Exceptions to Curtailment:**

If your post-1914 diversion is your only source for human health and safety purposes, you may contact the State Water Board with information supporting that there is no other available supply and maximum conservation has been implemented. The State Water Board may be able to assist with identifying alternatives on a case-by-case basis. Additionally, if your diversion is for hydroelectric generation and all water diverted is returned to the stream, you may continue to divert under your post-1914 permit or license. If you continue to divert under either of the above circumstances, you must identify that on the Form and provide the information requested.

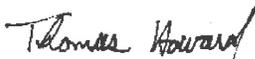
**Potential Enforcement:**

Those who are found to be diverting water beyond what is legally available to them may be subject to administrative fines, cease and desist orders, or prosecution in court. The State Water Board may levy fines of \$1,000 per day of violation and \$2,500 for each acre-foot diverted or used in excess of a valid water right. (See Water Code, §§ 1052, 1055.) Additionally, if the State Water Board issues a Cease and Desist Order against an unauthorized diversion, violation of any such order can result in a fine of \$10,000 per day. (See Water Code, §§ 1831, 1845.)

The State Water Board is encouraging diverters to work together to reach local voluntary agreements that not only provide solutions that help local communities with water shortages, but also prevent impacts to other legal users of water and do not cause unreasonable effects on fish and wildlife. If you have any questions, please call our Curtailment Hotline at (916) 341-5342, contact us by email at: [SWRCB-Curtailment-Certification@waterboards.ca.gov](mailto:SWRCB-Curtailment-Certification@waterboards.ca.gov), or review our drought year webpage at:

[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/index.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/index.shtml)

Sincerely,



Thomas Howard  
Executive Director

**BBID**  
**EXHIBIT 339**



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## State Water Resources Control Board

May 27, 2014

In Regards to Water Right(s):

**NOTICE OF UNAVAILABILITY OF WATER AND IMMEDIATE CURTAILMENT FOR THOSE DIVERTING WATER FROM THE RUSSIAN RIVER WATERSHED UPSTREAM OF THE RUSSIAN RIVER'S CONFLUENCE WITH DRY CREEK, AND WITH A POST-1914 APPROPRIATIVE RIGHT HAVING A PRIORITY DATE OF FEBRUARY 19, 1954 OR LATER**

On January 17, 2014, Governor Edmund G. Brown, Jr. proclaimed a State of Emergency (Proclamation) to address the record dry conditions around the State. On the same day, as directed by the Proclamation, the State Water Resources Control Board (State Water Board) issued a statewide notice of water shortages and potential for future curtailment of water right diversions.

**Curtailment of Junior Post-1914 Water Rights:**

Based upon the most recent reservoir storage and inflow projections, along with forecasts for future precipitation events, the State Water Board has determined that the existing water supply in the Russian River watershed is insufficient to meet the needs of all water rights holders. With this notice, the State Water Board is notifying holders of post-1914 appropriative water rights within the Russian River watershed upstream of the confluence of Dry Creek with a priority date of February 19, 1954 or later (Application A015743 or higher), of the need to immediately stop diverting under their junior post-1914 water rights, with the exceptions discussed below. This condition of curtailment will continue until water conditions improve. Even if there is water physically available at your point of diversion, that water is necessary to meet senior water right holders' needs or is water released from storage that you are not entitled to divert. If precipitation occurs in the following weeks or months, you should not commence diversion before being notified by the State Water Board that water is legally available for diversion under your priority of right.

Permission to initiate diversions during or following significant rainfall events may be posted at: [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/index.shtml#notices](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/index.shtml#notices). You can get immediate email updates from the State Water Board about these notices by subscribing to "Drought Updates" at: [http://www.waterboards.ca.gov/resources/email\\_subscriptions/](http://www.waterboards.ca.gov/resources/email_subscriptions/)

**Compliance Certification Required:**

Curtailed junior post-1914 diverters are required to document receipt of this notice by completing an online Curtailment Certification Form (Form) within seven days. The Form confirms cessation of diversion under the specific post-1914 water right, and, if applicable, identifies the alternate water supply to be used in lieu of the curtailed water right. Completion of the Form and identification of alternate rights can avoid unnecessary enforcement proceedings.

---

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

1001 I Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 100, Sacramento, Ca 95812-0100 | [www.waterboards.ca.gov](http://www.waterboards.ca.gov)



Please complete the Form for each post-1914 water right identified through this curtailment at:  
[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/ewrims/curtailment/](http://www.waterboards.ca.gov/waterrights/water_issues/programs/ewrims/curtailment/)

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and email your response to: [SWRCB-Curtailment-Certification@waterboards.ca.gov](mailto:SWRCB-Curtailment-Certification@waterboards.ca.gov).

**Warning of Potential Future Curtailment of Senior Rights:**

You may have received this notice because the State Water Board's records show you divert water under a riparian, a pre-1914, or senior post-1914 water right. As such, it is important that you conserve water due to declining supplies. If current conditions persist, the State Water Board may curtail all remaining senior post-1914 water rights and some riparian and pre-1914 water rights in the near future. If you are a senior post-1914, riparian or pre-1914 water right holder located downstream of a major reservoir operation which is releasing water from storage and you do not have a contract or transfer order authorizing diversion of the released water, you are not permitted to divert the released water quantity.

**Exceptions to Curtailment:**

If your junior post-1914 diversion is your only source for human health and safety purposes, you may contact the State Water Board with information supporting that there is no other available supply and maximum conservation has been implemented. The State Water Board may be able to assist with identifying alternatives on a case-by-case basis. Additionally, if your diversion is for hydroelectric generation and all water diverted is returned to the stream, you may continue to divert under your junior post-1914 permit or license. If you continue to divert under either of the above circumstances, you must identify that on the Form and provide the information requested.

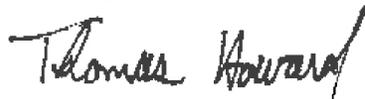
**Potential Enforcement:**

Those who are found to be diverting water beyond what is legally available to them may be subject to administrative fines, cease and desist orders, or prosecution in court. The State Water Board may levy fines of \$1,000 per day of violation and \$2,500 for each acre-foot diverted or used in excess of a valid water right. (See Water Code, §§ 1052, 1055.) Additionally, if the State Water Board issues a Cease and Desist Order against an unauthorized diversion, violation of any such order can result in a fine of \$10,000 per day. (See Water Code, §§ 1831, 1845.)

The State Water Board is encouraging diverters to work together to reach local voluntary agreements that not only provide solutions that help local communities with water shortages, but also prevent impacts to other legal users of water and do not cause unreasonable effects on fish and wildlife. If you have any questions, please call our Curtailment Hotline at (916) 341-5342, contact us by email at: [SWRCB-Curtailment-Certification@waterboards.ca.gov](mailto:SWRCB-Curtailment-Certification@waterboards.ca.gov), or review our drought year webpage at:

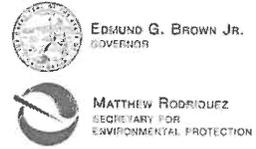
[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/index.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/index.shtml)

Sincerely,



Thomas Howard  
Executive Director

**BBID**  
**EXHIBIT 340**



## State Water Resources Control Board

April 23, 2015

### **NOTICE OF UNAVAILABILITY OF WATER AND NEED FOR IMMEDIATE CURTAILMENT FOR THOSE DIVERTING WATER UNDER A JUNIOR PRIORITY CLASS RIGHT IN THE SCOTT RIVER WATERSHED SUBJECT TO DECREE NO. 30662**

#### **Background:**

On January 23, 2015 and again on April 2, 2015, the State Water Resources Control Board (State Water Board) issued a Notice of Surface Water Shortage and Potential for Curtailment due to dry conditions throughout the State. On April 1, 2015, the Governor issued an executive order, order B-29-15, continuing the state of emergency, initially enacted on January 17, 2014, due to drinking water shortages, diminished water for agriculture production, degraded habitat for fish and wildlife, increased wildfire risk and the threat of saltwater contamination to fresh water supplies in the Sacramento-San Joaquin Delta.

#### **Curtailment of Junior Class Water Rights:**

The State Water Resources Control Board (State Water Board) has been monitoring the flow conditions in the Scott River watershed. Due to limited precipitation and snowpack, the current flows are insufficient to satisfy diversion demands under senior rights. Your water right is a junior priority class right identified in the Scott River Adjudication Decree 30662 (Decree) as either: (1) a Priority 2 Class Right in Schedule D-4 of the Decree, (2) a Post-1914 Appropriative Right in Schedule E of the Decree, or (3) a Surplus Class right<sup>1</sup>. With this notice, the State Water Board is notifying you of the need to immediately stop diverting under your junior priority class water rights.

This condition of curtailment will continue until water conditions improve and/or senior priority class water rights are satisfied. Even if there is water physically available at your point of diversion, that water is necessary to meet senior priority class water rights holder's needs and you are not entitled to divert. If precipitation occurs in the following weeks or months, you should not commence diversion before being notified by the State Water Board that water is legally available for diversion under your priority of right. Permission to initiate diversions during or following significant rainfall events, if issued, will be posted at:

[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/index.shtml#notices](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/index.shtml#notices).

You can get immediate email updates from the State Water Board about these notices by subscribing to the Water Rights "Drought Updates" at:

[http://www.waterboards.ca.gov/resources/email\\_subscriptions/swrcb\\_subscribe.shtml](http://www.waterboards.ca.gov/resources/email_subscriptions/swrcb_subscribe.shtml).

<sup>1</sup> You may also have interest in a senior priority class right of the Decree. If so, this notice applies only to the junior portion of your rights, and not to the senior priority class rights. Please note that the Decree assigns senior rights to most domestic diversions, and assigns all claimants senior rights for stockwatering, firefighting, wildlife, and recreational domestic diversions.

Any curtailment lifting or re-issuance throughout the diversion season will be posted online and issued through the State Water Board's email system; you will not be noticed by mail at your residence. You are highly encouraged to subscribe to the Water Rights email notification system to timely receive updates regarding the status of curtailment.

**Compliance Certification Required:**

Curtailed diverters are required to document receipt of this notice by completing an online Curtailment Certification Form (Form) within seven days. The Form confirms cessation of diversion under the specific junior priority class water right identified in the decree, and, if applicable, identifies the alternate water supply to be used in lieu of the curtailed water right. You are required to complete the Form for each of your junior priority class water rights identified through this curtailment at:

[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/ewrims/curtailment/2015curt\\_form.php](http://www.waterboards.ca.gov/waterrights/water_issues/programs/ewrims/curtailment/2015curt_form.php)

**Warning of Potential Future Curtailment of Senior Rights:**

If you divert water under senior priority class water rights, it is important to conserve water due to declining supplies. If current conditions persist, the State Water Board may curtail additional water rights within the senior priority class.

**No Exception for Health and Safety:**

There is no exception to the curtailment notice for health and safety needs. However, we are aware that some water users must comply with directives issued by the Division of Drinking Water (DDW), or local health or drinking water regulation to provide continued water service to meet minimum health and safety standards. Should you continue to divert water under a curtailed water right to meet human health and safety needs, you must complete the Form identifying your health and safety needs, whether there is an applicable DDW, state or local regulation and your attempts at securing an alternate water supply. The State Water Board will carefully analyze the non-exempted continued diversions for minimum health and safety needs on a case-by-case basis.

**Potential Enforcement:**

Those that are found to be diverting water beyond what is legally available to them may be subject to administrative fines, cease and desist orders, or prosecution in court. The State Water Board may levy fines of \$1,000 per day of violation and \$2,500 for each acre-foot diverted or used in excess of a valid water right. (See Water Code, §§ 1052, 1055.) Additionally, if the State Water Board issues a Cease and Desist Order against an unauthorized diversion, violation of any such order can result in a fine of \$10,000 per day. (See Water Code, §§ 1831, 1845.)

**Statement of Diversion and Use Law:**

Water Code section 5101 requires, with minor exceptions, that a person who diverts water from a surface stream, spring or subterranean stream must report that diversion by filing an Initial Statement of Water Diversion and Use (Statement) with the State Water Board, followed thereafter by Supplemental Statements, unless the diversion is covered by a permit, license or registration issued by the Division of Water Rights (Division) or the diversion is included in other approved reporting documents submitted to the State Water Board. Because a large portion of the Scott River watershed does not employ watermaster services it is likely your diversion(s) require a Statement(s). Information regarding the Statement program and a link to obtaining the necessary form can be found at:

[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/diversion\\_use/](http://www.waterboards.ca.gov/waterrights/water_issues/programs/diversion_use/).

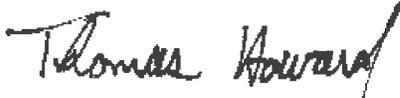
The State Water Board may administratively impose a civil liability in the amount of \$1,000 for the failure to file a Statement for diversions that have occurred since 2009, plus \$500 per day for each additional day on which the violation continues if the person fails to file a Statement within 30 days after the State Water Board has called the violation to the attention of that person (Water Code § 5107, subd. (c) (1)). Therefore, if you are diverting water that must be reported by filing a Statement, you should immediately file this form with the Division.

The State Water Board is encouraging diverters to work together to reach local voluntary agreements that not only provide solutions that help local communities with water shortages, but also prevent impacts to other legal users of water and do not cause unreasonable effects on fish and wildlife. If you have any questions, please call our Curtailment Hotline at (916) 341-5342, contact us by email at: [SWRCB-Curtailment-Certification@waterboards.ca.gov](mailto:SWRCB-Curtailment-Certification@waterboards.ca.gov), or review our drought year webpage at: [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/index.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/index.shtml)

The State Water Board also encourages water right holders to assist in the prevention of unlawful diversion of water and in discouraging any waste or unreasonable use of water. To assist the State Water Board, you may file a complaint at:  
[http://www.dtsc.ca.gov/database/CalEPA\\_Complaint/index.cfm](http://www.dtsc.ca.gov/database/CalEPA_Complaint/index.cfm).

We recognize the burden and loss this notice creates for you during the drought, and want to assure that others do not illegally benefit from your curtailments.

Sincerely,



Thomas Howard  
Executive Director

cc: See next page.

Notice of Curtailment  
for the Scott River

- 4 -

cc: Ms. Patricia A. Grantham  
Forest Supervisor  
U.S. Department of Agriculture  
Klamath National Forest  
1711 S. Main Street  
Yreka, CA 96097-9518

The Honorable Jared Huffman  
U.S. House of Representatives  
1630 Longworth House Office Building  
Washington, D.C. 20515

Mr. Buster Attebery  
Council Chairman  
Karuk Tribe  
P.O. Box 1016  
Happy Camp, CA 96039

Mr. Harold Bennett  
Tribal Chairperson  
Quartz Valley Indian Reservation  
13601 Quartz Valley Road  
Fort Jones, CA 96032

Mr. Ray A. Haupt  
District 5 Supervisor  
Siskiyou County Board of Supervisors  
9216 Smokey Lane  
Fort Jones, CA 96032

Mr. Ric Costales  
Natural Resources Specialist  
Siskiyou County  
P.O. Box 750  
Yreka, CA 96097

Mr. Tom Menne, Chair  
Scott Valley Groundwater Advisory Committee  
4647 Scott River Road  
P.O. Box 608  
Fort Jones, CA 96032

Mr. Preston Harris  
Executive Director  
Scott River Water Trust  
P.O. Box 591  
Etna, CA 96027

Ms. Carolyn Pimental  
District Manager  
Siskiyou County Resource Conservation District  
450 Main Street  
Etna, CA 96027

Ms. Betsy Stapleton, Chair  
Scott River Watershed Council  
P.O. Box 268  
Etna, CA 96027

Ms. Lisa Vanatta  
Assistant Regional Administrator  
National Marine Fisheries Service  
NOAA Fisheries West Coast Region  
1655 Heindon Road  
Arcata, CA 95521

Ms. Erin Williams  
Field Supervisor  
U.S. Fish and Wildlife Service  
1829 S. Oregon Street  
Yreka, CA 96097

Mr. Chuck Bonham, Director  
California Department of Fish and Wildlife Service  
1416 9th Street, Room 1205  
Sacramento, CA 95814

Mr. Jim Patterson  
District Conservationist  
USDA Natural Resources Conservation Service  
215 Executive Court, Suit A  
Yreka, CA 96097-2629

North Coast  
Regional Water Quality Control Board  
5550 Skylane Blvd Ste A  
Santa Rosa, CA 95403-1072

Konrad Fisher, Executive Director  
Klamath Riverkeeper  
P.O. Box 751  
Somes Bar, CA 95568

ec: Michael Lauffer  
[Michael.Lauffer@waterboards.ca.gov](mailto:Michael.Lauffer@waterboards.ca.gov)

Bryan McFadin  
[Bryan.Mcfadin@waterboards.ca.gov](mailto:Bryan.Mcfadin@waterboards.ca.gov)

Caitlin Bean  
[Caitlin.Bean@wildlife.ca.gov](mailto:Caitlin.Bean@wildlife.ca.gov)

Neil Manji  
[Neil.Manji@wildlife.ca.gov](mailto:Neil.Manji@wildlife.ca.gov)

**BBID**  
**EXHIBIT 341**

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## State Water Resources Control Board

April 23, 2015

### **NOTICE OF UNAVAILABILITY OF WATER AND IMMEDIATE CURTAILMENT FOR THOSE DIVERTING WATER IN THE SAN JOAQUIN RIVER WATERSHED WITH A POST-1914 APPROPRIATIVE RIGHT**

On January 23, 2015 and again on April 2, 2015, the State Water Resources Control Board (State Water Board) issued a Notice of Surface Water Shortage and Potential for Curtailment due to dry conditions throughout the State. On April 1, 2015, the Governor issued an executive order, order B-29-15, continuing the state of emergency, initially enacted on January 17, 2014, due to drinking water shortages, diminished water for agriculture production, degraded habitat for fish and wildlife, increased wildfire risk and the threat of saltwater contamination to fresh water supplies in the Sacramento-San Joaquin Delta.

#### **Curtailment of Post-1914 Water Rights:**

Based upon the most recent reservoir storage and inflow projections, along with forecasts for future precipitation events, the State Water Board has determined that the existing water supply in the San Joaquin River watershed is insufficient to meet the needs of all water rights holders. With this notice, the State Water Board is notifying all holders of post-1914 appropriative water rights within the San Joaquin River watershed of the need to immediately stop diverting under their post-1914 water rights, with the exceptions discussed below. Please be advised that, if you continue to divert under a claim of pre-1914 right, most or all pre-1914 rights in the San Joaquin River watershed are likely to be curtailed later this year due to the extreme dry conditions. This condition of curtailment will continue until water conditions improve. Even if there is water physically available at your point of diversion, that water is necessary to meet senior water right holders' needs or is water released from storage that you are not entitled to divert. If precipitation occurs in the following weeks or months, you should not commence diversion before being notified by the State Water Board that water is legally available for diversion under your priority of right.

Permission to initiate diversions during or following significant rainfall events may be posted at: [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/index.shtml#notices](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/index.shtml#notices). You can get immediate email updates from the State Water Board about these notices by subscribing to "Drought Updates" at: [http://www.waterboards.ca.gov/resources/email\\_subscriptions/](http://www.waterboards.ca.gov/resources/email_subscriptions/)

#### **Compliance Certification Required:**

Curtailed post-1914 diverters are required to document receipt of this notice by completing an online Curtailment Certification Form (Form) within seven days. The Form confirms your cessation of diversion under the specific post-1914 water right, and, if applicable, identifies the alternate water supply you will use in lieu of the curtailed water right. Completion of the Form is mandatory to avoid unnecessary potential enforcement proceedings. You are required to complete the Form for each post-1914 water right identified through this curtailment at: [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/ewrims/curtailment/2015curt\\_form.php](http://www.waterboards.ca.gov/waterrights/water_issues/programs/ewrims/curtailment/2015curt_form.php)

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FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

1001 I Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 100, Sacramento, Ca 95812-0100 | [www.waterboards.ca.gov](http://www.waterboards.ca.gov)



**Exceptions to Curtailment:**

If your diversion is for hydroelectric generation and all water diverted is returned to the same stream system, you may continue to divert under your post-1914 permit or license. If you continue to divert under the above circumstances, you must identify that on the Form and provide the information requested. If you have previously collected water to storage in a reservoir covered by a post-1914 right prior to this curtailment notice, you still may beneficially use that previous stored water consistent with the terms and conditions of your post-1914 water right. However, you must bypass all inflow into the reservoir at all times during the curtailment.

**No Exception for Health and Safety:**

There is no exception to the curtailment notice for health and safety needs. However, we are aware that some water users must comply with directives issued by the Division of Drinking Water (DDW), or local health or drinking water regulation to provide continued water service to meet minimum health and safety standards. Should you continue to divert water under a curtailed water right to meet human health and safety needs, you must complete the Form identifying your health and safety needs, whether there is an applicable DDW, state or local regulation and your attempts at securing an alternate water supply. The State Water Board will carefully analyze the non-exempted continued diversions for minimum health and safety needs on a case-by-case basis.

**Potential Enforcement:**

Those who are found to be diverting water beyond what is legally available to them may be subject to administrative fines, cease and desist orders, or prosecution in court. The State Water Board may levy fines of \$1,000 per day of violation and \$2,500 for each acre-foot diverted or used in excess of a valid water right. (See Water Code, §§ 1052, 1055.) Additionally, if the State Water Board issues a Cease and Desist Order against an unauthorized diversion, violation of any such order can result in a fine of \$10,000 per day. (See Water Code, §§ 1831, 1845.)

The State Water Board is encouraging diverters to work together to reach local voluntary agreements that not only provide solutions that help local communities with water shortages, but also prevent impacts to other legal users of water and do not cause unreasonable effects on fish and wildlife. If you have any questions, please call our Curtailment Hotline at (916) 341-5342, contact us by email at: [SWRCB-Curtailment-Certification@waterboards.ca.gov](mailto:SWRCB-Curtailment-Certification@waterboards.ca.gov), or review our drought year webpage at:

[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/index.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/index.shtml)

The State Water Board also encourages water right holders to assist in the prevention of unlawful diversion of water and in discouraging any waste or unreasonable use of water. To assist the State Water Board, you may file a complaint at:

[http://www.dtsc.ca.gov/database/CalEPA\\_Complaint/index.cfm](http://www.dtsc.ca.gov/database/CalEPA_Complaint/index.cfm).

We recognize the burden and loss this notice creates for you during the drought, and want to assure that others do not illegally benefit from your curtailments.

Sincerely,



Thomas Howard  
Executive Director

**BBID**  
**EXHIBIT 342**



**State Water Resources Control Board**

April 30, 2015

CERTIFIED MAIL NO.

Term 91 Right Owner's Name  
Street Address  
City, State Zip Code

**NOTICE OF IMMEDIATE CURTAILMENT**  
**TERM 91 WATER RIGHT PERMIT/LICENSE NO XX (APPLICATION NO. XX)**

Your Permit/License No. XX (Application No. XX) contains a term (Standard Term 91) that prohibits diversion of water under specified conditions. These conditions occur when Supplemental Project Water<sup>1</sup> from the Central Valley Project operated by the U.S. Bureau of Reclamation or the State Water Project operated by the California Department of Water Resources is being released to meet water quality standards and other in-basin entitlements in the Sacramento-San Joaquin Delta Watershed.

**Curtailment of Term 91 Water Rights:**

The State Water Board has determined that: (i) Supplemental Project Water is being released in the Sacramento-San Joaquin Delta Watershed, and (ii) the Delta is in Balanced Condition. With this notice, the State Water Board is invoking Term 91 and therefore directing you to immediately stop diverting water under the above water right. This condition of curtailment will continue until water conditions improve. Even if there is water physically available at your point of diversion, that water is necessary to meet senior water holders' needs or is water released from storage that you are not entitled to divert. You should not commence diversion before being notified by the State Water Board that water is legally available for diversion under your priority of right.

**Compliance Certification Required:**

Curtailed Term 91 diverters are required to document receipt of this Notice by completing the enclosed Curtailment Certification Form (Form). The completed Form should be returned to the Division of Water Rights within seven (7) days of receipt of this Notice. The Form confirms cessation of diversion under the specific water right that includes Term 91, and, if applicable, either (i) identifies the alternative water supply to be used in lieu of the curtailed water right, or (ii) claims there is no hydraulic continuity between the surface water at the authorized point of diversion and the surface water in the Sacramento-San Joaquin Delta. A Form that includes a claim of no hydraulic continuity should be accompanied by photographs and additional information to support the claim. Completion of the Form and identification of alternate rights can avoid unnecessary enforcement proceedings. State Water Board staff may perform a field inspection to determine compliance with this Notice.

<sup>1</sup> Supplemental Project Water is defined as water imported by the Projects plus water released from Project storage which is in excess of export diversions, Project carriage water, and Project in-basin deliveries.

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE OFFICER



**Status of Curtailment of Term 91 Water Rights:**

To provide more timely information on the status of curtailments under Term 91, the Division will be posting and updating information on our drought web page under "Water Rights with Term 91". The web page will be maintained to provide important information related to the availability of your water supply under a permit or license subject to Term 91. The address for the drought web page is: [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/water\\_availability.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/water_availability.shtml)

Electronic notification of Term 91 curtailment going into effect or being lifted will be made to subscribers of the Drought Web notifications. To sign up for electronic notices, go to: [http://www.waterboards.ca.gov/resources/email\\_subscriptions/swrcb\\_subscribe.shtml#dwr](http://www.waterboards.ca.gov/resources/email_subscriptions/swrcb_subscribe.shtml#dwr).

**Potential Enforcement:**

Those who are found to be diverting water beyond what is legally available to them may be subject to administrative fines, Cease and Desist Orders, or prosecution in court. The State Water Board may levy fines of \$1,000 per day and \$2,500 for each acre-foot diverted or used in excess of a valid water right. (See Water Code, §§ 1052, 1055.) Additionally, if the State Water Board issues a Cease and Desist Order against an unauthorized diversion, violation of any such order can result in a fine of \$10,000 per day. (See Water Code, §§ 1831, 1845.)

The State Water Board encourages water right holders to assist in the prevention of unlawful diversion of water and in discouraging any waste or unreasonable use of water. To assist the State Water Board, you may file a complaint at: [http://www.dtsc.ca.gov/database/CalEPA\\_Complaint/index.cfm](http://www.dtsc.ca.gov/database/CalEPA_Complaint/index.cfm).

We recognize the burden and loss this notice creates for you during the drought, and we want to assure that others do not illegally benefit from your curtailments.

If you have any questions concerning this notice, please contact Paul Wells of the Division of Water Rights at (916) 323-5195 or [paul.wells@waterboards.ca.gov](mailto:paul.wells@waterboards.ca.gov).

Sincerely,



for

Barbara Evoy, Deputy Director  
Division of Water Rights

cc: Please see next page.

cc: Paul Fujitani, Deputy Manager  
Central Valley Operations Office  
Bureau of Reclamation, Suite 300  
3310 El Camino Avenue  
Sacramento, CA 95821

Andy Chu, Chief Export Management Section  
SWP Operations Control Office  
Department of Water Resources  
3310 El Camino Avenue, Suite 300  
Sacramento, CA 95821

Tracy Pettit, Chief Water Management Branch  
SWP Operations Control Office  
Department of Water Resources  
3310 El Camino Avenue, Suite 300  
Sacramento, CA 95821

Michael George, Delta Watermaster  
Office of Delta Watermaster  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100

**BBID**  
**EXHIBIT 343**



## State Water Resources Control Board

May 1, 2015

### **NOTICE OF UNAVAILABILITY OF WATER AND IMMEDIATE CURTAILMENT FOR THOSE DIVERTING WATER IN THE SACRAMENTO RIVER WATERSHED WITH A POST-1914 APPROPRIATIVE RIGHT**

On January 23, 2015 and again on April 2, 2015, the State Water Resources Control Board (State Water Board) issued a Notice of Surface Water Shortage and Potential for Curtailment due to dry conditions throughout the State. On April 1, 2015, the Governor issued an executive order, order B-29-15, continuing the state of emergency, initially enacted on January 17, 2014, due to drinking water shortages, diminished water for agriculture production, degraded habitat for fish and wildlife, increased wildfire risk and the threat of saltwater contamination to fresh water supplies in the Sacramento-San Joaquin Delta.

#### **Curtailment of Post-1914 Water Rights:**

Based upon the most recent reservoir storage and inflow projections, along with forecasts for future precipitation events, the State Water Board has determined that the existing water supply in the Sacramento River watershed is insufficient to meet the needs of all water rights holders. With this notice, the State Water Board is notifying all holders of post-1914 appropriative water rights within the Sacramento River watershed of the need to immediately stop diverting under their post-1914 water rights, with the exceptions discussed below. Please be advised that, if you continue to divert under a claim of pre-1914 right, most or all pre-1914 rights in the Sacramento River watershed are likely to be curtailed later this year due to the extreme dry conditions. This condition of curtailment will continue until water conditions improve. Even if there is water physically available at your point of diversion, that water is necessary to meet senior water right holders' needs or is water released from storage that you are not entitled to divert. If precipitation occurs in the following weeks or months, you should not commence diversion before being notified by the State Water Board that water is legally available for diversion under your priority of right.

Permission to initiate diversions during or following significant rainfall events may be posted at: [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/index.shtml#notices](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/index.shtml#notices). You can get immediate email updates from the State Water Board about these notices by subscribing to "Drought Updates" at: [http://www.waterboards.ca.gov/resources/email\\_subscriptions/](http://www.waterboards.ca.gov/resources/email_subscriptions/)

#### **Compliance Certification Required:**

Curtailed post-1914 diverters are required to document receipt of this notice by completing an online Curtailment Certification Form (Form) within seven days. The Form confirms your cessation of diversion under the specific post-1914 water right, and, if applicable, identifies the alternate water supply you will use in lieu of the curtailed water right. Completion of the Form is mandatory to avoid unnecessary potential enforcement proceedings. You are required to complete the Form for each post-1914 water right identified through this curtailment at: [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/ewrins/curtailment/2015curt\\_form.php](http://www.waterboards.ca.gov/waterrights/water_issues/programs/ewrins/curtailment/2015curt_form.php)

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

1001 I Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 100, Sacramento, CA 95812-0100 | [www.waterboards.ca.gov](http://www.waterboards.ca.gov)

**Exceptions to Curtailment:**

If your diversion is for hydroelectric generation by direct diversion only and all water diverted is returned to the same stream system, you may continue to divert under your post-1914 permit or license. If you continue to divert under the above circumstances, you must identify that on the Form and provide the information requested. If you have previously collected water to storage in a reservoir covered by a post-1914 right prior to this curtailment notice, you still may beneficially use that previous stored water consistent with the terms and conditions of your post-1914 water right. However, you must bypass all inflow into the reservoir at all times during the curtailment.

**No Exception for Health and Safety:**

There is no exception to the curtailment notice for health and safety needs. However, we are aware that some water users must comply with directives issued by the Division of Drinking Water (DDW), or local health or drinking water regulation to provide continued water service to meet minimum health and safety standards. Should you continue to divert water under a curtailed water right to meet human health and safety needs, you must complete the Form identifying your health and safety needs, whether there is an applicable DDW, state or local regulation and your attempts at securing an alternate water supply. The State Water Board will carefully analyze the non-exempted continued diversions for minimum health and safety needs on a case-by-case basis.

**Potential Enforcement:**

Those who are found to be diverting water beyond what is legally available to them may be subject to administrative fines, cease and desist orders, or prosecution in court. The State Water Board may levy fines of \$1,000 per day of violation and \$2,500 for each acre-foot diverted or used in excess of a valid water right. (See Water Code, §§ 1052, 1055.) Additionally, if the State Water Board issues a Cease and Desist Order against an unauthorized diversion, violation of any such order can result in a fine of \$10,000 per day. (See Water Code, §§ 1831, 1845.)

The State Water Board is encouraging diverters to work together to reach local voluntary agreements that not only provide solutions that help local communities with water shortages, but also prevent impacts to other legal users of water and do not cause unreasonable effects on fish and wildlife. If you have any questions, please call our Curtailment Hotline at (916) 341-5342, contact us by email at: [SWRCB-Curtailment-Certification@waterboards.ca.gov](mailto:SWRCB-Curtailment-Certification@waterboards.ca.gov), or review our drought year webpage at:

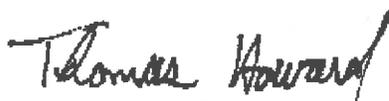
[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/index.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/index.shtml)

The State Water Board also encourages water right holders to assist in the prevention of unlawful diversion of water and in discouraging any waste or unreasonable use of water.

To assist the State Water Board, you may file a complaint at:  
[http://www.dtsc.ca.gov/database/CalEPA\\_Complaint/index.cfm](http://www.dtsc.ca.gov/database/CalEPA_Complaint/index.cfm).

We recognize the burden and loss this notice creates for you during the drought, and want to assure that others do not illegally benefit from your curtailments.

Sincerely,



Thomas Howard  
Executive Director

**BBID**  
**EXHIBIT 344**



State Water Resources Control Board

Byron-Bethany Irrigation District

June 12, 2015

BYRON-BETHANY IRRIGATION DISTRICT
C/O RICK GILMORE, GENERAL MANAGER
7995 BRUNS ROAD
BYRON, CA 94514

In Regards to Claim of Right(s) [ID (password)]: S021256 (407769)

NOTICE OF UNAVAILABILITY OF WATER AND NEED FOR IMMEDIATE CURTAILMENT FOR THOSE DIVERTING WATER IN THE SACRAMENTO-SAN JOAQUIN WATERSHEDS AND DELTA WITH A PRE-1914 APPROPRIATIVE CLAIM COMMENCING DURING OR AFTER 1903

On January 23, 2015 and again on April 2, 2015, the State Water Resources Control Board (State Water Board) issued a Notice of Surface Water Shortage and Potential for Curtailment due to dry conditions throughout the State. On April 1, 2015, the Governor issued an executive order, order B-29-15, continuing the state of emergency, initially enacted on January 17, 2014, due to drinking water shortages, diminished water for agriculture production, degraded habitat for fish and wildlife, increased wildfire risk and the threat of saltwater contamination to fresh water supplies in the Sacramento-San Joaquin Delta (Delta).

On April 23, 2015 and May 1, 2015, the State Water Board issued curtailment notices to all post-1914 appropriative water rights in the Sacramento and San Joaquin River watersheds, inclusive of the Delta, due to insufficient projected water supplies. Based on updated water supply projections provided by the Department of Water Resources in early May, the State Water Board is now notifying pre-1914 claims of right, with a priority date of 1903 and later for the Sacramento-San Joaquin watersheds and the Delta, that, due to ongoing drought conditions, there is insufficient water in the system to service their claims of right.

Curtailment of Certain Pre-1914 Claims of Right Commenced During or After 1903:

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. With this notice, the State Water Board is notifying pre-1914 appropriative claims of right with a priority date of 1903 and later within the Sacramento -San Joaquin watersheds and Delta of the need to immediately stop diverting water with the exceptions discussed below. This condition of curtailment will continue until water conditions improve. Even if there is water physically available at your point of diversion, that water is necessary to meet more senior water right holders' needs or the water may be released previously stored water which must continue instream to serve its intended beneficial use. If precipitation occurs in the following weeks or months, you should not commence diversion before being notified by the State Water Board that water is legally available for diversion under your priority of right. Evaluations for additional curtailments of more senior rights will be made every two weeks through September.

FELICIA MARQUEZ, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

1001 I Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 100, Sacramento, Ca 95812-0100 | www.waterboards.ca.gov



**Compliance Certification Required:**

Holders of pre-1914 water right claims with priority dates equal to or later than 1903 are required to document receipt of this notice by completing an online Curtailment Certification Form (Form) within seven days. The Form confirms your cessation of diversion under the specific pre-1914 claim of right. Completion of the Form is mandatory to avoid unnecessary potential enforcement proceedings. You are required to complete the Form for each pre-1914 claim of right identified through this notice at:

[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/ewrims/curtailment/2015curt\\_form.php](http://www.waterboards.ca.gov/waterrights/water_issues/programs/ewrims/curtailment/2015curt_form.php)

**Exceptions to Curtailment:**

If your diversion is for hydroelectric generation by direct diversion only and all water diverted is returned to the same stream system, you may continue to divert under your pre-1914 claim of right. If you continue to divert under the above circumstances, you must identify that on the Form and provide the information requested. If you have previously collected water to storage in a reservoir covered by a pre-1914 claim of right prior to this curtailment notice, you still may beneficially use that previously stored water. However, you must bypass all inflow into the reservoir at all times during the period this notice remains in effect.

**No Exception for Health and Safety:**

There is no exception to this notice for health and safety needs. However, we are aware that some water users must comply with directives issued by the Division of Drinking Water (DDW), or local health or drinking water regulation to provide continued water service to meet minimum health and safety standards. Should you continue to divert water under a claim of right subject to this notice to meet human health and safety needs, you must complete the Form identifying your health and safety needs, whether there is an applicable DDW, state or local regulation and your attempts at securing an alternate water supply. The State Water Board will carefully analyze the non-exempted continued diversions for minimum health and safety needs on a case-by-case basis.

**Potential Enforcement:**

Those who are found to be diverting water beyond what is legally available to them may be subject to administrative penalties, cease and desist orders, or prosecution in court. If the State Water Board finds following an adjudicative proceeding that a person or entity has diverted or used water water unlawfully, the State Water Board may assess penalties of \$1,000 per day of violation and \$2,500 for each acre-foot diverted or used in excess of a valid water right. (See Water Code, §§ 1052, 1055.) Additionally, if the State Water Board issues a Cease and Desist Order against an unauthorized diversion, violation of any such order can result in a fine of \$10,000 per day. (See Water Code, §§ 1831, 1845.)

The State Water Board is encouraging diverters to work together to reach local voluntary agreements that not only provide solutions that help local communities with water shortages, but also prevent injury to other legal users of water and do not cause unreasonable effects on fish and wildlife. If you have any questions, please call our Curtailment Hotline at (916) 341-5342, contact us by email at: [SWRCB-Curtailment-Certification@waterboards.ca.gov](mailto:SWRCB-Curtailment-Certification@waterboards.ca.gov), or review our drought year webpage at: [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/index.shtml#notices](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/index.shtml#notices) The State Water Board also encourages water right holders to assist in the prevention of unlawful diversion of water and in discouraging any waste or unreasonable use of water. To assist the State Water Board, you may file a complaint at:

To Water Right Users in the  
Sacramento-San Joaquin Delta,  
Sacramento & San Joaquin River Watersheds

-3-

June 12, 2015

[http://www.dtsc.ca.gov/database/CalEPA\\_Complaint/index.cfm](http://www.dtsc.ca.gov/database/CalEPA_Complaint/index.cfm)

We recognize the burden the drought creates, and want to assure that others do not illegally benefit from your curtailments.

Sincerely,

A handwritten signature in black ink that reads "Thomas Howard". The signature is written in a cursive style with a large initial 'T'.

Thomas Howard  
Executive Director

# **EXHIBIT 345**



RECEIVED

JUL 18 2015

Byron-Bethany  
Irrigation District



EDMUND G. BROWN, JR.  
GOVERNOR



MATTHEW ROODOLZ  
SECRETARY FOR  
ENVIRONMENTAL PROTECTION

State Water Resources Control Board

July 15, 2015

BYRON-BETHANY IRRIGATION DISTRICT  
C/O RICK GILMORE, GENERAL MANAGER  
7995 BRUNS ROAD  
BYRON, CA 94514

**PARTIAL RESCISSION OF APRIL, MAY AND JUNE 2015 CURTAILMENT NOTICES AND CLARIFICATION OF STATE WATER BOARD POSITION RE: NOTICES OF UNAVAILABILITY OF WATER FOR THOSE DIVERTING WATER IN THE SACRAMENTO RIVER WATERSHED, SAN JOAQUIN RIVER WATERSHED AND DELTA, AND SCOTT RIVER**

The State Water Resources Control Board (State Water Board) issued two letters earlier this year (January 23, 2015 and April 2, 2015) advising persons of the drought and the resulting lack of surface water availability. These letters were issued to facilitate planning for diversions during critical water supply shortages.

In addition to the planning letters, the State Water Board staff has issued notices to specific water diverters alerting categories of users that information available to the State Water Board staff indicates there is insufficient water available to divert under the priority of their water rights. These notices were issued as follows:

**Sacramento River and Delta**

- o May 1, 2015: All post-1914 rights (concurrent with term 91 curtailment); and
- o June 12, 2015: All appropriative water rights with a priority date between 1903 and 1914.

**San Joaquin River**

- o April 23, 2015: All post-1914 appropriative rights; and
- o June 12, 2015: All appropriative water rights with a priority date between 1903 and 1914.

**Additional San Joaquin River Sub-watersheds**

- o June 26, 2015: Appropriative rights in the Upper San Joaquin watershed with a priority date senior to 1903;
- o June 26, 2015: Appropriative rights in the Merced watershed with a priority date between 1858 and 1902; and
- o June 26, 2015: Four appropriative rights in the Tuolumne River watershed.

**Scott River**

- o April 23, 2015: All Decreed Surplus Class Rights, Post-1914 rights, and Priority class 2 water rights in Schedule D4.

You received one of the above notices because information available to the State Water Board, of which you may not be aware, indicates there is insufficient water to divert under the priority of your right. The notice was provided to ensure that diverters: (a) are aware of the severity of the situation; (b) have reliable information regarding the amount of water available for their diversion; and (c) have information on whether water that may appear to be available instead is only available to serve senior rights (expressed in the notices as priority of rights).

The purpose of this notice is to rescind the "curtailment" portions of the unavailability notices you received. To the extent that any of the notices described above contain language that may be construed as an order requiring you to stop diversions under your affected water right, that language is hereby rescinded. Similarly, any language that may be construed as requiring affected water right holders to submit curtailment certification forms is hereby rescinded.

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

1001 I Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 100, Sacramento, CA 95812-0100 | www.waterboards.ca.gov



July 15, 2015

Please note that information available to the State Water Board continues to indicate that there is insufficient water available for the categories of junior water users identified in the State Water Board's prior correspondence, identified above. If you believe you received this notice in error, or have information that you want to provide in response to this notice, or have information you believe the State Water Board staff should otherwise consider, you may submit that information via email to: [SWRCB-Drought-Availability@waterboards.ca.gov](mailto:SWRCB-Drought-Availability@waterboards.ca.gov)

Diversion is always subject to water availability limitations, and diversions under your affected water right may be subject to enforcement should the State Water Board find such diversions are or were unauthorized. The State Water Board is continuing its drought-year inspections to determine whether diverters are using water to which they are not entitled.

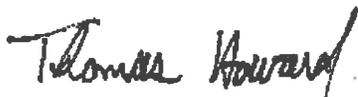
**Diversion when there is no available water under the priority of your right is an unauthorized diversion and use and is subject to enforcement by the State Water Board.** Those who are found to be diverting water beyond what is legally available to them may be subject to administrative penalties, cease and desist orders, or prosecution in court. If the State Water Board finds following an adjudicative proceeding that a person or entity has diverted or used water unlawfully, the State Water Board may assess penalties of up to \$1,000 per day of violation and \$2,500 for each acre-foot diverted or used in excess of a valid water right. (See Water Code, §§ 1052, 1055.) Additionally, if the State Water Board issues a Cease and Desist Order against an unauthorized diversion, violation of any such order can result in penalties of up to \$10,000 per day. (See Water Code, §§ 1831, 1845.) Any State Water Board enforcement action will be based upon the availability of water and be consistent with the reasonable and beneficial use requirement contained in article X, section 2 of the California Constitution. This notice does not establish or impose any new compliance responsibilities. Non-compliance with this notice shall not constitute a basis for the State Water Board's initiation of any enforcement action.

Consistent with the partial rescission of the prior notices, you are not required to complete and file the Curtailment Certification Form (Form) attached to the prior notices. The prior notices stated that there are no exceptions to curtailment, but provided opportunity for persons to inform the State Water Board, through the Form, whether they were under directives issued by the Division of Drinking Water or local health or drinking water regulation to provide continued water service to meet minimum health and safety standards. Although you are not required to complete the Form, you can voluntarily advise the State Water Board of directives regarding your domestic water system operation to facilitate the State Water Board's response to the drought conditions.

The State Water Board also encourages water right holders to assist in the prevention of unlawful diversion of water and in discouraging any waste or unreasonable use of water. To assist the State Water Board, you may file a complaint at: [http://www.dtsc.ca.gov/database/CalEPA\\_Complaint/index.cfm](http://www.dtsc.ca.gov/database/CalEPA_Complaint/index.cfm).

We recognize the burden and loss that California's historic drought is causing, and want to assure that others do not illegally benefit from your compliance with the Water Code.

Sincerely,



Thomas Howard  
Executive Director

**BBID**  
**EXHIBIT 346**

## Tauriainen, Andrew@Waterboards

---

**From:** Riddle, Diane@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=RIDDLE, DIANE@WATER7DEC8BE1-7D09-4111-A50A-759550813A4973D>  
**Sent:** Friday, March 14, 2014 4:57 PM  
**To:** Evoy, Barbara@Waterboards; Trgovcich, Caren@Waterboards; Grober, Les@Waterboards; Howard, Tom  
**Cc:** Kassel, Jim@Waterboards; O'Hagan, John@Waterboards  
**Subject:** RE: Call with Valerie Kincaid and Tim O'Laughlin

Tim is correct that SJR flows are required to be 1140 for 29 days in March (the number of required Chipps days) under D-1641. However, this year since we have waived the Chipps requirement (and are proposing to allow higher exports while not meeting all of the required Chipps days), that doesn't make total sense. Regardless, USBR should have requested a change for March, but they aren't technically out of compliance until the end of the month since it is a 30 day average, so maybe we'll get a request before the end of the month (or should at least tell USBR they should submit one asap).

---

**From:** Evoy, Barbara@Waterboards  
**Sent:** Friday, March 14, 2014 4:24 PM  
**To:** Trgovcich, Caren@Waterboards; Grober, Les@Waterboards; Riddle, Diane@Waterboards; Howard, Tom  
**Cc:** Kassel, Jim@Waterboards; O'Hagan, John@Waterboards  
**Subject:** FW: Call with Valerie Kincaid and Tim O'Laughlin

an update on the SJ picture.

---

**From:** O'Hagan, John@Waterboards  
**Sent:** Friday, March 14, 2014 4:22 PM  
**To:** Evoy, Barbara@Waterboards; Kassel, Jim@Waterboards  
**Subject:** Call with Valerie Kincaid and Tim O'Laughlin

Barbara,

Jim and I spoke with Valerie and Tim. Of most interest, Tim stated that his clients held off irrigation so far in March. He expects conditions will change next week when his clients will begin irrigation deliveries. We discuss current flow conditions and that data confirms there is limited deliveries from the major reservoirs. Downstream flows from the tributaries to San Joaquin are mostly FERC flow requirements or other flow conditions. We discussed some tributaries where there are some losses (either natural or small irrigation) occurring.

Tim stated in his opinion that the flows at Vernalis should be 1140 cfs and wanted to know our opinion but I provided no opinion. I told him I would check and get back to him. Les?

We also discussed the need for curtailment and the potential injury to his clients' prior rights from upstream post-1914 right holders. Tim stated that the upstream diversions are so minor that he sees no potential injury or reason for curtailment. I asked if his clients would be willing to allow such diversions to continue and waive rights to injury claims. He agreed to ask his clients. However, Tim does not represent all prior right holders, especially the diverters along the downstream portion of the San Joaquin. Valerie stated that if she represented a downstream prior right holder she would not want those post-1914 to continue to divert. I asked Tim if we curtailed these diverters, but allowed continued diversion for health and safety needs would that be an issue. Tim stated his clients are already helping some communities upstream and would have no problem with such exemption. Tim agreed to get back to me on Monday on exactly when his clients would be starting irrigation, and if they would be willing to waive injury by

upstream post-1914 right holders. He also stated that he was meeting with Paul Fujitani of the Bureau on March 25<sup>th</sup> to discuss summer operations of New Melones.

John O'Hagan, Manager  
Enforcement Section  
Division of Water Rights  
(916) 341-5368

**BBID**  
**EXHIBIT 347**

## Tauriainen, Andrew@Waterboards

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**From:** Kassel, Jim@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=KASSEL, JIM@WATERBOD8195469-BA7B-4952-B83A-EAEB987CA35E277>  
**Sent:** Friday, March 14, 2014 8:28 AM  
**To:** O'Hagan, John@Waterboards; Evoy, Barbara@Waterboards  
**Cc:** Grober, Les@Waterboards  
**Subject:** RE: Delta Links

That might make more sense. Les, What do you think?

Jim

---

**From:** O'Hagan, John@Waterboards  
**Sent:** Friday, March 14, 2014 8:24 AM  
**To:** Evoy, Barbara@Waterboards; Kassel, Jim@Waterboards  
**Cc:** Grober, Les@Waterboards  
**Subject:** FW: Delta Links

Delta is in excess and flow from San Joaquin at Vernalis is at 972 cfs. 576 cfs is coming from Stanislaus. Without using the South Delta Demand against the San Joaquin River, the 972 would be excess of San Joaquin upper watershed demand. Therefore, no curtailment at this time.

Due to the Delta issue, do you want me to have staff treat the Sacramento-San Joaquin watersheds as a single watershed?

---

**From:** Coats, Brian@Waterboards  
**Sent:** Friday, March 14, 2014 7:45 AM  
**To:** O'Hagan, John@Waterboards  
**Subject:** Delta Links

<http://www.water.ca.gov/swp/operationscontrol/docs/delta/deltaops.pdf>

<http://www.water.ca.gov/swp/operationscontrol/docs/mapper/WTRRPT.SAT>

Brian

**BBID**  
**EXHIBIT 348**

**Tauriainen, Andrew@Waterboards**

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**From:** Yeazell, Jeffrey@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=YEAZELL, JEFFDF6598F6-B0C8-42CD-A645-EF74CCA53ABC817>  
**Sent:** Tuesday, July 01, 2014 8:41 AM  
**To:** O'Hagan, John@Waterboards; Grober, Les@Waterboards  
**Subject:** Revised Sacramento Senior Demand Summary  
**Attachments:** Sacramento July 2010 Senior Demand rev 2.pdf

John and Les,

I found a cell calculation error this morning, which resulted in lower demand in the Sacramento valley floor. The revised map is attached.

I apologize for this inconvenience,

Jeff

**BBID**  
**EXHIBIT 349**

## Tauriainen, Andrew@Waterboards

---

**From:** O'Hagan, John@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=O'HAGAN, JOHN@WATER7B72A79A-DD76-4B3C-B470-A3BF3B5BCDD7939>  
**Sent:** Friday, August 08, 2014 1:22 PM  
**To:** Grober, Les@Waterboards  
**Cc:** Montgomery, Amanda@Waterboards; West, Yvonne@Waterboards; Coats, Brian@Waterboards; Miller, Aaron@Waterboards  
**Subject:** RE: Delta diversions

This is a bad time because both Yvonne and I are both out. Amanda will be acting for me but she is not familiar with the letters. I have saved letters at: S:\DWR\VOL1\COMDRV\2014 DROUGHT\Delta issues. Brian is acting as Enforcement Manager next week but he and Aaron are working on our process information for Term 22 for Michael B and for a potential Curtailment Order. Yvonne drafted an order format for the informational item based on the Bureau and DWR letter.

Per our discussion we have identified limited benefits of getting the information, especially this late in the year and if limited to south delta.

Benefits may be:

- Patent Date, pre-1914 priority date, and diversion information for this year can be requested and reviewed and used for:
  - Adjustment of South Delta Demand currently used for this year's analysis and any future analysis. If we are able to process the required information, the new demand information may affect determination of date for re-activating post-1914 diverters.
  - Identify claims that do not have sufficient supporting information. Unfortunately, the Regulation requires to comply with request for information but it does not require accurate information to be submitted.
  - Potentially identify cases of unauthorized diversions. Note: enforcement would be via existing enforcement process.

What an Information Order cannot require and Does not Solve:

- Cannot require the Delta Diverters to specially identify what water source is being used under claimed water right. The Delta diverters would still claim portion of their right satisfied by Bay water.
- Does not relate the priority of South Delta rights to the priorities claimed by diverters in the upper watershed.
- Does not identify the water that is available to divert under riparian, pre-1914 or post-1914 rights.

Informational order may not be the right tool, if applied only to the south delta area, but may be useful if inclusive of all diverters located immediately downstream of the CVP and SWP reservoirs. This may be important, especially after October when contracts end but dry conditions persist. Contractors and others will be diverting at that time under prior right claims, and that demand may limit vital collection of water to storage due required Project releases for delta conditions. However, we do not have a complaint.

---

**From:** Grober, Les@Waterboards  
**Sent:** Friday, August 08, 2014 7:29 AM  
**To:** O'Hagan, John@Waterboards  
**Subject:** FW: Delta diversions

Here is the formal request. We should not wait until you are back so tell me who I should work with.

---

**From:** Evoy, Barbara@Waterboards  
**Sent:** Thursday, August 07, 2014 7:37 PM  
**To:** Grober, Les@Waterboards  
**Subject:** Fwd: Delta diversions

FYI

Sent from my iPhone

Begin forwarded message:

**From:** "Dadamo, Dorene@Waterboards" <[Dorene.Dadamo@waterboards.ca.gov](mailto:Dorene.Dadamo@waterboards.ca.gov)>  
**Date:** August 7, 2014 at 7:34:52 PM PDT  
**To:** "O'Hagan, John@Waterboards" <[John.O'Hagan@waterboards.ca.gov](mailto:John.O'Hagan@waterboards.ca.gov)>, "Marcus, Felicia@Waterboards" <[Felicia.Marcus@waterboards.ca.gov](mailto:Felicia.Marcus@waterboards.ca.gov)>, "Evoy, Barbara@Waterboards" <[Barbara.Evoy@waterboards.ca.gov](mailto:Barbara.Evoy@waterboards.ca.gov)>, "Cole, Anna@Waterboards" <[Anna.Cole@Waterboards.ca.gov](mailto:Anna.Cole@Waterboards.ca.gov)>, "Sawyer, Andy@Waterboards" <[Andy.Sawyer@waterboards.ca.gov](mailto:Andy.Sawyer@waterboards.ca.gov)>, "Barrios, Alicia@Waterboards" <[Alicia.Barrios@Waterboards.ca.gov](mailto:Alicia.Barrios@Waterboards.ca.gov)>  
**Cc:** Thomas Howard <[tomrhow@me.com](mailto:tomrhow@me.com)>, "Trgovcich, Caren@Waterboards" <[Caren.Trgovcich@waterboards.ca.gov](mailto:Caren.Trgovcich@waterboards.ca.gov)>, "Lauffer, Michael@Waterboards" <[michael.lauffer@waterboards.ca.gov](mailto:michael.lauffer@waterboards.ca.gov)>  
**Subject:** Delta diversions

Barbara- I'd like to get a briefing on how we are going forward with this issue. Felicia is also interested, and we'd like to be in the same briefing. Can you please coordinate with Anna and Alicia on setting up a meeting? My preference is on Wed. the 13th if possible. Thanks, -DD  
DeeDee D'Adamo  
Board Member  
State Water Resources Control Board  
916-341-5264

---

**From:** "George V. Hartmann" <[gvhlaw@gmail.com](mailto:gvhlaw@gmail.com)>  
**Date:** Thursday, August 7, 2014 at 7:01 PM  
**To:** Barbara Evoy <[barbara.evoy@waterboards.ca.gov](mailto:barbara.evoy@waterboards.ca.gov)>  
**Cc:** Tom Howard <[tom.howard@waterboards.ca.gov](mailto:tom.howard@waterboards.ca.gov)>, "Marcus, Felicia@Waterboards" <[Felicia.Marcus@waterboards.ca.gov](mailto:Felicia.Marcus@waterboards.ca.gov)>, "Spivy-Weber, Frances@Waterboards" <[Frances.Spivy-Weber@waterboards.ca.gov](mailto:Frances.Spivy-Weber@waterboards.ca.gov)>, DeeDee D'Adamo <[dorene.dadamo@waterboards.ca.gov](mailto:dorene.dadamo@waterboards.ca.gov)>, Steve Moore <[steven.moore@waterboards.ca.gov](mailto:steven.moore@waterboards.ca.gov)>, Tam Doduc <[tam.doduc@waterboards.ca.gov](mailto:tam.doduc@waterboards.ca.gov)>, Jeanne Zolezzi <[JZOLEZZI@herumcrabtree.com](mailto:JZOLEZZI@herumcrabtree.com)>, Dante Nomellini <[ngmplcs@pacbell.net](mailto:ngmplcs@pacbell.net)>, "tkeeling@freemanfirm.com" <[tkeeling@freemanfirm.com](mailto:tkeeling@freemanfirm.com)>, "Dante Nomellini, Jr." <[dantejr@pacbell.net](mailto:dantejr@pacbell.net)>, John Herrick <[Jherrlaw@aol.com](mailto:Jherrlaw@aol.com)>, "rmehlhaff@mehlhaff-law.com" <[rmehlhaff@mehlhaff-law.com](mailto:rmehlhaff@mehlhaff-law.com)>, "Keller, Kurtis C." <[kkeller@neumiller.com](mailto:kkeller@neumiller.com)>, John O'Hagan <[john.O'Hagan@waterboards.ca.gov](mailto:john.O'Hagan@waterboards.ca.gov)>, Craig Wilson <[craig.wilson@waterboards.ca.gov](mailto:craig.wilson@waterboards.ca.gov)>, "Mia S. Brown" <[mbrown@miabrownlaw.com](mailto:mbrown@miabrownlaw.com)>, "Alexis Stevens (astevens@somachlaw.com)" <[astevens@somachlaw.com](mailto:astevens@somachlaw.com)>, Jennifer Spaletta <[jennifer@spalettalaw.com](mailto:jennifer@spalettalaw.com)>  
**Subject:** Re: Letter from South Delta landowners

August 7, 2014  
VIA ELECTRONIC MAIL

Ms. Barbara L. Evoy  
Deputy Director  
Division of Water Rights  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814  
RE: July 23, 2014 Letter from DWR and USBR and related correspondence

Dear Ms. Evoy:

This office represents Reclamation Districts and landowners in the Delta. Please regard this letter as a strong objection to the Board taking any action in response to the DWR and USBR July 23, 2014 "letter" other than scheduling a hearing. The letter in question does not appear to be a complaint that would trigger specific actions by the Board under its recently-adopted emergency regulations - much less a "wholesale" investigation of the water rights of all in-Delta diverters - which, as Mr. Herrick has ably stated in his letter to you - have already been thoroughly investigated by the Watermaster and others.

The McDonald Island landowners and Reclamation District (No. 2030) recently furnished the state Watermaster with the preliminary but factually accurate results of a recent study that clearly and simply demonstrates that the drainage system on McDonald Island returns substantially more water to the Delta than is consumed by crops, evaporation and carriage losses. Water returned to the system includes tail-water, seepage, rainfall and artesian flows. We are prepared to submit the results of our study to the Board as part of the record of a proper hearing.

To suggest, as DWR/USBR asserts in their letter to you, that Delta diversions increase the amount of stored water that must be released in order to maintain salinity levels, is mere speculation and without foundation. We believe this and other issues should be thoroughly vetted in the proper forum. We also believe that the Board Members and Staff (as well as DWR and USBR) would be helped by understanding the reality of the Delta, the constant availability of water in the Delta, and what would happen if landowners / farmers were rendered unable to conduct farming and reclamation (drainage) operations in the Delta. All of these subjects (and more) are ripe for discussion at a properly noticed Hearing, which we request before any action is taken under the emergency regulations.

I am out of the office on vacation and do not have my firm's letterhead available. Please accept this communication in email format.

Very Truly Yours,

George V. Hartmann

--

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information contained in this transmission is strictly **PROHIBITED**. Any such inadvertent disclosure of information, which includes any metadata in emails or attachments, shall not compromise or waive the attorney-client privilege as to this communication or otherwise. If you have received this transmission in error, please notify me by telephone at (209)-956-9940 or reply e-mail and delete this message and any attachments. Thank you.

George V. Hartmann, Esq.  
THE HARTMANN LAW FIRM  
3425 Brookside Road, Suite A  
Stockton, CA 95219

209.956.9940 O  
209.956.9929 F

Discourage litigation. Persuade your neighbors to compromise whenever you can. As a peacemaker the lawyer has superior opportunity of being a good man. There will still be business enough.

Abraham Lincoln  
16th president of US (1809 - 1865)

**BBID**  
**EXHIBIT 350**

## **Tauriainen, Andrew@Waterboards**

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**From:** Coats, Brian@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=COATS, BRIAN@WATERBBBDDE385-DD05-476A-BC5C-F251692B0BEA11F>  
**Sent:** Thursday, September 25, 2014 9:06 AM  
**To:** Grober, Les@Waterboards  
**Cc:** O'Hagan, John@Waterboards; Mrowka, Kathy@Waterboards; Evoy, Barbara@Waterboards  
**Subject:** RE: Lifting Curtailments Letter  
**Attachments:** oct1.jpg; oct2.jpg; sept26.jpg; sept27.jpg; sept28.jpg; sept29.jpg; sept30.jpg

Attached is the next seven day forecast, some rain in the foothills and northeastern part of the State for the next couple days; peters out afterwards.

-----Original Message-----

**From:** Grober, Les@Waterboards  
**Sent:** Thursday, September 25, 2014 8:54 AM  
**To:** O'Hagan, John@Waterboards; Evoy, Barbara@Waterboards  
**Cc:** Riddle, Diane@Waterboards; West, Yvonne@Waterboards; Aue, Marianna@waterboards; Coats, Brian@Waterboards; Mrowka, Kathy@Waterboards  
**Subject:** RE: Lifting Curtailments Letter

This is the latest (September 12) I see of this letter. What is the status? It was my understanding that we would want to turn off curtailments when it starts raining, not necessarily tied to stream response. I know there is not likely to be a large runoff response but Tom wanted us to turn off curtailments tied to rainfall.

-----Original Message-----

**From:** O'Hagan, John@Waterboards  
**Sent:** Friday, September 12, 2014 7:02 AM  
**To:** Evoy, Barbara@Waterboards  
**Cc:** Grober, Les@Waterboards; Riddle, Diane@Waterboards; West, Yvonne@Waterboards; Aue, Marianna@waterboards; Coats, Brian@Waterboards; Mrowka, Kathy@Waterboards  
**Subject:** RE: Lifting Curtailments Letter

Here is a revised letter. I accepted most of Marianna's edit and put in edit and footnote for Term 91. This is needed for today's meeting so we need to have final version by 9:00.

-----Original Message-----

**From:** Evoy, Barbara@Waterboards  
**Sent:** Thursday, September 11, 2014 1:50 PM  
**To:** O'Hagan, John@Waterboards  
**Cc:** Grober, Les@Waterboards; Riddle, Diane@Waterboards  
**Subject:** FW: Lifting Curtailments Letter

Craig pointed out that lifting "curtailments" at specific times may impact the protections of Term 91. We thought it might be important just to note it in the general letter and then follow with more specific info to the Term 91 folks.

-----Original Message-----

**From:** Wilson, Craig@Waterboards

Sent: Thursday, September 11, 2014 1:47 PM  
To: Evoy, Barbara@Waterboards  
Subject: Lifting Curtailments Letter

Hi Barbara,  
See suggested footnote re Term 91 toward end.  
Craig

**BBID**  
**EXHIBIT 351**

**Tauriainen, Andrew@Waterboards**

---

**From:** Grober, Les@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=GROBER, LES@WATERBO70C00AFE-C3A3-4DCB-8E6B-7C0EEC93F2C874D>  
**Sent:** Monday, September 29, 2014 5:33 PM  
**To:** O'Hagan, John@Waterboards  
**Cc:** Trgovcich, Caren@Waterboards; Evoy, Barbara@Waterboards  
**Subject:** turning off curtailment in SJR

On today's RTDOMT call Ron Milligan asked again if we would be willing to turn off curtailments in the SJR. Ron clarified what Paul said last week-- They are expecting (having heard from them) that Southern California Edison will be releasing more water from reservoirs upstream of Friant, and that inflow to Friant is expected, at some point, to exceed releases—this without any rain or runoff. Ron said he would check if turning off curtailment in the entire SJR system, including New Melones, would cause any problems for them, but he didn't think so.

Did this issue come up in briefings? A special case could be made for turning off curtailment without any precipitation in just SJR mainstem upstream of Merced (or perhaps entire SJR).

**BBID**  
**EXHIBIT 352**

## Tauriainen, Andrew@Waterboards

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**From:** Grober, Les@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=GROBER, LES@WATERBO70C00AFE-C3A3-4DCB-8E6B-7C0EEC93F2C874D>  
**Sent:** Wednesday, October 01, 2014 4:47 PM  
**To:** Evoy, Barbara@Waterboards  
**Cc:** Riddle, Diane@Waterboards; O'Hagan, John@Waterboards  
**Subject:** RE: DWR letter re BBID  
**Attachments:** Scan.pdf

Here is the letter.

---

**From:** Grober, Les@Waterboards  
**Sent:** Wednesday, October 01, 2014 4:39 PM  
**To:** Evoy, Barbara@Waterboards  
**Cc:** Riddle, Diane@Waterboards; O'Hagan, John  
**Subject:** DWR letter re BBID

Barbara,

Did you get an email with attached letter on or around 9/23 from DWR regarding Byron-Bethany ID? If not or not readily available, don't waste time looking; I'll have Enessa scan. I'd like to post since it is a followup to DWR's "complaint" re Delta diverters, basically stating we should not include BBID in any info Orders since they report their diversion to DWR—and have offered to share with us.

Les

**BBID**  
**EXHIBIT 353**



We are not convinced that this weekend's forecasted precipitation will result in a significant change in our water operations and are not in favor of lifting the curtailment yet. We are still making storage withdrawals from our reservoirs to support the in-basin uses and next week we may be closing the Delta Cross Channel gates to achieve the modified Rio Vista flow objective for October. Delta water quality is above levels of concern and more diversions in the basin will not be helpful. We can evaluate conditions next week when we can assess what the weekend storm produced, Delta water quality, and also evaluate forecasted conditions for the remainder of the month.

Thanks,  
Paul

On Fri, Oct 24, 2014 at 12:02 PM, O'Hagan, John@Waterboards <[John.O'Hagan@waterboards.ca.gov](mailto:John.O'Hagan@waterboards.ca.gov)> wrote:

Gentlemen,

I am reaching out for comments from both DWR and USBR. The State Water Board has received several requests from water right holders in the Sacramento River watershed to temporarily lift curtailments to allow for the collection of the runoff that may occur. As you know, our Board sent notices to post-1914 water right holders describing the intent to allow diversions when rainfall conditions justified. [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/docs/curtail\\_lift.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/curtail_lift.pdf).

Before the State Water Board considers lifting of curtailment, that would likely start on Saturday, we would like to know if DWR or USBR object because it will affect delta operations and salinity control. FYI- We do expect that some parties downstream of your reservoirs will exercise rights to fill duck ponds during this period.

Please provide your feedback as soon as possible. Thanks

John O'Hagan

Assistant Deputy Director, Water Rights

State Water Resources Control Board

916-341-5368



**BBID**  
**EXHIBIT 354**

## Tauriainen, Andrew@Waterboards

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**From:** Grober, Les@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=GROBER, LES@WATERBO70C00AFE-C3A3-4DCB-8E6B-7C0EEC93F2C874D>  
**Sent:** Thursday, October 30, 2014 2:16 PM  
**To:** Howard, Tom  
**Cc:** O'Hagan, John@Waterboards  
**Subject:** curtailment

DWR and USBR continue to be opposed to the lifting of curtailments in SJR; would prefer, and support lifting only from Mokelumne north, or even settle for SJR at Vernalis north. They are concerned about backstopping demand on the SJR and not meeting the TUCP SJR pulse. They also are still pushing for only a 48 hour release of curtailment to limit any negative effects. I told them that at this time we are headed for a lifting on Sac and SJR from noon tomorrow for 72 hours but would continue to consider their comments, and evaluate the SJR hydrology (and expected rainfall runoff). John was not on the call but we discussed; absent a change based on a reevaluation of expected SJR hydrology we continue to propose the 72 lift for both Sac and SJR.

**BBID**  
**EXHIBIT 355**

## Tauriainen, Andrew@Waterboards

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**From:** O'Hagan, John@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=O'HAGAN, JOHN@WATER7B72A79A-DD76-4B3C-B470-A3BF3B5BCDD7939>  
**Sent:** Friday, October 31, 2014 8:50 AM  
**To:** Mrowka, Kathy@Waterboards  
**Cc:** Grober, Les@Waterboards; Evoy, Barbara@Waterboards; Trgovcich, Caren@Waterboards; Howard, Tom  
**Subject:** FW: Sacramento- San Joaquin River Curtailment Lifting  
**Attachments:** image001.png; image002.jpg

Kathy,

Tom has given ok for sending this notice. Use the notice below since Caren made minor edits and post it.

---

**From:** Trgovcich, Caren@Waterboards  
**Sent:** Friday, October 31, 2014 7:52 AM  
**To:** O'Hagan, John@Waterboards  
**Subject:** RE: Sacramento- San Joaquin River Curtailment Lifting

John – if the notice has not gone, I fixed a couple of typos.

SUBJECT: NOTICE OF TEMPORARY OPPORTUNITY TO DIVERT WATER UNDER PREVIOUSLY CURTAILED WATER RIGHTS FOR SACRAMENTO AND SAN JOAQUIN WATERSHEDS

The State Water Resources Control Board (State Water Board) has temporarily lifted the water rights curtailment for post-1914 water rights in the Sacramento and San Joaquin River watersheds for Friday October 31<sup>st</sup> and continuing to **7 AM on Monday, November 3<sup>rd</sup>**. The temporary lifting of curtailments is based on a predicted rain event. Unless otherwise directed in a future lyris notification, all curtailed water rights in the Sacramento and San Joaquin watersheds must cease diversions at **7 AM on Monday November 3<sup>rd</sup>**. All diversions during this time period must be in accordance with the State Water Board's October 3, 2014 letter and lyris notification.

During this diversion opportunity, you must comply with all terms and conditions of your water right, especially the season of diversion and bypass conditions. This notice also does not relieve you of yourr responsibility to comply with other curtailments, like Term 91 Curtailment and Curtailment Orders for Deer Creek. You should keep a record of your diversions since such diversions are still subject to prior rights. Any diversion in violation of the terms and conditions or of these notices is subject to enforcement.

The State Water Board will be monitoring weather forecasts and stream gages to determine if the temporary diversion opportunity should continue. Please monitor your email and our website for further updates on when diversions are authorized, and when curtailments are in place. If a lyris notice is issued on the weekend, the website will not be updated until the following Monday due to service limitations. Although curtailments may be lifted on a seasonal basis once weather events allow such action, the current authorization to divert is based on limited duration storm events in the identified watersheds.

---

**From:** O'Hagan, John@Waterboards  
**Sent:** Friday, October 31, 2014 7:43 AM  
**To:** Howard, Tom; Grober, Les@Waterboards; Trgovcich, Caren@Waterboards; Evoy, Barbara@Waterboards  
**Cc:** Mrowka, Kathy@Waterboards; Coats, Brian@Waterboards  
**Subject:** Sacramento- San Joaquin River Curtailment Lifting

Tom,

Based on DWR/NOAA Guidance Plots, I recommend sending the Sacramento-San Joaquin Notice now and letting it last through Monday at 7 am. Here is what we are seeing although these were from yesterday (Green is forecast and guidance is pink (more uncertainty)):

#### Sacramento

The flows in the Sacramento at Bend Bridge shows increases from today through Monday, the 3<sup>rd</sup> at 7:00 AM ([http://cdec.water.ca.gov/guidance\\_plots/BND\\_gp.html](http://cdec.water.ca.gov/guidance_plots/BND_gp.html).)

The flow at Verona, show up a day later. ([http://cdec.water.ca.gov/guidance\\_plots/VON\\_gp.html](http://cdec.water.ca.gov/guidance_plots/VON_gp.html).)

Middle Fork Feather, shows a smaller response ending on the 3<sup>rd</sup>. [http://cdec.water.ca.gov/guidance\\_plots/MFP\\_gp.html](http://cdec.water.ca.gov/guidance_plots/MFP_gp.html).

Bear River were elevated from last storm but will increase with this storm. [http://cdec.water.ca.gov/guidance\\_plots/BRW\\_gp.html](http://cdec.water.ca.gov/guidance_plots/BRW_gp.html).

#### San Joaquin:

Cosumnes flows increasing today through Monday. [http://cdec.water.ca.gov/guidance\\_plots/MHB\\_gp.html](http://cdec.water.ca.gov/guidance_plots/MHB_gp.html).

San Joaquin at Vernalis shows a slight delayed increase flow responses but through the 3<sup>rd</sup>. [http://cdec.water.ca.gov/guidance\\_plots/VNS\\_gp.html](http://cdec.water.ca.gov/guidance_plots/VNS_gp.html).

Tuolumne River at Modesto shows small increase ending the 3<sup>rd</sup>. [http://cdec.water.ca.gov/guidance\\_plots/MOD\\_gp.html](http://cdec.water.ca.gov/guidance_plots/MOD_gp.html).

Merced River at Yosemite shows large increase today and beyond Nov 4<sup>th</sup>. [http://cdec.water.ca.gov/guidance\\_plots/POH\\_gp.html](http://cdec.water.ca.gov/guidance_plots/POH_gp.html).

San Joaquin at Mossdale Bridge shows minor increase on Nov. 2<sup>nd</sup>. [http://cdec.water.ca.gov/guidance\\_plots/MSD\\_gp.html](http://cdec.water.ca.gov/guidance_plots/MSD_gp.html).

Here is the proposed notice:

#### SUBJECT: NOTICE OF TEMPORARY OPPORTUNITY TO DIVERT WATER UNDER PREVIOUSLY CURTAILED WATER RIGHTS FOR SACRAMENTO AND SAN JOAQUIN WATERSHEDS

The State Water Resources Control Board (State Water Board) has temporarily lifted the water rights curtailment for post-1914 water rights in the Sacramento and San Joaquin River watersheds for Friday October 31<sup>st</sup> and continuing to **7 AM on Monday, November 3<sup>rd</sup>**. The temporary lifting of curtailments is based on a predicted rain event. Unless otherwise directed in a future lyrics notification, all curtailed water rights in the Sacramento and San Joaquin watersheds must cease diversions at **7 AM on Monday November 3<sup>rd</sup>**. All diversions during this time period must be in accordance with the State Water Board's October 3, 2014 letter and lyrics notification.

During this diversion opportunity, you must comply with all terms and conditions of your water right, especially season of diversion and bypass conditions. This notice also does not relieve your responsibility to comply with other curtailments, like Term 91 Curtailment and Curtailment Orders for Deer Creek. You should keep a record of your diversions since such diversions are still subject to prior rights. Any diversion in violation of terms and conditions or of these notices is subject to enforcement.

The State Water Board will be monitoring weather forecasts and stream gages to determine if the temporary diversion opportunity should continue. Please monitor your email and our website for further updates on when diversions are authorized, and when curtailments are in place. If a lyrics notice is issued on the weekend, the website will not be updated until the following Monday due to service limitations. Although curtailments may be lifted on a seasonal basis once weather events allow such action, the current authorization to divert is based on limited duration storm events in the identified watersheds.

**BBID**  
**EXHIBIT 356**

## **Tauriainen, Andrew@Waterboards**

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**From:** Howard, Tom </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=HOWARD, TOM@WATERBO97BB8206-7061-4BF7-B503-158A6481C1EA139>  
**Sent:** Wednesday, November 12, 2014 3:32 PM  
**To:** O'Hagan, John@Waterboards  
**Subject:** RE: curtailment update

OK

---

**From:** O'Hagan, John@Waterboards  
**Sent:** Wednesday, November 12, 2014 3:30 PM  
**To:** Howard, Tom  
**Subject:** RE: curtailment update

Will do. Just got a call from Russ Stein and discussed. He make send an email just to identify DWR would like us to wait and show that they were responsive to my email.

---

**From:** Howard, Tom  
**Sent:** Wednesday, November 12, 2014 3:28 PM  
**To:** O'Hagan, John@Waterboards; Trgovcich, Caren@Waterboards; Evoy, Barbara@Waterboards; Grober, Les@Waterboards  
**Cc:** Mrowka, Kathy@Waterboards; Coats, Brian@Waterboards; Yeazell, Jeffrey@Waterboards  
**Subject:** RE: curtailment update

Go ahead and send.

---

**From:** O'Hagan, John@Waterboards  
**Sent:** Wednesday, November 12, 2014 2:31 PM  
**To:** Howard, Tom; Trgovcich, Caren@Waterboards; Evoy, Barbara@Waterboards; Grober, Les@Waterboards  
**Cc:** Mrowka, Kathy@Waterboards; Coats, Brian@Waterboards; Yeazell, Jeffrey@Waterboards  
**Subject:** FW: curtailment update

No word back from DWR or USBR. We are ready to send the following notice with a bump up to 1953:

### NOTICE OF LIFTING OF CURTAILED WATER RIGHTS FOR SACRAMENTO AND SAN JOAQUIN RIVER WATERSHEDS

The State Water Resources Control Board (State Water Board) is lifting the water right curtailments for post-1914 water rights in the Sacramento and San Joaquin River watersheds with a priority date of December 31, 1953, and earlier. This action is based on reduced diversion demands after October 31<sup>st</sup>, and the switch in diversion demand from direct diversion to storage. Unless otherwise directed in a future email list notification, all curtailed water rights in the Sacramento and San Joaquin watersheds with a priority date of December 31, 1953, and earlier, may commence diversions.

Water right holders must comply with all terms and conditions of their water right, including the season of diversion and bypass conditions. This notice also does not relieve a right holder of responsibility to comply with other curtailments, like Term 91 Curtailment and Curtailment Orders for Deer Creek. All water right holders should keep a record of their diversions since such diversions are still subject to prior rights. Any diversion in violation of terms and conditions or of these notices is subject to enforcement.

The State Water Board will be monitoring weather forecasts and stream gages to determine if curtailments should be re-imposed in the future, or if lifting of remaining curtailments is appropriate. Please monitor your email and our website for future updates. If an email list notice is issued on the weekend, the website will not be updated until the following Monday due to service limitations.

If you have questions, please contact our Drought Year Curtailment Hotline at: (916) 341-5342.

---

**From:** O'Hagan, John@Waterboards  
**Sent:** Wednesday, November 12, 2014 12:49 PM  
**To:** Stein, Russell@DWR  
**Cc:** Grober, Les@Waterboards; Croyle, William@DWR; Leahigh, John@DWR; Trgovcich, Caren@Waterboards; Howard, Tom; Evoy, Barbara@Waterboards  
**Subject:** RE: curtailment update

Hi Russ,

I left two messages on your phone since your call to me this morning. We will be sending a notice this afternoon that will lift curtailments in the Sacramento San Joaquin watersheds for certain priority of rights. The notice is based on a reduction in the water right demand after October 31<sup>st</sup>. Our records suggest that unimpaired flow will satisfy these post-1914 rights so the lifting will be permanent unless conditions worsen..

I wanted to make sure your Department was aware; and I was interested in any feedback.

---

**From:** Stein, Russell@DWR  
**Sent:** Wednesday, November 12, 2014 12:38 PM  
**To:** O'Hagan, John@Waterboards  
**Cc:** Grober, Les@Waterboards; Croyle, William@DWR; Leahigh, John@DWR  
**Subject:** curtailment update

Hi John,

I left you a voicemail this am. It looks like Bill Croyle responded to your emails earlier this week.

Any update on suspension of curtailments and how long the suspension will be in effect?

Thanks, Russ

Russell Stein  
Assistant Deputy Director  
Department of Water Resources  
901 P Street, Room 432  
Sacramento, CA 95814  
916 651-9560

**BBID**  
**EXHIBIT 357**

## Tauriainen, Andrew@Waterboards

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**From:** Riddle, Diane@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=RIDDLE, DIANE@WATER7DEC8BE1-7D09-4111-A50A-759550813A4973D>  
**Sent:** Thursday, November 20, 2014 8:42 AM  
**To:** Satkowski, Rich@Waterboards; O'Hagan, John@Waterboards; Grober, Les@Waterboards; Mrowka, Kathy@Waterboards  
**Cc:** Ligare, Scott@Waterboards; Bartolomeo, Eleanor@Waterboards; Coats, Brian@Waterboards; Yeazell, Jeffrey@Waterboards; Schultz, Daniel@Waterboards; Rico, Christine@Waterboards; Ragazzi, Erin@Waterboards; Anderson, William@Waterboards; Collins, John@Waterboards; Rinker, Bob@Waterboards  
**Subject:** RE: Sac R. Watershed Water Rights and Modeling Coordination Meeting

Thanks for the summary Rich. We will discuss your questions at the next PM meeting and get back to the group.

---

**From:** Satkowski, Rich@Waterboards  
**Sent:** Wednesday, November 19, 2014 3:34 PM  
**To:** O'Hagan, John@Waterboards; Grober, Les@Waterboards; Mrowka, Kathy@Waterboards; Riddle, Diane@Waterboards  
**Cc:** Ligare, Scott@Waterboards; Bartolomeo, Eleanor@Waterboards; Coats, Brian@Waterboards; Yeazell, Jeffrey@Waterboards; Schultz, Daniel@Waterboards; Rico, Christine@Waterboards; Ragazzi, Erin@Waterboards; Anderson, William@Waterboards; Collins, John@Waterboards; Rinker, Bob@Waterboards  
**Subject:** Sac R. Watershed Water Rights and Modeling Coordination Meeting

Diane, Les, Kathy, John,

On Nov 19, 2014, a meeting was held to (1) decide how to best develop a common water rights/use dataset for the Sacramento River Watershed, if applicable, and (2) discuss the status and future work on the Division's two drought water allocation models: (a) the Drought Water Rights Allocation Tool, "DWRAT," and (b) the Sacramento Water Allocation (WEAP) Model, "Sac WAM." The participants were:

Enforcement staff: John O'Hagan, Kathy Mwroka, Brian Coats, Jeff Yeazell

Bay-Delta staff: Les Grober, Diane Riddle, Rich Satkowski, Scott Ligare, Eleanor Bartolomeo

Public Trust staff: Dan Schultz, William Anderson

Delta Watermaster staff: Christine Rico

Each section/unit above are in the process of using eWRIMS' Report Management System data to develop water rights/use datasets for their respective projects that cover the following regions:

Enforcement staff: Enforcement's Sac R. Watershed dataset

Bay-Delta staff: Bay-Delta's (Phase 2) Sac Valley (below the rim dams) dataset

Public Trust staff: Public Trust's (Phase 4) Sac R. Tributaries (Mill, Deer, Battle) dataset

Delta Watermaster staff: Delta dataset

At the meeting, it tentatively decided/determined that:

- The drought is the Board's/Division's highest priority unless informed otherwise.
- The Sac Valley, Sac R. tributaries and Delta datasets are subsets of the Sac R. Watershed dataset.
- A common water rights/use datasets (WRUD) for the Sac R. Watershed, including the Delta, should be developed, documented and maintained.

- Each Section/Unit will write up their respectively WRUD development methodology, similar to the attached Bay-Delta methods.
- A staff working group whose purpose is to develop, document and maintain the Sac R. WRUD, should be formed immediately and also include Bob Rinker's staff. The working group should meet periodically (bi-monthly?) with the first meeting to be held the week after Thanksgiving.
- Delta Watermaster staff is using the Oracle BL Discoverer Plus database software, which Division staff does not have access to.
- The Dept. of Water Resources' staff has been collaborating with Bay-Delta staff on a common Sac Valley dataset (which they want to use in CalSim).
- The WRUD and subsequent revisions should be shared with and reviewed by stakeholders including, but not limited to, Dept of Water Resources, USBR, MBK Engineers and others.
- The DWRAT and Sac WAM models are still in the water rights model development stage and neither will be available for water right curtailment purposes in WY 2014-2015. Division staff and the consultants working on the DWRAT (UC Davis) and Sac WAM (SEI Consult.) should meet periodically to discuss further model integration efforts.

Key questions for Division management are:

- Should the Division form a Sac R. WRUD working group?
- If formed, what is the priority of the Sac R. WRUD work in relation to other current assignments and who will lead the group?
- If formed, should the Sac R. WRUD collaborate with stakeholders?
- Should the Division be funding two separate modeling efforts?

Thanks,  
Rich

**BBID**  
**EXHIBIT 358**

## Tauriainen, Andrew@Waterboards

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**From:** O'Hagan, John@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=O'HAGAN, JOHN@WATER7B72A79A-DD76-4B3C-B470-A3BF3B5BCDD7939>  
**Sent:** Friday, January 16, 2015 12:02 PM  
**To:** Grober, Les@Waterboards; Riddle, Diane@Waterboards; Evoy, Barbara@Waterboards  
**Cc:** Mrowka, Kathy@Waterboards  
**Subject:** FW: Demand Comparison Summary with changes.  
**Attachments:** Demand Comparison Summary 2015-01-16\_3.pdf

FYI-

Comparison of Delta demand data used for 2014 Curtailment to 1977 estimates, and to 2014 NDCU posted by USBR. We also compared MBK's numbers for Sacramento Basin and a couple of contractors. Our total statement demand for Delta is reasonably with 77 and NDCU for summer months, April and September are suspect. Upper Sacramento comparison is widely off. Shows we need better information from upstream claimants.

---

**From:** Yeazell, Jeffrey@Waterboards  
**Sent:** Friday, January 16, 2015 11:36 AM  
**To:** O'Hagan, John@Waterboards  
**Cc:** Mrowka, Kathy@Waterboards; Coats, Brian@Waterboards  
**Subject:** RE: Demand Comparison Summary with changes.

Done, and attached.

-Jeff

---

**From:** O'Hagan, John@Waterboards  
**Sent:** Friday, January 16, 2015 11:25 AM  
**To:** Yeazell, Jeffrey@Waterboards  
**Cc:** Mrowka, Kathy@Waterboards; Coats, Brian@Waterboards  
**Subject:** RE: Demand Comparison Summary with changes.

Just, for hand-outs at the meeting, just show totals for delta from 2010 data (don't show amounts of Sac and San Joaquin Delta, just total) Save this one for internal. I don't want to discuss how the Delta is subdivided at the meeting. Thanks

---

**From:** Yeazell, Jeffrey@Waterboards  
**Sent:** Friday, January 16, 2015 11:18 AM  
**To:** O'Hagan, John@Waterboards  
**Cc:** Mrowka, Kathy@Waterboards; Coats, Brian@Waterboards  
**Subject:** Demand Comparison Summary with changes.

John,

If this looks good, how many copies should I print out for the meeting?

-Jeff

**BBID**  
**EXHIBIT 359**

## Tauriainen, Andrew@Waterboards

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**From:** Ligare, Scott@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=LIGARE, SCOTT@WATERF116FD5F-0E5F-48C5-9073-35D736505B35704>  
**Sent:** Tuesday, February 17, 2015 1:46 PM  
**To:** Grober, Les@Waterboards  
**Cc:** Bartolomeo, Eleanor@Waterboards; Yeazell, Jeffrey@Waterboards; Coats, Brian@Waterboards; Mrowka, Kathy@Waterboards; Satkowski, Rich@Waterboards  
**Subject:** RE: Supply Demand Curves for Delta Watershed

Les,

The Dayflow Gross Channel Depletion estimate for March increases from 950 cfs to 1700 cfs throughout the month with a total depletion of 80.5 TAF. This term does not include diversions at Jones Pumping Plant, Banks Pumping Plant, Byron Bethany, Contra Costa, or North Bay Aqueduct.

Jeff's reported demands likely include many of these diversions which we can attribute most of the difference. The DWR Gross Channel Depletion estimate is used for all years and has not been updated since 1965, so it is likely too low in dry years as was observed last year.

--Scott

**From:** Yeazell, Jeffrey@Waterboards  
**Sent:** Tuesday, February 17, 2015 8:15 AM  
**To:** Grober, Les@Waterboards  
**Cc:** Coats, Brian@Waterboards; Bartolomeo, Eleanor@Waterboards; Mrowka, Kathy@Waterboards  
**Subject:** RE: RE: supply demand curves for delta watershed

Les,

Removing Bureau demand reduces the March Legal Delta demand to 141 taf. Our demand data set is based on diversions reported in eWRIMs, which is likely different than DWR's method to estimate demand, resulting in the discrepancy. I will confirm with Eleanor when she gets in.

-Jeff

**From:** Grober, Les@Waterboards  
**Sent:** Tuesday, February 17, 2015 7:45 AM  
**To:** Coats, Brian@Waterboards  
**Cc:** Yeazell, Jeffrey@Waterboards; Bartolomeo, Eleanor@Waterboards  
**Subject:** RE: RE: supply demand curves for delta watershed

Thanks!

**From:** Coats, Brian@Waterboards  
**Sent:** Tuesday, February 17, 2015 7:43 AM  
**To:** Grober, Les@Waterboards  
**Cc:** Yeazell, Jeffrey@Waterboards  
**Subject:** RE: RE: supply demand curves for delta watershed

Likely due to the Bureau demand included. I'm having Jeff strip that out now and will confirm with Eleanor when she gets in.

**From:** Grober, Les@Waterboards  
**Sent:** Tuesday, February 17, 2015 7:21 AM  
**To:** Coats, Brian@Waterboards  
**Cc:** Mrowka, Kathy@Waterboards; O'Hagan, John@Waterboards; Evoy, Barbara@Waterboards; Montgomery, Amanda@Waterboards; Riddle, Diane@Waterboards  
**Subject:** RE: RE: supply demand curves for delta watershed

Please check the legal delta demand of 379 taf. Have Jeff, or whoever calculated that amount to confirm with Eleanor since this figure is a lot higher than what DWR uses for estimating march demand, which I think is less than 60taf. Eleanor is checking that figure.

**From:** Coats, Brian@Waterboards  
**Sent:** Friday, February 13, 2015 8:00 PM  
**To:** Grober, Les@Waterboards  
**Cc:** Mrowka, Kathy@Waterboards; O'Hagan, John@Waterboards; Evoy, Barbara@Waterboards; Montgomery, Amanda@Waterboards; Riddle, Diane@Waterboards  
**Subject:** RE: RE: supply demand curves for delta watershed

For the entire Sac-SJ basin minus the Legal Delta, yes.

Since the majority of the supply comes from the Sacramento watershed, I think a better comparison would be to compare the Sacramento demand with the Sacramento supply since most of the export water comes from that side.

Jeff can get those numbers to you on Tuesday morning.

Brian

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**From:** Grober, Les@Waterboards  
**Sent:** Friday, February 13, 2015 2:59 PM  
**To:** Coats, Brian@Waterboards  
**Cc:** Mrowka, Kathy@Waterboards; O'Hagan, John@Waterboards; Evoy, Barbara@Waterboards; Riddle, Diane@Waterboards; Montgomery, Amanda@Waterboards  
**Subject:** RE: RE: supply demand curves for delta watershed

So at 50% March demand exceeds supply by about 1.7 million af?

**From:** Coats, Brian@Waterboards  
**Sent:** Friday, February 13, 2015 2:17 PM  
**To:** Grober, Les@Waterboards  
**Cc:** Mrowka, Kathy@Waterboards; O'Hagan, John@Waterboards; Evoy, Barbara@Waterboards; Riddle, Diane@Waterboards; Montgomery, Amanda@Waterboards  
**Subject:** FW: RE: supply demand curves for delta watershed

Here you go.

**From:** Yeazell, Jeffrey@Waterboards  
**Sent:** Friday, February 13, 2015 1:31 PM  
**To:** Coats, Brian@Waterboards  
**Subject:** RE: supply demand curves for delta watershed

Brian,

The March 2015 FNF Forecasts for the 10 stations in the Sacramento and San Joaquin watersheds are:

50% FNF Forecast: 2,393 taf

90% FNF Forecast: 1,714 taf

The March 4-year average total demand for the combined Sacramento/San Joaquin watersheds exclusive of the Legal Delta is 4,116 taf.

The March 4-year average total demand for the Legal Delta is 379 taf.

-Jeff

**BBID**  
**EXHIBIT 360**

## Tauriainen, Andrew@Waterboards

---

**From:** Grober, Les@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=GROBER, LES@WATERBO70C00AFE-C3A3-4DCB-8E6B-7C0EEC93F2C874D>  
**Sent:** Tuesday, February 17, 2015 11:13 AM  
**To:** Yeazell, Jeffrey@Waterboards; Bartolomeo, Eleanor@Waterboards  
**Cc:** Evoy, Barbara@Waterboards; O'Hagan, John@Waterboards; Mrowka, Kathy@Waterboards; Riddle, Diane@Waterboards; Coats, Brian@Waterboards  
**Subject:** RE: Estimated March Supply/Demand Numbers

Thanks.

Eleanor, Jeff,

Thoughts on why Delta march demand of 141 is higher than the 50 to 60 taf used by DWR?

---

**From:** Yeazell, Jeffrey@Waterboards  
**Sent:** Tuesday, February 17, 2015 11:03 AM  
**To:** Grober, Les@Waterboards  
**Cc:** Evoy, Barbara@Waterboards; O'Hagan, John@Waterboards; Mrowka, Kathy@Waterboards; Riddle, Diane@Waterboards; Coats, Brian@Waterboards  
**Subject:** Estimated March Supply/Demand Numbers

Les,

Below are the March supply/demand estimates, all in taf.

Supply:

Sacramento CDEC 50% FNF Forecast: 1,850

Sacramento CDEC 90% FNF Forecast: 1,171

San Joaquin CDEC 50% FNF Forecast: 543

San Joaquin CDEC 90% FNF Forecast: 204

Demand:

Sacramento Basin excluding Legal Delta: 3,326

Sacramento Basin excluding Legal Delta and Bureau: 1,397

San Joaquin Basin excluding Legal Delta: 790

San Joaquin Basin excluding Legal Delta and Bureau: 559

Legal Delta: 379

Legal Delta excluding Bureau: 141

Regards,

**BBID**  
**EXHIBIT 361**

## Tauriainen, Andrew@Waterboards

---

**From:** Grober, Les@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=GROBER, LES@WATERBO70C00AFE-C3A3-4DCB-8E6B-7C0EEC93F2C874D>  
**Sent:** Tuesday, February 17, 2015 1:56 PM  
**To:** Ligare, Scott@Waterboards  
**Cc:** Bartolomeo, Eleanor@Waterboards; Yeazell, Jeffrey@Waterboards; Coats, Brian@Waterboards; Mrowka, Kathy@Waterboards; Satkowski, Rich@Waterboards  
**Subject:** RE: RE: Supply Demand Curves for Delta Watershed  
**Attachments:** Estimated March Supply/Demand Numbers.msg

Jeff split out the projects demand in this later email—still have a difference between 80 taf per DAYFLOW and 141 taf. Given different methods I think this is OK.

Eleanor,

Please see how this different DAYFLOW number affects the percent delta outflow relative to fnf.

---

**From:** Ligare, Scott@Waterboards  
**Sent:** Tuesday, February 17, 2015 1:46 PM  
**To:** Grober, Les@Waterboards  
**Cc:** Bartolomeo, Eleanor@Waterboards; Yeazell, Jeffrey@Waterboards; Coats, Brian@Waterboards; Mrowka, Kathy@Waterboards; Satkowski, Rich@Waterboards  
**Subject:** RE: Supply Demand Curves for Delta Watershed

Les,

The Dayflow Gross Channel Depletion estimate for March increases from 950 cfs to 1700 cfs throughout the month with a total depletion of 80.5 TAF. This term does not include diversions at Jones Pumping Plant, Banks Pumping Plant, Byron Bethany, Contra Costa, or North Bay Aqueduct.

Jeff's reported demands likely include many of these diversions which we can attribute most of the difference. The DWR Gross Channel Depletion estimate is used for all years and has not been updated since 1965, so it is likely too low in dry years as was observed last year.

--Scott

**From:** Yeazell, Jeffrey@Waterboards  
**Sent:** Tuesday, February 17, 2015 8:15 AM  
**To:** Grober, Les@Waterboards  
**Cc:** Coats, Brian@Waterboards; Bartolomeo, Eleanor@Waterboards; Mrowka, Kathy@Waterboards  
**Subject:** RE: RE: supply demand curves for delta watershed

Les,

Removing Bureau demand reduces the March Legal Delta demand to 141 taf. Our demand data set is based on diversions reported in eWRIMs, which is likely different than DWR's method to estimate demand, resulting in the discrepancy. I will confirm with Eleanor when she gets in.

-Jeff

**From:** Grober, Les@Waterboards  
**Sent:** Tuesday, February 17, 2015 7:45 AM  
**To:** Coats, Brian@Waterboards  
**Cc:** Yeazell, Jeffrey@Waterboards; Bartolomeo, Eleanor@Waterboards  
**Subject:** RE: RE: supply demand curves for delta watershed

Thanks!

**From:** Coats, Brian@Waterboards  
**Sent:** Tuesday, February 17, 2015 7:43 AM  
**To:** Grober, Les@Waterboards  
**Cc:** Yeazell, Jeffrey@Waterboards  
**Subject:** RE: RE: supply demand curves for delta watershed

Likely due to the Bureau demand included. I'm having Jeff strip that out now and will confirm with Eleanor when she gets in.

**From:** Grober, Les@Waterboards  
**Sent:** Tuesday, February 17, 2015 7:21 AM  
**To:** Coats, Brian@Waterboards  
**Cc:** Mrowka, Kathy@Waterboards; O'Hagan, John@Waterboards; Evoy, Barbara@Waterboards; Montgomery, Amanda@Waterboards; Riddle, Diane@Waterboards  
**Subject:** RE: RE: supply demand curves for delta watershed

Please check the legal delta demand of 379 taf. Have Jeff, or whoever calculated that amount to confirm with Eleanor since this figure is a lot higher than what DWR uses for estimating march demand, which I think is less than 60taf. Eleanor is checking that figure.

**From:** Coats, Brian@Waterboards  
**Sent:** Friday, February 13, 2015 8:00 PM  
**To:** Grober, Les@Waterboards  
**Cc:** Mrowka, Kathy@Waterboards; O'Hagan, John@Waterboards; Evoy, Barbara@Waterboards; Montgomery, Amanda@Waterboards; Riddle, Diane@Waterboards  
**Subject:** RE: RE: supply demand curves for delta watershed

For the entire Sac-SJ basin minus the Legal Delta, yes.

Since the majority of the supply comes from the Sacramento watershed, I think a better comparison would be to compare the Sacramento demand with the Sacramento supply since most of the export water comes from that side.

Jeff can get those numbers to you on Tuesday morning.

Brian

---

**From:** Grober, Les@Waterboards  
**Sent:** Friday, February 13, 2015 2:59 PM  
**To:** Coats, Brian@Waterboards  
**Cc:** Mrowka, Kathy@Waterboards; O'Hagan, John@Waterboards; Evoy, Barbara@Waterboards; Riddle, Diane@Waterboards; Montgomery, Amanda@Waterboards  
**Subject:** RE: RE: supply demand curves for delta watershed

So at 50% March demand exceeds supply by about 1.7 million af?

**From:** Coats, Brian@Waterboards  
**Sent:** Friday, February 13, 2015 2:17 PM  
**To:** Grober, Les@Waterboards  
**Cc:** Mrowka, Kathy@Waterboards; O'Hagan, John@Waterboards; Evoy, Barbara@Waterboards; Riddle, Diane@Waterboards; Montgomery, Amanda@Waterboards  
**Subject:** FW: RE: supply demand curves for delta watershed

Here you go.

**From:** Yeazell, Jeffrey@Waterboards  
**Sent:** Friday, February 13, 2015 1:31 PM  
**To:** Coats, Brian@Waterboards  
**Subject:** RE: supply demand curves for delta watershed

Brian,

The March 2015 FNF Forecasts for the 10 stations in the Sacramento and San Joaquin watersheds are:

50% FNF Forecast: 2,393 taf  
90% FNF Forecast: 1,714 taf

The March 4-year average total demand for the combined Sacramento/San Joaquin watersheds exclusive of the Legal Delta is 4,116 taf.

The March 4-year average total demand for the Legal Delta is 379 taf.

-Jeff

**BBID**  
**EXHIBIT 362**

## Tauriainen, Andrew@Waterboards

---

**From:** Mrowka, Kathy@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=MROWKA, KATHY@WATERD1188F18-E359-4DA8-A3F2-FC48F57B907E63A>  
**Sent:** Monday, April 13, 2015 1:22 PM  
**To:** Grober, Les@Waterboards; Evoy, Barbara@Waterboards; O'Hagan, John@Waterboards; Riddle, Diane@Waterboards  
**Subject:** FW: Updated San Joaquin Supply/Demand Graph  
**Attachments:** San Joaquin Basin Supply-Demand 2015-04-13.pdf; image005.png; image006.jpg

Here is a new San Joaquin River graph. Lots of new, additional information on it.

Katherine Mrowka, Manager  
Enforcement Section  
Water Rights  
P.O. Box 2000  
Sacramento, CA 95814

916-341-5363



---

**From:** Grober, Les@Waterboards  
**Sent:** Monday, April 13, 2015 12:19 PM  
**To:** Evoy, Barbara@Waterboards; Mrowka, Kathy@Waterboards  
**Subject:** RE: Updated San Joaquin Supply/Demand Graph

Kathy,

Please send me the curve.

Thanks, Les

---

**From:** Evoy, Barbara@Waterboards  
**Sent:** Monday, April 13, 2015 11:54 AM  
**To:** Mrowka, Kathy@Waterboards  
**Cc:** Grober, Les@Waterboards  
**Subject:** FW: Updated San Joaquin Supply/Demand Graph

FYI

---

**From:** Howard, Tom  
**Sent:** Monday, April 13, 2015 11:07 AM  
**To:** O'Hagan, John@Waterboards; Evoy, Barbara@Waterboards; Trgovcich, Caren@Waterboards  
**Subject:** RE: Updated San Joaquin Supply/Demand Graph

Start curtailments.

---

**From:** O'Hagan, John@Waterboards  
**Sent:** Friday, April 10, 2015 4:50 PM  
**To:** Howard, Tom; Evoy, Barbara@Waterboards; Trgovcich, Caren@Waterboards  
**Subject:** FW: Updated San Joaquin Supply/Demand Graph

Disregard last curve and use this one. Very bad

---

**From:** Yeazell, Jeffrey@Waterboards  
**Sent:** Friday, April 10, 2015 12:10 PM  
**To:** O'Hagan, John@Waterboards  
**Cc:** Mrowka, Kathy@Waterboards; Coats, Brian@Waterboards  
**Subject:** Updated San Joaquin Supply/Demand Graph

John,

Here is an updated version with revised FNF forecast values. I inadvertently included the March forecast instead of the April forecast. Also, I added points to the forecast line to emphasize that the FNF forecast values are single values for the month, not a series of changing values.

Thanks,

Jeff

**BBID**  
**EXHIBIT 363**

## Tauriainen, Andrew@Waterboards

---

**From:** Evoy, Barbara@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=EVOY, BARBARA@WATER0C556DE1-8FEA-4DD1-91A5-2BBA7A82D039430>  
**Sent:** Thursday, April 16, 2015 11:16 AM  
**To:** Mrowka, Kathy@Waterboards; O'Hagan, John@Waterboards  
**Subject:** Tom really needs the complete list with the dates of each curtailment action  
**Attachments:** ATT46840.jpg; ATT80301.jpg  
**Importance:** High

You have both sent good background information, but Tom is really asking for dates that the orders are going out for each piece of curtailment. You can group however you want, but he wants to know when the specific rights, both post 1914 and pre-1914 on specific rivers are going out. He wanted it for the noon meeting. I can send the previous info, but if you have the specifics, please send as soon as you complete the Sac meeting.

---

**From:** Howard, Tom  
**Sent:** Monday, April 13, 2015 3:16 PM  
**To:** Evoy, Barbara@Waterboards  
**Cc:** Trgovcich, Caren@Waterboards; Howard, Tom; O'Hagan, John@Waterboards; Mrowka, Kathy@Waterboards; Grober, Les@Waterboards  
**Subject:** Re: Coordination with Division of Drinking Water

Send again with pre1914.

Sent from my iPhone

On Apr 13, 2015, at 1:54 PM, "Evoy, Barbara@Waterboards" <[Barbara.Evoy@waterboards.ca.gov](mailto:Barbara.Evoy@waterboards.ca.gov)> wrote:

FYI – here is the current schedule so you can notify the Board and any others (CalEPA?, GO?) that are needed. We spent time today with DDW to coordinate on an improved process for PWS who are curtailed this year and have to continue to divert. We also discussed that the Board is likely to want to know what the response of PWS was to the order to look at alternate supplies. Some have obtained them, some did not. For those that don't have an alternate supply, DDW will notify us so we will continue to use that diversion amount in our curtailment analysis. They are concerned about the San Joaquin hits this year. We are also participating in the OES calls today to give them a heads up on curtailment. We will follow the curtailment check list we developed last year and do so pulls for advanced notification (state agencies, public systems). We will also contact Danny Merkely at the Farm Bureau. The OES call my generate requests to talk to Boards of Supervisors as we did last year....FYI

---

**From:** Mrowka, Kathy@Waterboards  
**Sent:** Monday, April 13, 2015 1:42 PM  
**To:** O'Hagan, John@Waterboards; Montgomery, Amanda@Waterboards; Evoy, Barbara@Waterboards; Larsen, Karen@Waterboards; Forbes, Cindy@Waterboards; Burton, Bruce@Waterboards  
**Subject:** Coordination with Division of Drinking Water

I wanted to let you know what we see in the future for curtailments. We will be making some edits to the Health and Safety Claim form based on our meeting today and will share the form with you shortly.

Curtailment Status:

Issued:

Antelope Creek on April 3, 2015

Upcoming:

Deer Creek Fishery Minimum Flow Curtailment (by April 14<sup>th</sup>)  
Post-1914s in the San Joaquin River watershed (between April 15<sup>th</sup> and May 1<sup>st</sup> )  
Post-1914s and surplus rights in the Scott River (between April 15<sup>th</sup> and May 1<sup>st</sup> )

Pending:

Post-1914s in the Sacramento River (between May 1<sup>st</sup> and 15<sup>th</sup>, likely after the May B120 report update)

Areas on Watch:

Upper Russian River, storage is higher this year in Lake Mendocino but reduced flow releases have expired depleting storage

Eel River Watershed, currently flush with excess flow but has been receding lately

Areas not on the Radar:

Mill Creek Minimum Flow due to Voluntary Agreements in place

Katherine Mrowka, Manager  
Enforcement Section  
Water Rights  
P.O. Box 2000  
Sacramento, CA 95814

916-341-5363

<Picture (Device Independent Bitmap) 1.jpg> <Picture (Device Independent Bitmap) 2.jpg>

-----Original Appointment-----

**From:** Forbes, Cindy@Waterboards **On Behalf Of** O'Hagan, John@Waterboards

**Sent:** Thursday, April 09, 2015 4:45 PM

**To:** O'Hagan, John@Waterboards; Mrowka, Kathy@Waterboards; Montgomery, Amanda@Waterboards; Evoy, Barbara@Waterboards; Larsen, Karen@Waterboards

**Subject:** FW: Water Rights Inspection Needs

**When:** Monday, April 13, 2015 11:00 AM-12:00 PM (UTC-08:00) Pacific Time (US & Canada).

**Where:** Conference Room 2420

Can one of you attend.

We need to make sure we coordinate this year with DDW. Last year we had:

PALS

- Our staff contacts by regional area
- OES weekly calls on vulnerable water supplies
- Transfers/TUCs

Enforcement

- Curtailment Certification Form- (we need to decide if we are going to include H&S claim, if no other source available)
- We had two forms last year. DDW got responses to the projects under its authority and did compliance orders. We should pull those and send the special letters that identify curtailment but also that they are under DDW Orders. (Confirm with Cindy)
- Discuss who does other claimants if we provide H&S responses.

---

**From:** Forbes, Cindy@Waterboards

**Sent:** Monday, March 16, 2015 3:38 PM

**Required:** Forbes, Cindy@Waterboards; Evoy, Barbara@Waterboards; O'Hagan, John@Waterboards; Larsen, Karen@Waterboards

**Subject:** Water Rights Inspection Needs

**When:** Monday, April 13, 2015 11:00 AM-12:00 PM.

**Where:** Conference Room 2420

**BBID**  
**EXHIBIT 364**

## **Tauriainen, Andrew@Waterboards**

---

**Subject:** Curtailment Issues  
**Location:** Tom's Office (25-60)

**Start:** Wed 5/13/2015 9:00 AM  
**End:** Wed 5/13/2015 10:00 AM  
**Show Time As:** Tentative

**Recurrence:** (none)

**Meeting Status:** Not yet responded

**Organizer:** Aquino, Nancy@Waterboards  
**Required Attendees:** Howard, Tom@Waterboards (Tom.Howard@waterboards.ca.gov); O'Hagan, John@Waterboards; Hensley, Cindy D.@Waterboards; Mrowka, Kathy@Waterboards  
**Optional Attendees:** Trgovcich, Caren@Waterboards; Grober, Les@Waterboards

Participants:  
Tom Howard  
Barbara Evoy  
John O'Hagan  
Kathy Mrowka

Optional:  
Caren Trgovcich  
Les Grober

---

**From:** Evoy, Barbara@Waterboards  
**Sent:** Monday, April 20, 2015 5:27 PM  
**To:** O'Hagan, John@Waterboards; Hensley, Cindy D.@Waterboards; Mrowka, Kathy@Waterboards  
**Cc:** Grober, Les@Waterboards; Aquino, Nancy@Waterboards  
**Subject:** 30-60 minutes is all "we" ask.....

John – I mentioned to Tom that it would be good to have a check in time at least once a week as we go thru curtailments so you know you have his thoughts before you tackle specific curtailment issues. Tom indicated he be happy to have 30 or 60 minute meetings once a week to make sure you got some time. Cindy, please work with John and Nancy to see if we can get time for each of the next 3 or 4 weeks. If we don't need it as the time approaches, we can cancel, but it is darn tough to squeeze into Tom's jammed calendar, so better to try and schedule now. If I am here, I would like to be included as well.

Barbara L. Evoy  
Deputy Director, Water Rights  
State Water Resources Control Board  
916-341-5632

**BBID**  
**EXHIBIT 365**

## Tauriainen, Andrew@Waterboards

---

**From:** Evoy, Barbara@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=EVOY, BARBARA@WATEROC556DE1-8FEA-4DD1-91A5-2BBA7A82D039430>  
**Sent:** Tuesday, April 21, 2015 1:33 PM  
**To:** Howard, Tom  
**Cc:** Trgovcich, Caren@Waterboards; O'Hagan, John@Waterboards  
**Subject:** FW: Updated San Joaquin Graph  
**Attachments:** San Joaquin Basin Supply-Demand 2015-04-21.pdf; San Joaquin Basin Curtailment PODs.pdf

Tom – see attached supply/demand graph. First, John has made the adjustments in the supply/demand graph to respond to stakeholder comments. We can clearly curtail the post 1914s in the SJ. We will move forward with that.

Second, see curtailment POD map. Attributing 80/20 Sac/SJ flows to the legal delta users creates an odd inequity. Some diversions on the SJ side of the line with older dates, are curtailed before younger dates on the other side of the line as the legal delta then draws significant water from the Sacto to fulfill need whereas the SJ PODs don't. Some of these are very close in location. These legal delta users will be curtailed in the coming weeks as the Sacto flow supply goes down, but we are likely to hear from some folks as to methodology. Wanted you to be aware of the results.

---

**From:** O'Hagan, John@Waterboards  
**Sent:** Tuesday, April 21, 2015 12:25 PM  
**To:** Evoy, Barbara@Waterboards; Grober, Les@Waterboards  
**Cc:** Mrowka, Kathy@Waterboards; Coats, Brian@Waterboards  
**Subject:** FW: Updated San Joaquin Graph

Barbara and Les

In an effort to continue consider stakeholders comments, we have added additional tributary inflow and estimate for return flows based on 1977 estimates. Our curtailment analysis does not change date of curtailment. We are curtailing all post-1914 in the San Joaquin, except those in Legal Delta based on analysis methodology of proportioning Delta inflows. Those in Legal Delta will be curtailed when Sacramento River is curtailed due to methodology being applied.

Look how the Legal Delta is depicted on the second map blow-up. Our notice will exclude the diverters within the Legal Delta boundary at this time (red dots). It appears that boundary eliminates water rights that should be curtailed as part of the San Joaquin. Let me know if this raises concerns

---

**From:** Coats, Brian@Waterboards  
**Sent:** Tuesday, April 21, 2015 11:20 AM  
**To:** Mrowka, Kathy@Waterboards  
**Cc:** O'Hagan, John@Waterboards  
**Subject:** FW: Updated San Joaquin Graph

Attached is the updated San Joaquin curve incorporating return flows and the San Joaquin Valley Floor tribs FNF from the 2007 DWR report; doesn't change the curtailment of post-1914s.

Brian

**BBID**  
**EXHIBIT 366**

## Tauriainen, Andrew@Waterboards

---

**From:** Howard, Tom </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=HOWARD, TOM@WATERBO97BB8206-7061-4BF7-B503-158A6481C1EA139>  
**Sent:** Tuesday, April 21, 2015 3:40 PM  
**To:** Grober, Les@Waterboards; Evoy, Barbara@Waterboards  
**Cc:** O'Hagan, John@Waterboards  
**Subject:** RE: your SJ question  
**Attachments:** image001.png; image002.jpg

OK, do that. Thanks

---

**From:** Grober, Les@Waterboards  
**Sent:** Tuesday, April 21, 2015 3:39 PM  
**To:** Evoy, Barbara@Waterboards; Howard, Tom  
**Cc:** O'Hagan, John@Waterboards  
**Subject:** RE: your SJ question

John and I discussed further. Mosssdale makes more sense as an upstream boundary because, although there is a tidal effect there, there is not a flow reversal, similar to what happens at the I Street Bridge. Also, Mosssdale is just upstream of the head of Old River—any reverse flows on the SJR downstream of Mosssdale are likely directed down Old River. Although there is no tidal effect at Vernalis (which is why is used as the gage for inflow), it is a little too far upstream to use as an upstream boundary for tidal /reverse flow effects.

---

**From:** Evoy, Barbara@Waterboards  
**Sent:** Tuesday, April 21, 2015 3:06 PM  
**To:** Howard, Tom  
**Cc:** O'Hagan, John@Waterboards; Grober, Les@Waterboards  
**Subject:** your SJ question

The tidal influence zone ends somewhat downstream of Vernalis. How much downstream, Les is asking. John will include those south of Vernalis in the evaluation to see if more would be curtailed. He is also looking at the PODs to see how many in the “tween” zone may be post 1914 and how many might be pre-1914 so not relevant to this current curtailment.

Barbara L. Evoy  
Deputy Director, Water Rights  
State Water Resources Control Board  
916-341-5632



**BBID**  
**EXHIBIT 367**

## Tauriainen, Andrew@Waterboards

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**From:** Mrowka, Kathy@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=MROWKA, KATHY@WATERD1188F18-E359-4DA8-A3F2-FC48F57B907E63A>  
**Sent:** Monday, May 18, 2015 2:27 PM  
**To:** Trgovcich, Caren@Waterboards; Grober, Les@Waterboards; Evoy, Barbara@Waterboards  
**Cc:** O'Hagan, John@Waterboards; Grober, Les@Waterboards  
**Subject:** RE: Curtailment info  
**Attachments:** Tuolumne Supply-Demand Graph 2015-05-11.pdf; San Joaquin Basin Supply-Demand Graph 2015-05-11.pdf; Merced Supply-Demand Graph 2015-05-11.pdf; Stanislaus Supply-Demand Graph 2015-05-11.pdf; Draft Upper San Joaquin To Merced Supply-Demand Analysis 2015-05-18.pdf; Draft North SJ Basin Supply-Demand Analysis 2015-05-18.pdf; image005.png; image006.jpg

Here it is.

Attached are the current supply/demand charts for the San Joaquin Basin, and the Stanislaus, Merced, and Tuolumne rivers. Listed below are the rights junior to the red lines on the San Joaquin tributary graphs. If the major river basins are considered separately, these are the cutoff dates:

Merced River above Goodwin Dam – cutoff date is junior to 1857.

Stanislaus River above Crocker-Huffman Dam - cutoff date is junior to 1908.

Tuolumne River above La Grange Dam - cutoff date is junior to 1871.

During the meeting on curtailment of San Joaquin River pre-1914 rights, the parties asked that we run a separate model run with the upper San Joaquin assumed to have no hydraulic connectivity to the San Joaquin River at Merced. The graph (see Draft Upper San Joaquin to Merced graph) includes all rainfall events through 5-13. We are below the pre-1914 water supply now and should curtail all pre-1914s on the San Joaquin River mainstem above the Merced River. We also completed a North SJ Basin River supply graph (Draft North SJ Basin graph) which includes all rainfall events through 5-13. This graph includes the Stanislaus, Tuolumne, Merced, Mokelumne and Cosumnes Rivers and cuts off at the lowermost point where all these sources have joined the San Joaquin River. Staff does not yet have a common date for pre-1914 curtailment, if we curtail the basin upstream of the common point at one common date. The curtailment issue for Friday is whether you prefer curtailment at the common point, or the localized curtailments listed above. Also, should we curtail the mainstem San Joaquin River above Merced? The two new graphs will be distributed to the pre-1914 curtailment meeting participants. The meeting participants previously received the other graphs.

Of course, there is still the general graph for the San Joaquin River. It includes the Millerton supply and Exchange Contractors demand. (see San Joaquin Basin Supply-Demand Graph). This was last updated on the 11<sup>th</sup>.

Katherine Mrowka, Manager  
Enforcement Section  
Water Rights  
P.O. Box 2000  
Sacramento, CA 95814

916-341-5363



---

**From:** Trgovcich, Caren@Waterboards  
**Sent:** Monday, May 18, 2015 8:29 AM  
**To:** Grober, Les@Waterboards; Evoy, Barbara@Waterboards; Mrowka, Kathy@Waterboards  
**Cc:** O'Hagan, John@Waterboards  
**Subject:** RE: Curtailment info

Thanks...also, does the cooler weather and precipitation last week change the recommendations?

---

**From:** Grober, Les@Waterboards  
**Sent:** Monday, May 18, 2015 8:27 AM  
**To:** Trgovcich, Caren@Waterboards; Evoy, Barbara@Waterboards; Mrowka, Kathy@Waterboards  
**Cc:** O'Hagan, John@Waterboards  
**Subject:** RE: Curtailment info

Kathy,

Please send.

Thanks, Les

---

**From:** Trgovcich, Caren@Waterboards  
**Sent:** Monday, May 18, 2015 8:16 AM  
**To:** Grober, Les@Waterboards; Evoy, Barbara@Waterboards  
**Cc:** O'Hagan, John@Waterboards  
**Subject:** Curtailment info

Can one of you send me the handout that John had prepared providing the priorities for the next round of curtailments later this week?

*Caren Trgovcich*  
*Chief Deputy Director*  
*State Water Board*  
*(916) 341-5727*  
[ctrgovcich@waterboards.ca.gov](mailto:ctrgovcich@waterboards.ca.gov)

**BBID**  
**EXHIBIT 368**

## Tauriainen, Andrew@Waterboards

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**From:** Evoy, Barbara@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=EVOY, BARBARA@WATEROC556DE1-8FEA-4DD1-91A5-2BBA7A82D039430>  
**Sent:** Thursday, May 21, 2015 12:30 PM  
**To:** Grober, Les@Waterboards; Howard, Tom  
**Cc:** O'Hagan, John@Waterboards  
**Subject:** FW: 25 percent reduction program

The web appears to potentially be more tangled.

-----Original Message-----

**From:** Mrowka, Kathy@Waterboards  
**Sent:** Thursday, May 21, 2015 12:25 PM  
**To:** Evoy, Barbara@Waterboards  
**Cc:** O'Hagan, John@Waterboards; George, Michael@Waterboards  
**Subject:** 25 percent reduction program

I just met with Dan Kelly and Byron Bethany ID. The district wants to participate as a pre-1914. He will be asking Michael about it. Their priority date is 1914. They are at the SWP intake location. Mostly Sac water. Pre-1914 curtailment date now yet determined for that watershed.

They are on CDEC daily. Willing to cut 25 percent more than current use. Already down on use. Trying to swap with DWR for Oroville water after curtailment. Jerry Johns wants a 50 percent cut, same as Feather River contractors. BBID wants to get to end of June with water.

They want to cut now, to provide some of the pre-1914 pay back water to DWR prior to curtailment. Don't want to do 50 percent cut.

Told him he would have to talk to Michael about the program. I have no problem with crediting early reduction prior to curtailments, coupled with use of DWR water after curtailment. Of course, their goal is no curtailment by participating in program.

It may make sense to work out a special case exemption, to the extent they pre-load a swap of water with DWR and limit use after curtailment to that quantity.

Kathy Mrowka, Manager  
Complaints and Enforcement  
(916) 341-5363

Sent from my iPhone. Please pardon any typos.

**BBID**  
**EXHIBIT 369**

## Tauriainen, Andrew@Waterboards

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**From:** Grober, Les@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=GROBER, LES@WATERBO70C00AFE-C3A3-4DCB-8E6B-7C0EEC93F2C874D>  
**Sent:** Wednesday, May 27, 2015 10:45 AM  
**To:** O'Hagan, John@Waterboards  
**Subject:** FW: Delta Riparian and Pre-14 Demands  
**Attachments:** Delta\_daily\_data.xlsx

---

**From:** Ligare, Scott@Waterboards  
**Sent:** Wednesday, May 27, 2015 9:29 AM  
**To:** Grober, Les@Waterboards  
**Cc:** Yeazell, Jeffrey@Waterboards  
**Subject:** RE: Delta Riparian and Pre-14 Demands

I have attached the daily Delta data that I used. I used DAYFLOW through 9/13, USBR CVO reports for 10/13-4/15, and USBR forecasts from 5/15-9/15.

Let me know if you have any questions.

--Scott

---

**From:** Grober, Les@Waterboards  
**Sent:** Wednesday, May 27, 2015 9:02 AM  
**To:** Ligare, Scott@Waterboards  
**Subject:** FW: Delta Riparian and Pre-14 Demands

If you have handy, what are the monthly dayflow numbers? Is that what you used for the 2015 pie chart projected? If other, what was it?

---

**From:** O'Hagan, John@Waterboards  
**Sent:** Wednesday, May 27, 2015 8:59 AM  
**To:** Yeazell, Jeffrey@Waterboards; Mrowka, Kathy@Waterboards  
**Cc:** Grober, Les@Waterboards  
**Subject:** FW: Delta Riparian and Pre-14 Demands

Jeff,

Please check our number for June. It suggests a Delta Demand of over 5,000 cfs. Last year we had 3383 cfs for June? I added what I have for last year.

---

**From:** Yeazell, Jeffrey@Waterboards  
**Sent:** Wednesday, May 27, 2015 8:33 AM  
**To:** O'Hagan, John@Waterboards  
**Cc:** Mrowka, Kathy@Waterboards; Coats, Brian@Waterboards  
**Subject:** Delta Riparian and Pre-14 Demands

John,

These are the Delta Riparian and Pre-14 demands being used in the spreadsheets. I have verified they are the same in the three forthcoming graphs.

**Delta Senior Demands (Acre-Feet)**

	March	April	May	June	July	August	September
Riparian and Riparian+Pre-14	105,820	70,970	129,894	239,549	196,442	141,356	85,921
Pre-14 Only	15,940	20,315	35,203	62,677	46,704	35,296	17,651
<b>Total</b>	<b>121,760</b>	<b>91,284</b>	<b>165,097</b>	<b>302,226</b>	<b>243,145</b>	<b>176,651</b>	<b>103,572</b>
CFS	1980 cfs	1534 cfs	2685 cfs	5079 cfs	3954 cfs	2873	
cfs	1741 cfs	2014 cfs		2163 cfs	3383 cfs	3627	
cfs	2683 cfs	1399 cfs					

Regards,

Jeff

**BBID**  
**EXHIBIT 370**

**Cc:** Trgovcich, Caren@Waterboards  
**Subject:** FW: Curtailment Package

resending

---

**From:** Evoy, Barbara@Waterboards  
**Sent:** Wednesday, June 10, 2015 1:10 PM  
**To:** Howard, Tom  
**Cc:** Trgovcich, Caren@Waterboards; O'Hagan, John@Waterboards; Mrowka, Kathy@Waterboards; Grober, Les@Waterboards  
**Subject:** FW: Curtailment Package

Tom – attached is the full package of curtailment info. I believe you were intending to send the Press Release and the Pre-14 combined curtailment letter to Wade as a head up. We are ready to get the letter going as soon as you sign or give us the electronic approval. We can send tomorrow or Friday (the letter and press release are currently dated June 11). Your choice given the rain.

---

**From:** O'Hagan, John@Waterboards  
**Sent:** Wednesday, June 10, 2015 12:19 PM  
**To:** Evoy, Barbara@Waterboards  
**Cc:** Mrowka, Kathy@Waterboards; Evoy, Barbara@Waterboards  
**Subject:** Curtailment Package

Here are the documents for Tom

John O'Hagan  
Assistant Deputy Director, Water Rights  
State Water Resources Control Board  
916-341-5368



**BBID**  
**EXHIBIT 371**

## Tauriainen, Andrew@Waterboards

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**From:** Evoy, Barbara@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=EVOY, BARBARA@WATER0C556DE1-8FEA-4DD1-91A5-2BBA7A82D039430>  
**Sent:** Friday, June 12, 2015 2:14 PM  
**To:** Grober, Les@Waterboards; O'Hagan, John@Waterboards  
**Subject:** Caren asked us to respond to Mark

Caren is asking that we send Mark a note saying we can talk about it to him on Monday if we can't get to him today. Otherwise, John, please send him a note saying we did the analysis with his preferred return flow and the changed Sac demand.

---

**From:** Grober, Les@Waterboards  
**Sent:** Friday, June 12, 2015 1:39 PM  
**To:** O'Hagan, John@Waterboards  
**Cc:** Trgovcich, Caren@Waterboards; Evoy, Barbara@Waterboards  
**Subject:** demand

On call now with David Guy and Mark VCamp; Mark said that Sac demand is back up to the (incorrect) 50% demand that was used in previous versions of the curtailment calculations—otherwise said is improvement over prior.

**BBID**  
**EXHIBIT 372**

## Tauriainen, Andrew@Waterboards

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**From:** Evoy, Barbara@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=EVOY, BARBARA@WATER0C556DE1-8FEA-4DD1-91A5-2BBA7A82D039430>  
**Sent:** Tuesday, June 30, 2015 1:14 PM  
**To:** O'Hagan, John@Waterboards; Grober, Les@Waterboards; Ragazzi, Erin@Waterboards  
**Subject:** FW: CVP contact info.

Good grief. How has this gotten so convoluted? We have the TUCP, BBID pre-1914 curtailment, Mountain House HS (which they never applied for), transfer of stored water vs. natural flow and one of 2 power plants all mixed in.

---

**From:** Marshall, Paul@Energy  
**Sent:** Tuesday, June 30, 2015 11:09 AM  
**To:** Wetzell, Jeff@Waterboards; Ragazzi, Erin@Waterboards; Evoy, Barbara@Waterboards  
**Subject:** FW: CVP contact info.

See communication with BOR below. BBID may be using their M&I allocation for Mountain House. I can't get anyone at BBID to respond to my calls or e-mail for info on how they are using this supply.

**From:** Kiteck, Elizabeth [<mailto:ekiteck@usbr.gov>]  
**Sent:** Tuesday, June 30, 2015 11:00 AM  
**To:** Marshall, Paul@Energy  
**Cc:** [pfujitani@usbr.gov](mailto:pfujitani@usbr.gov); Bui, Tuan@DWR; Layton, Matthew@Energy  
**Subject:** Re: CVP contact info.

I'll let our contracts people know and have them get in touch with BBID.

On Tue, Jun 30, 2015 at 10:52 AM, Marshall, Paul@Energy <[Paul.Marshall@energy.ca.gov](mailto:Paul.Marshall@energy.ca.gov)> wrote:

Have you or your contracts people spoken to BBID about this? They are telling the power plant they will be cutoff tomorrow. Thanks

**From:** Kiteck, Elizabeth [<mailto:ekiteck@usbr.gov>]  
**Sent:** Tuesday, June 30, 2015 10:16 AM  
**To:** Marshall, Paul@Energy  
**Cc:** [pfujitani@usbr.gov](mailto:pfujitani@usbr.gov); Bui, Tuan@DWR  
**Subject:** Re: CVP contact info.

Hi Paul,

We heard from our contracting group and BBID does have a Public Health and Safety allocation this year for M&I use that will cover the power plant needs. At this time we do not anticipate any problems with supplying this water to them. Let us know if you need any other information from us.

Thanks,

Liz

On Tue, Jun 30, 2015 at 9:31 AM, Marshall, Paul@Energy <[Paul.Marshall@energy.ca.gov](mailto:Paul.Marshall@energy.ca.gov)> wrote:

Hi Paul,

Just checking in to see if your contracts folks have found anything that would control BBID's deliveries through the DMC.

I am currently working with water rights folks at SWRCB to figure out what they need from the state agencies to authorize this short term temporary delivery and what finding they can make for your use.

Thanks

**From:** Fujitani, Paul [<mailto:pfujitani@usbr.gov>]  
**Sent:** Monday, June 29, 2015 3:26 PM  
**To:** Marshall, Paul@Energy  
**Cc:** Bui, Tuan@DWR; [ekiteck@usbr.gov](mailto:ekiteck@usbr.gov)  
**Subject:** Re: CVP contact info.

I am on a conference call right now but hope to be done in about 15 minutes, if not sooner.

Paul

On Mon, Jun 29, 2015 at 3:18 PM, Marshall, Paul@Energy <[Paul.Marshall@energy.ca.gov](mailto:Paul.Marshall@energy.ca.gov)> wrote:

Yes, now is good. Please call.

**From:** Fujitani, Paul [<mailto:pfujitani@usbr.gov>]  
**Sent:** Monday, June 29, 2015 3:17 PM  
**To:** Marshall, Paul@Energy

**Cc:** Bui, Tuan@DWR; [ekiteck@usbr.gov](mailto:ekiteck@usbr.gov)  
**Subject:** Re: CVP contact info.

Hi Paul,

I think it might be better if we can discuss and clarify some items. If you are available, I can give you a call this afternoon before 4:00.

Thanks

Paul

On Mon, Jun 29, 2015 at 1:43 PM, Marshall, Paul@Energy <[Paul.Marshall@energy.ca.gov](mailto:Paul.Marshall@energy.ca.gov)> wrote:

Hi Paul and Liz,

We understand from Byron Bethany Irrigation District that they will cutoff deliveries of water from the Delta Mendota Canal on or about July 1, if the SWRCB approves the TUCP for temperature control. Can you explain why they would have to cutoff deliveries from the DMC?

BBID is the purveyor to the GWF Tracy Power Plant. GWF Tracy is a critical power plant that provides grid reliability in the area. They have a turnout on the DMC and they are being told they can no longer take water from that connection if the TUCP is approved.

The SWRCB has a process where an entity can get an exemption from the curtailments when they can show there is a significant health and safety need. If the SWRCB were to grant GWF Tracy an exemption to the curtailment for health and safety purposes would GWF Tracy be able to take water from the DMC?

If there is another process we need to go through with BOR to get an exemption and allow delivery from DMC or other federal sources please let me know asap. I recall at one time there was a proposal to pump water upstream from San Luis res. in the canal to meet some demand. Is that still on the Table?

This is a confidential request and I appreciate you keeping this amongst agencies for now. Our management is considering options for keeping the plant operating this summer and we were thinking this might be one way to do it.

Please call if it is better to discuss over the phone. Thanks in advance for your timely response.

Paul Marshall

915.654.4059

---

**From:** Bui, Tuan@DWR  
**Sent:** Monday, June 29, 2015 1:26 PM  
**To:** Marshall, Paul@Energy  
**Cc:** [pfujitani@usbr.gov](mailto:pfujitani@usbr.gov); [ekiteck@usbr.gov](mailto:ekiteck@usbr.gov); Bui, Tuan@DWR  
**Subject:** CVP contact info.

Hello Paul,

Paul Fujitani and Liz Kiteck of the Bureau of Reclamation could help or could point you in the right direction regarding the Contra Costa and South San Joaquin transfers.

-Tuan

=====

F. Tuan Bui, P.E.

Supervising Engineer, W.R.

CA. Department of Water Resources

Chief, Power Management & Optimization

916.574.2663 - [tbui@water.ca.gov](mailto:tbui@water.ca.gov)

=====

**BBID**  
**EXHIBIT 373**

**Tauriainen, Andrew@Waterboards**

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**From:** Mrowka, Kathy@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=MROWKA, KATHY@WATERD1188F18-E359-4DA8-A3F2-FC48F57B907E63A>  
**Sent:** Wednesday, July 01, 2015 8:34 AM  
**To:** Evoy, Barbara@Waterboards; O'Hagan, John@Waterboards; Grober, Les@Waterboards; Riddle, Diane@Waterboards; Ragazzi, Erin@Waterboards; Montgomery, Amanda@Waterboards  
**Subject:** June 29 Update on Status of Curtailment  
**Attachments:** Status of water right curtailments - June 29.docx; image005.png; image006.jpg

Katherine Mrowka, Manager  
Enforcement Section  
Water Rights  
P.O. Box 2000  
Sacramento, CA 95814

916-341-5363



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State Water Resources Control Board

**DIVISION OF WATER RIGHTS  
STATUS REPORT**

**TO:** KATHY MROWKA, MANAGER, ENFORCEMENT SECTION

**SUBJECT:** UPDATE ON CURTAILED WATER RIGHTS

**DATE:** JUNE 29, 2015

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- **Sacramento River Basin**
  - Curtailment of Post-14 rights went into effect on May 1, 2015, and expected to continue through the summer.
  - Curtailment of appropriative water rights with a priority date between 1903 and 1914 went into effect on June 12, 2015.
  
- **San Joaquin River Basin**
  - Curtailment of Post-14 rights went into effect on April 23, 2015, and expected to continue through the summer.
  - Curtailment of appropriative water rights with a priority date between 1903 and 1914 went into effect on June 12, 2015.
  - June 26, 2015: All remaining appropriative water rights in the Upper San Joaquin watershed with a priority date senior to 1903 curtailed.
  - June 26, 2015: Appropriative rights in the Merced watershed with a priority date between 1858 and 1902 curtailed.
  - June 26, 2015: Four appropriative rights in the Tuolumne River watershed curtailed.
  - Tributary-level evaluation of pre-14 rights is ongoing.
  
- **Eel River, Main Stem** – not curtailed as of June 15, 2015.
  - Current flow is over 35 cfs; total demand is 133 cfs during June. However, during July the total demand will be 53 cfs (9 cfs post-1914) and during August total demand will be 13 cfs (8 cfs post-1914). Staff will monitor future conditions to determine if curtailment is appropriate.
  
- **Eel River, Van Duzen** – not curtailed as of June 22, 2015.
  - Current flow is 20 cfs; demand is under 2 cfs during June. Curtailment not recommended at this time.

- **Russian River**
  - Upper Russian River – (as of 6/28/2015) Flow in the West Fork is 0.02 cfs and flow in Big Sulphur Creek is 1.3 cfs (representative of natural flows).
  - Lake Mendocino inflow/bypass is (not reported for the past three days) and storage release is (can't be calculated without infow). Flow at Healdsburg is 52 cfs (not a gaining stream).
  - Lake Mendocino storage is 53,635 AF (vs 47,152 last year) and outflow is 116 cfs (vs 123 last year). Projected October 1 storage is 40,000 AF (vs 31,000 last year).
  - Diverters of water under the 10K and 8K reservations under local conservation measures, and curtailment is not anticipated at this time.
  - Curtailment is not anticipated for Pre-1949 appropriators (including Pre-1914).
  - Curtailment of Post-1949 Non-Reservation Diverters may be necessary, pending analysis.
  - Curtailment of Main-Stem Riparian diverters may be necessary, pending analysis.
  
- **Scott River** - Curtailment initiated: April 23, 2015.
  - Water rights affected: All Decreed Surplus Class Rights, Post-1914 rights, and Priority class 2 water rights in Schedule D4.
  - The current flow is 27 cfs with a projected 10 cfs decrease this week. Staff is monitoring the conditions and the flow is well below the USFS instream flow right of 284 cfs for the month of June. The USFS instream flow right for July is 192 cfs. Curtailment will remain in effect until the Forest Service right is satisfied.
  
- **Deer Creek** - Curtailment period was from April 17 through June 3, 2015.
  - Curtailment may be required again starting October 15, 2015 if specific types of fish are present. A new order would be required to curtail water rights starting in October.
  - Water rights affected: Post-1914 rights (with limited exceptions) and other right holders required to provide specified fishery flows.
  
- **Antelope Creek** - Curtailment period was from April 3 through May 29, 2015.
  - Curtailment may be required again starting November 1, 2015 if specific types of fish are present. A new order would be required to curtail water rights starting in November.
  - Water rights affected: Post-1914 rights (with limited exceptions) and other right holders required to provide specified fishery flows.
  
- **Mill Creek (tributary of the Sacramento River)** - Voluntary drought agreements in effect through December 31, 2015.

**BBID**  
**EXHIBIT 374**

**Tauriainen, Andrew@Waterboards**

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**From:** Evoy, Barbara@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=EVOY, BARBARA@WATER0C556DE1-8FEA-4DD1-91A5-2BBA7A82D039430>  
**Sent:** Thursday, July 09, 2015 10:19 AM  
**To:** Wetzal, Jeff@Waterboards  
**Cc:** Ragazzi, Erin@Waterboards; Mrowka, Kathy@Waterboards  
**Subject:** FW: This Week's Curtailment - 3 Water Rights on the Stanislaus River  
**Attachments:** Stanislaus To San Joaquin Pre-14 Supply-Demand 2015-07-08.pdf; Merced To San Joaquin Pre-14 Supply-Demand 2015-07-08.pdf; Graph A.PDF; Graph B.PDF; image005.png; image006.jpg

There are two of the three that could have power implications. Could you work with Kathy to determine if there will be an impact that we need to pay attention to?

---

**From:** Mrowka, Kathy@Waterboards  
**Sent:** Thursday, July 09, 2015 8:52 AM  
**To:** Evoy, Barbara@Waterboards; O'Hagan, John@Waterboards; Trgovcich, Caren@Waterboards; Grober, Les@Waterboards  
**Subject:** This Week's Curtailment - 3 Water Rights on the Stanislaus River

Hi –

Due to some data issues (noted below) this week's curtailment is 3 water rights on the Stanislaus River.

Tom's Approval:

Ok

Sent from my iPad

On Jul 8, 2015, at 3:00 PM, Mrowka, Kathy@Waterboards <[Kathy.Mrowka@waterboards.ca.gov](mailto:Kathy.Mrowka@waterboards.ca.gov)> wrote:

Apparently, streamflows have been fluctuating in the American and Merced Rivers. We aren't sure if it is due to the thunderstorm activity, or simply slow reporting of data to DWR by Districts. The staff notes are below.

At this time, we are proposing curtailment on the Stanislaus River only due to this issue.

**Stanislaus and Merced River:**

Kathy,

Attached are the Stanislaus Merced River supply/demand graphs with current daily FNFs.

The Stanislaus River graph continues to support curtailment of Pre14 claims with 1886 and junior (through 1902) priority dates. The affected statement numbers/owners are:

**Stanislaus – 1886 to 1902**

APP_ID	Owner	PRE-14 PRIORITY	POWER_ONLY
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S000999	UTICA POWER AUTHORITY	1898	NO
S009036	PACIFIC GAS AND ELECTRIC COMPANY	1897	NO
S021672	DEL ORO WATER COMPANY	1897	NO

In the Merced River watershed, the daily FNFs have been fluctuating between 0 and 149 cfs since July 1, crossing the Riparian/Pre-14 demand dividing line on an almost-daily basis. All of the Pre-14 demand with a priority date of 1857 and junior is claimed by Merced Irrigation District, which is the sole remaining uncurtailed Pre-14 claim in the Merced watershed. Because the data shows that some of MID's demand can be satisfied intermittently, curtailment of this Pre-14 claim should be postponed until a more stable daily FNF trend is observed.

Regards,

Jeff Yeazell, P.E.

**American River:**

Kathy,

After checking the daily FNFs at Folsom Dam this morning, I noticed they were considerably different than what were posted on CDEC yesterday. I've attached two graphs. Graph A shows the daily FNFs as they appeared on the CDEC website yesterday, and Graph B shows the daily FNFs as they appeared this morning. In both cases, the data from June 21 (when the values began changing) through July 5 were flagged as estimates, indicating that reporting by the operators is not complete.

In general, the FNFs have increased for June 21 through June 30 to levels that may not warrant curtailment of additional Pre-14 claims. Because of the steep drop in FNF from 230 cfs on June 30 to 36 cfs on July 1, then remaining an 'estimated' constant 36 cfs through July 5, we may want to consider postponing Pre-14 curtailments until the daily FNF values are more reliable.

Regards,

Jeff Yeazell, P.E.

Katherine Mrowka, Manager  
 Enforcement Section  
 Water Rights  
 P.O. Box 2000  
 Sacramento, CA 95814

Katherine Mrowka, Manager  
 Enforcement Section  
 Water Rights  
 P.O. Box 2000  
 Sacramento, CA 95814

916-341-5363

**BBID**  
**EXHIBIT 375**

**Tauriainen, Andrew@Waterboards**

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**From:** Mrowka, Kathy@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=MROWKA, KATHY@WATERD1188F18-E359-4DA8-A3F2-FC48F57B907E63A>  
**Sent:** Monday, July 20, 2015 4:03 PM  
**To:** Evoy, Barbara@Waterboards; O'Hagan, John@Waterboards; Riddle, Diane@Waterboards; Grober, Les@Waterboards; Montgomery, Amanda@Waterboards; Burton, Bruce@Waterboards; Forbes, Cindy@Waterboards; Ragazzi, Erin@Waterboards  
**Subject:** Weekly Curtailment Updates  
**Attachments:** Status of water right curtailments - July 20.docx; image001.png; image002.jpg

Katherine Mrowka, Manager  
Enforcement Section  
Water Rights  
P.O. Box 2000  
Sacramento, CA 95814

916-341-5363



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State Water Resources Control Board

**DIVISION OF WATER RIGHTS  
STATUS REPORT**

**TO:** KATHY MROWKA, MANAGER, ENFORCEMENT SECTION

**SUBJECT:** UPDATE ON CURTAILED WATER RIGHTS

**DATE:** JULY 20, 2015

---

- **Sacramento River Basin**
  - Curtailment of Post-14 rights went into effect on May 1, 2015, and expected to continue through the summer.
  - Curtailment of appropriative water rights with a priority date between 1903 and 1914 went into effect on June 12, 2015.
  - Tributary-level evaluation of pre-14 rights is ongoing.
  
- **San Joaquin River Basin**
  - Curtailment of Post-14 rights went into effect on April 23, 2015, and expected to continue through the summer.
  - Curtailment of appropriative water rights with a priority date between 1903 and 1914 went into effect on June 12, 2015.
  - June 26, 2015: All remaining appropriative water rights in the Upper San Joaquin watershed with a priority date senior to 1903 curtailed.
  - June 26, 2015: Appropriative rights in the Merced watershed with a priority date between 1858 and 1902 curtailed.
  - June 26, 2015: Four appropriative rights in the Tuolumne River watershed curtailed.
  - Tributary-level evaluation of pre-14 rights is ongoing.
  
- **Eel River, Main Stem** – not curtailed as of July 7, 2015.
  - Current flow is just under 15 cfs; total demand is 45 cfs during July. However, during August total demand will be 13 cfs (8 cfs post-1914). Eel River would need to stabilize at current flow to satisfy total demand in August. However, main stem shows a consistent decrease in flow since June. Staff will monitor future conditions to determine if curtailment is appropriate.
  
- **Eel River, Van Duzen** – not curtailed as of July 7, 2015.

- Current flow is 15 cfs; total demand is under 2 cfs during July. Curtailment not recommended at this time.
- **Russian River**
  - Review of Drought Water Rights Allocation Tool (DWRAT) being made this week. Comparison will be made to evaluation methods employed during 2014 curtailment. Additional information on possible curtailment scenarios will be available next week.
- **Scott River** - Curtailment initiated: April 23, 2015.
  - Water rights affected: All Decreed Surplus Class Rights, Post-1914 rights, and Priority class 2 water rights in Schedule D4.
  - The current flow is 11 cfs. Staff is monitoring the conditions and the flow is well below the USFS instream flow right of 192 cfs for the month of July. Curtailment will remain in effect until the Forest Service right is satisfied.
- **Deer Creek** - Curtailment period was from April 17 through June 3, 2015.
  - Curtailment may be required again starting October 15, 2015 if specific types of fish are present. A new order would be required to curtail water rights starting in October.
  - Water rights affected: Post-1914 rights (with limited exceptions) and other right holders required to provide specified fishery flows.
- **Antelope Creek** - Curtailment period was from April 3 through May 29, 2015.
  - Curtailment may be required again starting November 1, 2015 if specific types of fish are present. A new order would be required to curtail water rights starting in November.
  - Water rights affected: Post-1914 rights (with limited exceptions) and other right holders required to provide specified fishery flows.
- **Mill Creek (tributary of the Sacramento River)** - Voluntary drought agreements in effect through December 31, 2015.

**BBID**  
**EXHIBIT 376**

**Tauriainen, Andrew@Waterboards**

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**From:** Evoy, Barbara@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=EVOY, BARBARA@WATEROC556DE1-8FEA-4DD1-91A5-2BBA7A82D039430>  
**Sent:** Monday, July 27, 2015 5:38 PM  
**To:** Grober, Les@Waterboards; Riddle, Diane@Waterboards; Ragazzi, Erin@Waterboards; O'Hagan, John@Waterboards; Mrowka, Kathy@Waterboards; McFarland, Scott@Waterboards; Montgomery, Amanda@Waterboards  
**Subject:** FW: WSID, et al. v. CSWRCB, et al. - Sacramento County Superior Court - Case No. 34-2015-80002121  
**Attachments:** WSID - REPLY TO RESPONDENT CSWRCB'S OPPOSITION RE ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE.pdf; WSID - DECLARATION OF KARNA E. HARRIGFELD IN SUPPORT OF GRANTING PRELIMINARY INJUNCTION.pdf; WSID - 15 07 22 Woods SDWA and CDWA reply to SWRCB opposition (2).pdf; WSID - 15 07 22 Woods CDWA and SDWA response to SWRCB evidentiary objections (2).pdf; WSID - PROOF OF SERVICE.pdf  
**Importance:** High

As discussed in the Litigation update meeting today

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**From:** Sawyer, Andy@Waterboards  
**Sent:** Monday, July 27, 2015 1:51 PM  
**To:** Evoy, Barbara@Waterboards  
**Subject:** FW: WSID, et al. v. CSWRCB, et al. - Sacramento County Superior Court - Case No. 34-2015-80002121  
**Importance:** High

Attached are the brief's for the West Side ID preliminary injunction motion

=====  
Andrew H. Sawyer, Assistant Chief Counsel  
California State Water Resources Control Board  
1001 I Street, 22nd Floor  
Sacramento, CA 95814-2828  
phone: (916) 341-5191  
fax: (916) 341-5199  
e-mail: [asawyer@waterboards.ca.gov](mailto:asawyer@waterboards.ca.gov)  
=====

**BBID**  
**EXHIBIT 377**

## Tauriainen, Andrew@Waterboards

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**From:** O'Hagan, John@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=O'HAGAN, JOHN@WATER7B72A79A-DD76-4B3C-B470-A3BF3B5BCDD7939>  
**Sent:** Tuesday, September 15, 2015 9:10 AM  
**To:** Grober, Les@Waterboards; Howard, Tom@Waterboards; Mrowka, Kathy@Waterboards; Evoy, Barbara@Waterboards  
**Cc:** Coats, Brian@Waterboards; Riddle, Diane@Waterboards  
**Subject:** RE: Lifting of Curtailments  
**Attachments:** image001.png; image002.jpg

Les, with decrease in releases, this may affect Term 91. Look at conditions up to September 11th:  
[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/analysis/docs/term91graph.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/analysis/docs/term91graph.pdf).

---

**From:** Grober, Les@Waterboards  
**Sent:** Tuesday, September 15, 2015 8:56 AM  
**To:** Howard, Tom@Waterboards; Mrowka, Kathy@Waterboards; O'Hagan, John@Waterboards; Evoy, Barbara@Waterboards  
**Cc:** Coats, Brian@Waterboards; Riddle, Diane@Waterboards  
**Subject:** RE: Lifting of Curtailments

Just so everyone has the same info...

In response to concerns by us and fish agencies that earlier than predicted gate changes in Shasta may mean that USBR is losing temperature control earlier than just recently modeled, USBR just started the first of what could be several decreases in releases from Shasta. At 1am today USBR decreased releases from Keswick from 7200 to 7000 cfs. There may be additional 200 cfs per day release reductions again tonight and tomorrow, bringing releases down to about 6600 cfs by Thursday.

Delta outflow is around 3000 cfs, and combined state and federal exports were around 2600 cfs yesterday, with plan to go down to 2300 cfs tomorrow; with these Keswick reductions, however, exports may need to be reduced further.

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**From:** Howard, Tom@Waterboards  
**Sent:** Tuesday, September 15, 2015 8:26 AM  
**To:** Mrowka, Kathy@Waterboards; O'Hagan, John@Waterboards; Evoy, Barbara@Waterboards  
**Cc:** Coats, Brian@Waterboards; Grober, Les@Waterboards; Riddle, Diane@Waterboards  
**Subject:** RE: Lifting of Curtailments

Kathy, hold off for today while we see what is going on with Shasta. Discuss with me on Wednesday.

---

**From:** Mrowka, Kathy@Waterboards  
**Sent:** Monday, September 14, 2015 4:54 PM  
**To:** O'Hagan, John@Waterboards; Evoy, Barbara@Waterboards; Howard, Tom@Waterboards  
**Cc:** Coats, Brian@Waterboards  
**Subject:** Lifting of Curtailments

The curtailment team is recommending limited lifting of curtailment for pre-1914 rights with a priority of 1903 or later in the Sacramento River, Feather River and Delta watersheds. Lifting is not recommended on the Yuba River, American

River and San Joaquin River watershed (all streams) excluding the Delta. Lifting is done through lyrics notification only. The proposed lyrics is attached.

Staff notes from Monday:

At this time, release of the Yuba and American areas is not warranted due to the full natural flows recently touching zero.

Additional staff notes from Friday:

Attached are the updated Sacramento River supply/demand graphs incorporating the recent monthly informational order data.

For August 2015, the reported demand data is 70% of the 2014 reported demand. June and July demands averaged out to 85% of their respective 2014 months. Given reduced irrigation demands going forward, using a 70% reduction factor for September and October is more appropriate than the peak irrigation months factor of 85%. Applying a 70% factor to the 2014 demand data for September and October results in a scenario where releasing all pre-1914s in the Sacramento and Delta (North, Central & South) is viable.

The proportional demand percentage for September, which is the portion of the total Delta demand allocated to the Sacramento watershed's analysis is 99.4%. For October, since we don't have a DWR forecast yet (new water year), we used last year's actual full natural flows and the percentage is 96.1%. Due to the high percentages, we can base our release analysis on the proportional graph which includes the entire Delta.

In the attached graphs, the adjusted total Senior demand is the solid green line for past months and hashed for future months. We did not project an adjusted 1902 demand line based on the new adjusted demands due to making the graph appear busy; the adjusted 1902 demands would of course be lower than the green lines.

The daily FNF trend (using August data since recent daily FNF data is subject to revision) would be above the total adjusted senior demand line for both the North Delta and Prorated Delta graph variants.

The graph's FNF data are current through September 7<sup>th</sup>. Folsom is the only holdout through the 9<sup>th</sup> but Bend Bridge FNF on the 9<sup>th</sup> is 2,000 acre-feet above the 7<sup>th</sup> value and Oroville another 600 acre-feet which would push the daily FNF line up around 1,300 cfs; well into the release zone. Monday's update which will hopefully have the Folsom holdout will be much more supportive.

Katherine Mrowka, Manager  
Enforcement Section  
Water Rights  
P.O. Box 2000  
Sacramento, CA 95814

**BBID**  
**EXHIBIT 378**

## Tauriainen, Andrew@Waterboards

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**From:** Coats, Brian@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=COATS, BRIAN@WATERBBBDDE385-DD05-476A-BC5C-F251692B0BEA11F>  
**Sent:** Thursday, September 17, 2015 1:38 PM  
**To:** O'Hagan, John@Waterboards  
**Cc:** Mrowka, Kathy@Waterboards  
**Subject:** FW: Lifting of Curtailments  
**Attachments:** image001.png; image002.jpg; American To Sacramento Pre-14 Release Evaluation 2015-09-16.pdf; Feather To Sacramento Pre-14 Release Evaluation 2015-09-16.pdf; Sacramento + Proportional Delta PRE-14 Release Evaluation 2015-09-16.pdf; Yuba To Feather Pre-14 Release Evaluation 2015-09-16.pdf

Here are the graphs Jeff prepared yesterday afternoon. On the Sacramento + proportional Delta graph, ignoring the recent five-day FNF data that is subject to revision, if you project the FNF supply into September, the lifting of all pre-1914s is supported with the reduced total senior demand as provided by the monthly informational order estimates.

While you could use the recent FNF data to justify release without the reduced demands, especially since Bend Bridge and Oroville are not often revised downwards, stating that we are using the monthly informational order demands would be good PR as well.

Brian

---

**From:** Trgovcich, Caren@Waterboards  
**Sent:** Thursday, September 17, 2015 1:28 PM  
**To:** Moran, Timothy@Waterboards; O'Hagan, John@Waterboards; Coats, Brian@Waterboards; Mrowka, Kathy@Waterboards; Evoy, Barbara@Waterboards  
**Cc:** Yeazell, Jeffrey@Waterboards; Grober, Les@Waterboards  
**Subject:** RE: Lifting of Curtailments

Tim – check the shorter version of the title that I sent earlier and see if that works for you. In the 3rd paragraph of the release, I suggest deleting the last sentence. While projections were provided in response to the informational order, it is my understanding that the projections are not what is being relied upon for this decision. John will correct me if this is wrong.

CT

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**From:** Moran, Timothy@Waterboards  
**Sent:** Thursday, September 17, 2015 1:22 PM  
**To:** O'Hagan, John@Waterboards; Coats, Brian@Waterboards; Mrowka, Kathy@Waterboards; Trgovcich, Caren@Waterboards; Evoy, Barbara@Waterboards  
**Cc:** Yeazell, Jeffrey@Waterboards; Grober, Les@Waterboards  
**Subject:** RE: Lifting of Curtailments

Here is the press release with language added in the first few graphs to address Alex's concerns. I kept the "should."

---

**From:** O'Hagan, John@Waterboards  
**Sent:** Thursday, September 17, 2015 12:58 PM  
**To:** Coats, Brian@Waterboards; Mrowka, Kathy@Waterboards; Moran, Timothy@Waterboards; Trgovcich,

Caren@Waterboards; Evoy, Barbara@Waterboards  
**Cc:** Yeazell, Jeffrey@Waterboards; Grober, Les@Waterboards  
**Subject:** RE: Lifting of Curtailments

Because of the Notice issue and it not being an order, we should leave "should".

I spoke with Paul F. of Bureau and informed him of the lifting. Trying to connect with DWR.

---

**From:** Coats, Brian@Waterboards  
**Sent:** Thursday, September 17, 2015 12:30 PM  
**To:** O'Hagan, John@Waterboards; Mrowka, Kathy@Waterboards; Moran, Timothy@Waterboards; Trgovcich, Caren@Waterboards; Evoy, Barbara@Waterboards  
**Cc:** Yeazell, Jeffrey@Waterboards  
**Subject:** RE: Lifting of Curtailments

Attached is the list. I am having Jeff work on a map of the released area to attach as page 6 as I know people will ask for it due to the Yuba and American River exclusions.

Total number of statements: 238  
Total number of unique holders: 88

Suggested edit to the press release to address the use of the word "should"

### Background

California water rights law is based on seniority. In dry years, when there isn't enough water in the system to serve all water right holders, those with more junior rights should stop diverting water from rivers and streams so the available water can be used by more senior right holders.

California water rights law is based on seniority. In dry years, when there isn't enough water in the system to serve all water right holders, those with more junior rights may be notified that water is not available at their priority of right due to senior priority water right demand.

Brian

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**From:** O'Hagan, John@Waterboards  
**Sent:** Thursday, September 17, 2015 12:09 PM  
**To:** Mrowka, Kathy@Waterboards; Coats, Brian@Waterboards; Moran, Timothy@Waterboards; Trgovcich, Caren@Waterboards; Evoy, Barbara@Waterboards  
**Subject:** RE: Lifting of Curtailments

Attached are the lyrics and press release. I edited the lyrics to make it consistent as possible with Caren's last edits to press release. Brian we need the attached list of water rights and owners being lifted.

---

**From:** Mrowka, Kathy@Waterboards  
**Sent:** Thursday, September 17, 2015 9:32 AM  
**To:** O'Hagan, John@Waterboards  
**Subject:** Lifting of Curtailments

Caren had provided edited versions of both the press release and the lyrics. See attached.

**BBID**  
**EXHIBIT 379**

~~FILED~~ / ENDORSED  
 JUL 23 2015  
 By E. Higginbotham, Deputy Clerk

Exempt from Filing Fees  
 Pursuant to Government  
 Code Section 6103

1 STEVEN A. HERUM – SBN: 90462  
 2 JEANNE M. ZOLEZZI – SBN: 121282  
 3 KARNA E. HARRIGFELD – SBN: 162824  
 4 HERUM\CRABTREE\SUNTAG  
 5 A California Professional Corporation  
 6 5757 Pacific Avenue, Suite 222  
 7 Stockton, CA 95207  
 8 Telephone: (209) 472-7700

9 Attorneys for Petitioner  
 10 THE WEST SIDE IRRIGATION DISTRICT

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 12 IN AND FOR THE COUNTY OF SACRAMENTO

13 THE WEST SIDE IRRIGATION DISTRICT;  
 14 CENTRAL DELTA WATER AGENCY;  
 15 SOUTH DELTA WATER AGENCY; and  
 16 WOODS IRRIGATION COMPANY,

17 Petitioners/Plaintiffs,

18 vs.

19 CALIFORNIA STATE WATER  
 20 RESOURCES CONTROL BOARD;  
 21 THOMAS HOWARD, EXECUTIVE  
 22 DIRECTOR OF CALIFORNIA STATE  
 23 WATER RESOURCES CONTROL BOARD;  
 24 and DOES 1 THROUGH 100, INCLUSIVE.

25 Respondents/Defendants.

Case No.: 34-2015-80002121  
 [PROPOSED] ORDER PARTIALLY  
 GRANTING PETITIONERS' EX PARTE  
 APPLICATION FOR TEMPORARY  
 RESTRAINING ORDER AND ISSUING AN  
 ORDER TO SHOW CAUSE AS TO WHY A  
 PRELIMINARY INJUNCTION SHOULD  
 NOT BE GRANTED

Petition Filed: June 29, 2015  
 Hon. Shelleyanne W. L. Chang

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BY FAX

33 On July 8, 2015, Petitioners/Plaintiffs', The West Side Irrigation District, Central Delta  
 34 Water Agency ("CDWA") and South Delta Water Agency ("SDWA") (collectively,  
 35 "Petitioners"), Ex Parte Application Seeking a Stay or Temporary Restraining Order / Order to

HERUM\CRABTREE\SUNTAG  
 472-7700

[PROPOSED] ORDER GRANTING PETITIONERS' EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND  
 ISSUING AN ORDER TO SHOW CAUSE AS TO WHY A PRELIMINARY INJUNCTION SHOULD NOT BE GRANTED

1 Show Cause concerning the May 1, 2015 and June 12, 2015 Curtailment Letters<sup>1</sup> issued by  
2 Respondents/Defendants, the California State Water Resources Control Board and through its  
3 Executive Director, Thomas Howard (collectively, "Respondents"), came on for ex parte hearing  
4 in the above-referenced Court before the Honorable Judge Shelleyanne W. L. Chang, Judge  
5 Presiding.

6 Steven A. Herum, Jennifer L. Spaletta and Dean Ruiz appeared for Petitioners/Plaintiffs  
7 and Matthew Bullock and Clifford Lee appeared for Respondents/Defendants at the Ex Parte  
8 Hearing. The parties submitted moving and opposing papers on an ex parte basis shortly before  
9 the hearing. All parties had the opportunity to present oral arguments concerning the issues  
10 raised in the moving and opposing papers.

11 Having considered the moving and opposing papers and having considered the oral  
12 arguments presented by the parties regarding the ex parte application for stay or temporary  
13 restraining order, and good cause having been shown, the **COURT FINDS AS FOLLOWS:**

- 14 1. The Curtailment Letters are properly subject to a judicial determination of whether they  
15 violate the Petitioners' due process rights such that a temporary restraining order/order to  
16 show cause should issue.<sup>2</sup>
- 17 2. Although a petition for reconsideration filed by West Side Irrigation District is pending  
18 concerning the May Curtailment Letter, the Court finds this is a situation where the  
19 pursuit of the administrative remedy would result in irreparable harm absent a temporary  
20 restraining order. (See *People ex rel. DuFauchard v. U.S. Financial Management, Inc.*

21  
22 <sup>1</sup> The May 1, 2015 Curtailment Letter is titled "NOTICE OF UNAVAILABILITY OF WATER  
23 AND IMMEDIATE CURTAILMENT" (hereinafter "May Curtailment Letter"). The June 12,  
24 2015 Curtailment Letter is titled "NOTICE OF UNAVAILABILITY OF WATER AND NEED  
25 FOR IMMEDIATE CURTAILMENT" (hereinafter "June Curtailment Letter"). Collectively, the  
26 May 1, 2015 Curtailment Letter and the June 12, 2015 Curtailment Letter are entitled  
27 "Curtailment Letters."

28 <sup>2</sup> Petitioners have filed a petition for reconsideration pursuant to California Water Code section  
1126(b) which petition is still pending before the Water Resources Control Board and for which  
the 90-day period for reconsideration has not yet expired. (See Petition, ¶ 21; Wat. Code § 1122.)  
The Court declines to interfere in these administrative proceedings, and consequently in no way  
stays the furtherance of that petition in accordance with the Water Code. The Court agrees that in  
light of the pending reconsideration petition, this matter is not subject to a Civil Code section  
1094.5, subdivision (g) stay.

1 (2009) 169 Cal.App.4th 1502, 1512) (citing *Public Employment Relations Bd. v. Superior*  
2 *Court* (1993) 13 Cal.App.4th 1816, 1827). Petitioners' belief that they must stop  
3 diverting water, not because to do so would be a legal violation but merely a violation of  
4 the May Curtailment Letter, will result in irreparable harm to their crops while they await  
5 a decision on the petition for reconsideration. (Decl. of Jack Alvarez, ¶¶ 7, 8, 11.)  
6 Consequently, Petitioners will be irreparably harmed should they have to wait for final  
7 resolution of the administrative process before obtaining relief from the immediate  
8 mandate the May Curtailment Letter appears to impose outside of the statutory processes  
9 provided by the Water Code.

- 10 3. The Court further finds, for the reasons stated below, that the issuance of the Curtailment  
11 Letters violated Petitioners' Due Process rights. Every day the Letters remains in their  
12 current form constitutes a violation of those constitutional rights. Accordingly, it is  
13 proper for this Court to issue a temporary restraining order while the administrative  
14 process is ongoing.
- 15 4. With regard to the June Curtailment Letter, the Court liberally construes the allegations  
16 of the Petition For Writ of Administrative Mandate, as it must, and finds that for purposes  
17 of this *ex parte* application, Petitioners CDWA and SDWA have adequately pled that  
18 certain of their landowners exercise pre-1914 appropriative and/or permit licenses rights  
19 that are subject to the directives given in the June Letter. (Petition, ¶13, 14.)  
20 Consequently, Petitioners CDWA and SDWA have standing to bring the instant  
21 application concerning the June Curtailment Letter.
- 22 5. The Court finds the Curtailment Letters are coercive in nature and go beyond the  
23 "informational" purpose the Board claims prevents a stay. Consequently, Petitioners are  
24 likely to succeed on the merits. As in *Duarte Nursery, Inc. v. United States Corps of*  
25 *Engineers* (2014) 17 F.Supp.3d 1013 (*Duarte*), even though the Curtailment Letters are  
26 not enforceable on their own and there are no separate penalties for violating them, the  
27 language used in the Curtailment Letters results in a "comman[d] by the...[g]overnment  
28 to stop [water diverting] activities." (*Duarte*, 17 F.Supp.3d. at 1018.) It is not a

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suggestion for “voluntary cessation of activities,” but instead requires Petitioners to “immediately stop diverting water.” (*Id.* at 1019; Pet. exh. B.)

- 6. Respondents argue *Duarte* is distinguishable because it involved a single letter sent to a single rights-holder, and provided that the Army Corps of Engineers had already determined that a violation of the Clean Water Act had occurred. (*Duarte*, 17 F.Supp.3d at 1015.) Respondents contend the challenged Curtailment letters are form letters being sent to hundreds of appropriators, and are merely informational with no pre-determination that any individual rights-holder has violated the law.
- 7. While all parties acknowledge the Curtailment Letters were sent to more than one appropriator, the letters provided to the Court are addressed to an individual company, and identify a specific claim of rights at issue. The Curtailment Letters further declare and determine that the recipient is not entitled to divert water because that water is necessary to meet senior water rights holders, thus making a determination of the recipient’s water rights priority. (Pet., exh. B, ¶2.) By including this specific information, the Curtailment Letters appear not to be generalized notices, but instead a specific adjudication and command with respect to the particular rights holder.
- 8. Further, nothing in *Duarte* limits its holding to an instance involving only one notice. The *Duarte* court’s focus was on the fact that nothing in the letter notified “plaintiffs that the Corps could not take action based upon the CDO alone.” (*Duarte*, 17 F.Supp.3d at 1022.) The same is true in this situation, as the Curtailment Letters indicate the recipient must “immediately stop diverting water” and do not clearly state the letter is merely informational, without any legal force or effect.
- 9. The Curtailment Letters also require recipients to “document receipt of this notice by completing an online Curtailment Certification Form (Form) within seven days. The Form confirms your cessation of diversion under the specific pre-1914 claim of right. Completion of the Form is mandatory...” Nowhere in this language do the Curtailment Letters assert that Petitioners are free to ignore the directive to cease diverting water or

1 that this directive is merely a suggestion.<sup>3</sup> At the hearing on this matter, Respondents  
2 acknowledged that the Form requires diverters to sign under penalty of perjury that they  
3 are no longer diverting water.

4 10. Although the Curtailment Letters do not state that the Board has made a specific  
5 determination that the particular recipient has already engaged in illegal conduct, the  
6 letters plainly state that the recipient must “immediately stop diverting water” because  
7 there is insufficient water for the diverter to continue diverting and that the only action  
8 available is to sign the compliance certification that “confirms your cessation of diversion  
9 under the specific pre-1914 claim of right.” (Pet., exh. B.)<sup>4</sup> As in *Duarte*, this strong  
10 directive implicates a pre-determination as to the availability of water pursuant to the  
11 recipient’s appropriation rights. The Board, “did not ‘notify’ plaintiffs they were  
12 operating in violation of the law, it commanded plaintiffs to stop their activities.”  
13 (*Duarte*, 17 F.Supp.3d at 1023.)

14 11. At oral argument, Respondents argued that because the Curtailment Letters did not  
15 expand or alter Petitioners’ civil liability for water diversions and are merely  
16 “informational documents”, a temporary restraining order should not issue. Respondents’  
17 argument is not only misguided, it is also inaccurate.

18 12. The focus is not whether the Petitioners’ legal exposure remains unchanged or not, but  
19 rather whether the Curtailment Letters could be reasonably interpreted to be an order or  
20 command by the government, not merely a suggestion or request for voluntary cessation  
21 of activities. (*Duarte*, 17 F.Supp.3d at 1020.) Moreover, contrary to Respondents’  
22 assertions, the Curtailment Letters have altered Petitioners’ legal position. The  
23 Curtailment Letters state that even if there is available water for the water user, said water

24  
25 <sup>3</sup> This is similar to *Phelps v. State Water Resources Control Board* (2007) 157 Cal.App.4th 89,  
26 where the Court held plaintiffs were aggrieved by a curtailment notice within the meaning of  
27 section 1126(b) because it “required plaintiffs to immediately discontinue diversion of water  
under their licenses.” Although *Phelps* involved only one notice, the implication of the language  
of the letters is the same as in this case.

28 <sup>4</sup> In *Duarte* the Court noted that the assertion that a violation has already occurred, by itself, is  
insufficient to satisfy the ripeness requirement. A letter or notice must also threaten  
consequences for failure to take certain action, as it does here. (*Duarte*, 17 F.Supp.3d at 1025.)

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ATTORNEYS

1 is dedicated for senior water rights' holders needs, conclude that the recipient no longer  
2 has any legal right to said water, and orders the recipient to "immediately stop diverting  
3 water..." Indeed, the Curtailment Letters appear to alter Petitioners' civil liability as the  
4 Board has apparently concluded without hearing or notice that Petitioners are no longer  
5 entitled to divert water for their needs.

6 13. As the court in *Duarte* stated, "If the [Letters] were simply a 'notification' to plaintiffs,  
7 then it should have said so, rather than clothing itself as an 'order' which carried with it  
8 the authority to 'prohibit' the plaintiffs from continuing their activities." (*Duarte*, 17  
9 F.Supp.3d at 1020.) The Court recognizes, and Respondents admit, that the Curtailment  
10 Letters do not subject Petitioners to any additional liability or penalties above that which  
11 they may already be subjected to due to the extreme drought conditions California is  
12 currently experiencing. However, the Curtailment Letters represent that the Board has  
13 already adjudicated that the recipients are no longer entitled to divert water and that any  
14 future diversions would be improper and a trespass ["This Form confirms your cessation  
15 of diversion under the specific post-1914 water right... Completion of the form is  
16 mandatory to avoid unnecessary enforcement proceedings"].

17 14. Respondents are free to provide truly informational notices to water diverters of the  
18 nature of the drought and the Board's right to initiate Water Code section 1831 or 1052  
19 proceedings. Respondents are also free to initiate inquiries with diverters as to whether  
20 they have alternate water sources and to otherwise exercise their statutory enforcement  
21 authority under the Water Code, including investigation and instituting any actions for  
22 trespass. To be clear, Respondents are free to exercise their statutory authority to enforce  
23 the Water Code as to any water user, including these Petitioners, if it deems them to be in  
24 violation of any provisions of the Water Code, so long as the bases for said action are not  
25 the Curtailment Letters.

26 15. However, the language of the Curtailment Letters goes beyond informational and is  
27 instead coercive such that a recipient is likely to believe they are no longer allowed to  
28 divert. This belief is not because such a diversion would be a trespass or other legal

1 violation, but because the Board has already declared in the Curtailment Letters that it  
2 has made a determination that they are no longer entitled to divert under their  
3 appropriate water rights, without any sort of pre-deprivation hearing. Respondents do  
4 not challenge Petitioners' assertion that any cessation of water diversion done in response  
5 to the Curtailment Letters, not as a result of an unavailability of legally divertible water,  
6 would cause a serious hardship to Petitioners. This is an issue ripe for judicial  
7 intervention and the Court concludes that the Curtailment Letters as presently drafted  
8 constitute a violation of the due process rights of the Petitioners.<sup>5</sup>

9 16. The Curtailment Letters, including the requirement that recipients sign a compliance  
10 certification confirming cessation of diversion, result in a taking of Petitioners' property  
11 rights without a pre-deprivation hearing, in violation of Petitioners' Due Process Rights.

12 Based on the foregoing, the **COURT HEREBY ORDERS AS FOLLOWS:**

13  
14 (1) Petitioners' ex parte application for a temporary restraining order and an order to show  
15 cause as to why a preliminary injunction should not issue requiring the Board to issue a  
16 revised letter/notice that is informational in nature are **HEREBY GRANTED.**

17 (2) A temporary restraining order shall issue staying or prohibiting Respondents/ Defendants  
18 State Water Resources Control Board and Thomas Howard from taking any action  
19 against the West Side Irrigation District and landowners of the other petitioner Districts  
20 on the basis of the 2015 Curtailment Letters sent by the Water Board's Executive  
21 Director, Thomas Howard, or on the basis of a failure to complete a Curtailment  
22 Certification Form.

23 (3) This matter is set for an Order to Show Cause on **July 30, 2015 at 9:00 a.m. in**  
24 **Department 24.** Respondents shall file with the clerk of Department 24 and serve (via  
25 email or fax) any supplemental Opposition to the Order to Show Cause no later than  
26

27  
28 <sup>5</sup> There is no allegation that Petitioners have filed a petition for reconsideration with the Board concerning the June Curtailment Notice. Respondents made no argument that Petitioners were required to do so before bringing the instant petition and ex parte application. Consequently, the Court does not address whether such a reconsideration petition was required.

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**July 16, 2015.** Petitioners shall file with the clerk of Department 24 and serve (via email or fax) any Reply no later than **July 23, 2015.**

(4) Petitioners' application for a temporary stay pursuant to Code of Civil Procedure Section 1094.5(g) is **HEREBY DENIED.**

**IT IS SO ORDERED:**

Date: July 23, 2015

SHELLEYANNE W.L. CHANG  
\_\_\_\_\_  
Honorable Judge Shelleyanne W. L. Chang  
Superior Court of California, County of Sacramento

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PROOF OF SERVICE

I, LAURA CUMMINGS, certify and declare as follows:

I am over the age of 18 years, and not a party to this action. My business address is 5757 Pacific Avenue, Suite 222, Stockton, California 95207, which is located in the county where the mailing described below took place.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing. On July 20, 2015 at my place of business a copy of [PROPOSED] ORDER GRANTING PETITIONERS' EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ISSUING AN ORDER TO SHOW CAUSE AS TO WHY A PRELIMINARY INJUNCTION SHOULD NOT BE GRANTED was placed for deposit following ordinary course of business as follows:

[X] BY U.S. MAIL with the United States Postal Service in a sealed envelope, with postage thereon fully prepaid.

OFFICE OF THE CALIFORNIA ATTORNEY GENERAL  
Deputy Attorney General Clifford Lee  
Deputy Attorney General Matthew Bullock  
455 Golden Gate Ave., Suite 11000  
San Francisco, CA 94102

*Attorneys for California State Water Resources Control Board*

John Herrick  
LAW OFFICES OF JOHN HERRICK  
4255 Pacific Avenue, Suite 2  
Stockton, CA 95207

*Attorney for South Delta Water Agency*

Dante John Nomellini  
Daniel A. McDaniel  
Dante John Nomellini, Jr.  
NOMELLINI, GRILLI & McDANIEL  
PROFESSIONAL LAW CORPORATIONS  
235 East Weber Avenue  
Stockton, California 95202

*Attorneys for Central Delta Water Agency*

Jennifer L. Spaletta  
SPALETТА LAW, PC  
Post Office Box 2660  
Lodi, CA 95241

*Attorney for Central Delta Water Agency*

1 S. Dean Ruiz  
2 HARRIS, PERISHO & RUIZ  
3 3439 Brookside Road, Suite 210  
4 Stockton, CA 95219

5 *Attorney for Woods Irrigation Company*

6 [X] BY ELECTRONIC MAIL (EMAIL) at \_\_\_\_\_ a.m. By sending the document(s) to the  
7 person(s) at the email address(es) listed below.

8 [ ] BY FEDERAL EXPRESS/OVERNIGHT MAIL in a sealed envelope, with postage  
9 thereon fully prepaid. [Code Civ. Proc., §§ 1013(c), 2015.5.]

10 [ ] BY PERSONAL SERVICE/HAND DELIVERY.

11 [ ] BY FACSIMILE at approximately 8:40 a.m. by use of facsimile machine telephone  
12 number (209) 472-7986. I caused the facsimile machine to print a transmission record of  
13 the transmission, a copy of which is attached to this declaration. The transmission was  
14 reported as complete and without error. [Cal. Rule of Court 2008 and 2003(3).]

15 I certify and declare under penalty of perjury under the laws of the State of California that  
16 the foregoing is true and correct.

17 Dated: July 20, 2015

  
LAURA CUMMINGS

# **EXHIBIT A**

BEFORE THE  
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

IN RE THE MATTERS OF:

SWRCB Enforcement Actions  
ENFO1951; ENFO1949

WEST SIDE IRRIGATION  
DISTRICT CEASE AND DESIST  
ORDER HEARING,

and

BYRON-BETHANY IRRIGATION  
DISTRICT ADMINISTRATIVE  
CIVIL LIABILITY HEARING.

\_\_\_\_\_ /

DEPOSITION OF MICHAEL GEORGE

December 7, 2015

Reported By: KATHRYN DAVIS, CSR No. 3808

kathryndavis & associates  
deposition reporting

BEFORE THE  
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

IN RE THE MATTERS OF:

SWRCB Enforcement Actions  
ENFO1951; ENFO1949

WEST SIDE IRRIGATION  
DISTRICT CEASE AND DESIST  
ORDER HEARING,

and

BYRON-BETHANY IRRIGATION  
DISTRICT ADMINISTRATIVE  
CIVIL LIABILITY HEARING.

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DEPOSITION OF MICHAEL GEORGE

December 7, 2015

Reported By: KATHRYN DAVIS, CSR No. 3808

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APPEARANCES

For the Central Delta Water Agency:

SPALETTA LAW PC  
By: JENNIFER SPALETTA  
Attorney at Law  
P.O. Box 2660  
Lodi, California 95421

For the Byron-Bethany Irrigation District:

SOMACH SIMMONS & DUNN  
By: DANIEL KELLY  
Attorney at Law  
500 Capitol Mall, Suite 1000  
Sacramento, California 95814

For the West Side Irrigation District, Banta-Carbona  
Irrigation District and Patterson Irrigation District:

HERUM/CRABTREE/SUNTAG  
By: JEANNE M. ZOLEZZI  
Attorney at Law  
5757 Pacific Avenue, Suite 222  
Stockton, California 95207

For the San Joaquin Tributaries Authority:

O'LAUGHLIN & PARIS, LLP  
By: TIM WASIEWSKI  
Attorney at Law  
2617 K Street, Suite 100  
Sacramento, California 95816

For the Division of Water Rights:

SWRCB OFFICE OF ENFORCEMENT  
By: CHRISTIAN CARRIGAN, Director  
ANDREW TAURIAINEN, Senior Staff Counsel  
JOHN PRAGER, Attorney III  
KEN PETRUZZELLI, Attorney III  
Attorneys at Law  
1101 I Street, 16th Floor  
Sacramento, California 95814

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APPEARANCES CONTINUED

For the California Department of Water Resources:

Department of Water Resources  
Office of the Chief Counsel  
By: ROBIN MCGINNIS  
Attorney at Law  
1416 Ninth Street, Room 1104  
Sacramento, California 95814

For the State Water Contractors:

STATE WATER CONTRACTORS  
By: STEFANIE MORRIS  
Attorney at Law  
1121 L Street, Suite 1050  
Sacramento, California 95814

For the South Delta Water Agency:

HARRIS, PERISHO & RUIZ  
By: S. DEAN RUIZ  
Attorney at Law  
3439 Brookside Road, Suite 210  
Stockton, California 95129

For the Westlands Water District:

KRONICK MOSKOVITZ TIEDEMANN & GIRARD  
BY: REBECCA R. AKROYD  
Attorney at Law  
400 Capitol Mall, 27th Floor  
Sacramento, California 95814

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DEPOSITION OF MICHAEL GEORGE

1 I've also had discussions with other  
2 colleagues in state governments and other  
3 constituents outside of state government.

4 Q What about counsel of the State Board? Which  
5 counsel?

6 A So I've had discussions about that with Andy  
7 Sawyer, Michael Lauffer. I can't remember  
8 specifically carrying on that discussion with Andrew  
9 but he would have naturally been involved in some of  
10 those broader discussions, I would think.

11 Q Are you a member of the West Side Irrigation  
12 District's Prosecution Team?

13 A Yes.

14 Q Are you a member of the BBID's Prosecution Team?

15 A I think I am as a result of having been  
16 exposed to information. I have been advised or  
17 instructed to refrain from discussions with the  
18 hearing side.

19 Q And is Mr. Andy Sawyer part of the Prosecution  
20 Team for West Side?

21 MR. CARRIGAN: Calls for speculation.

22 THE WITNESS: I don't know.

23 Q BY MS. SPALETTA: What about Mr. Lauffer?

24 A I don't know.

25 MR. CARRIGAN: Same.

DEPOSITION OF MICHAEL GEORGE

1 him not to answer. I think that infringes on the  
2 attorney-client communication. The topic is the subject  
3 matter of the communication. So I'm going to instruct  
4 not to answer.

5 Q BY MR. KELLY: Did you ever discuss the  
6 substance of the Delta pool theory with the chair of the  
7 State Water Board?

8 A Yes.

9 Q Tell me about that conversation.

10 A It was in the nature of my describing to her  
11 what I viewed as the unsettled law around the Delta  
12 pool theory, and some of the arguments on either  
13 side that I thought needed to be determined and  
14 adjudicated; and that the State Board's and my own  
15 administration of water rights in the Delta would be  
16 significantly advantaged if the issues and the  
17 substantive law around the Delta pool could be  
18 determined.

19 Q Have you ever had a substantive conversation  
20 with any other board member besides the chair?

21 A Yes.

22 Q All of the board members?

23 A Yes.

24 Q Individually or in group meetings?

25 A Primarily individually. I have discussed it

1 in open session, and it was also discussed during a  
2 performance review which was done in closed session  
3 with all the board members present.

4 Q Now I'm going to switch topics.

5 You talked with Ms. Spaletta about the April  
6 outreach meeting at EPA with respect to, I think it was,  
7 supply and demand, the supply and demand analysis. I  
8 don't want to misstate that, but do you recall that  
9 conversation?

10 A Yes.

11 Q You said that you had the meeting with Delta  
12 interests or representatives. Was it a publicly-noticed  
13 meeting, do you know?

14 A I believe that outreach meeting was an  
15 invitation. The invitations went out. Some of  
16 those invitations went to people who communicated  
17 them more broadly. And, you know, a number of  
18 people showed up. It wasn't exclusive but I don't  
19 think it was publicly noticed.

20 Q Do you know whether BBID was invited to that  
21 meeting?

22 A I do not know.

23 Q You talked with Ms. Spaletta a little bit about  
24 the temporary urgency change petitions. That was in the  
25 context of an email, one of the email exhibits. Are you

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REPORTER'S CERTIFICATE

State of California     )  
                                  ) ss.  
County of Sacramento    )

I certify that the witness in the foregoing deposition,

MICHAEL GEORGE,

was by me duly sworn to testify in the within-entitled cause; that said deposition was taken at the time and place therein named; that the testimony of said witness was reported by me, a duly Certified Shorthand Reporter Of the State of California authorized to administer oaths and affirmations, and said testimony was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for either or any of the parties to said deposition, nor in any way interested in the outcome of the cause named in said deposition.

IN WITNESS WHEREOF, I have hereunto set my hand this 10th day of December 2015.

-----  
KATHRYN DAVIS  
Certified Shorthand Reporter  
Certificate No. 3808

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DISPOSITION OF ORIGINAL TRANSCRIPT

Date \_\_\_\_\_

Check One

\_\_\_\_\_ Signature waived.

\_\_\_\_\_ I certify that the witness was given the statutory allowable time within which to read and sign the deposition, and the witness failed to appear for such reading and signing.

\_\_\_\_\_ I certify that the witness has read and signed the deposition and has made any changes indicated therein.

By \_\_\_\_\_  
KATHRYN DAVIS & ASSOCIATES

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DEPOSITION OF MICHAEL GEORGE

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**KATHRYN DAVIS & ASSOCIATES**  
Certified Shorthand Reporters  
555 University Avenue, Suite 160  
Sacramento, California 95825  
(916) 567-4211

December 10, 2015

State Water Resources Control Board  
Office of Enforcement  
Attn: CHRISTIAN CARRIGAN  
1001 I Street, 16th Floor  
Sacramento, California 95814

Re: West Side Irrigation District Cease and Desist  
Order & Byron-Bethany Irrigation District Civil Hearing

Date Taken: December 7, 2015

Dear Mr. Michael George:

Your deposition transcript is now available for review  
And signature, and will be available for the next 30  
days. This review is optional. An appointment is  
required to review your transcript. Please bring this  
letter with you.

You may wish to discuss with your attorney whether  
he/she requires that it be read, corrected, and signed,  
before it is filed with the Court.

If you are represented by an attorney, you may read his  
or her copy of the transcript. If you read your  
attorney's copy of the transcript, please send us a  
photocopy of the Signature Line and Deponent's Change  
Sheet.

If you choose not to read your deposition, please sign  
here and return this letter to our office.

-----  
Signature Date

Sincerely,  
  
KATHRYN DAVIS, CSR No. 3808

cc: Ms. Spaletta; Mr. Kelly; Ms. Zolezzi; Ms. Leeper;  
Mr. Ruiz; Mr. O'Laughlin; Mr. Tauriainen; Ms. McGinnis;  
Ms. Morris

# **EXHIBIT B**

**Tauriainen, Andrew@Waterboards**

---

**From:** Mrowka, Kathy@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=MROWKA, KATHY@WATERD1188F18-E359-4DA8-A3F2-FC48F57B907E63A>  
**Sent:** Tuesday, June 02, 2015 8:44 AM  
**To:** Kostyrko, George@Waterboards  
**Subject:** San Joaquin Curtailments  
**Attachments:** image005.png; image006.jpg

John just returned from briefing Felicia. He said Thursday for curtailment.

Katherine Mrowka, Manager  
Enforcement Section  
Water Rights  
P.O. Box 2000  
Sacramento, CA 95814

916-341-5363



# **EXHIBIT C**

1 SOMACH SIMMONS & DUNN  
A Professional Corporation  
2 STUART L. SOMACH (SBN 90959)  
DANIEL KELLY, ESQ. (SBN 215051)  
3 MICHAEL E. VERGARA (SBN 137689)  
AARON FERGUSON, ESQ (SBN 271427)  
4 500 Capitol Mall, Suite 1000  
Sacramento, California 95814-2403  
5 Telephone: (916) 446-7979  
Facsimile: (916) 446-8199

**EXEMPT FROM FILING FEES  
PURSUANT TO GOVERNMENT  
CODE SECTION 6103**

6 Attorneys for Petitioner/Plaintiff BYRON-  
7 BETHANY IRRIGATION DISTRICT

**E-FILED**

8  
9 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

Filed: 2015 3:35 PM

10 IN AND FOR THE COUNTY OF SANTA CLARA

David H. Yamasaki

Chief Executive Officer/Clerk  
Superior Court of CA, County of Santa Clara

Case #1-15-CV-285182 Filing #G-76103

By R. Walker, Deputy

11 BYRON-BETHANY IRRIGATION DISTRICT;

Case No. 1-15-CV-285182

12 Petitioner/Plaintiff,

California Water Curtailment Cases  
(JCCP 4838)

13 vs.

14 CALIFORNIA STATE WATER RESOURCES  
15 CONTROL BOARD; THOMAS HOWARD as  
EXECUTIVE DIRECTOR OF THE STATE  
16 WATER RESOURCES CONTROL BOARD;  
MICHAEL GEORGE, as DELTA  
17 WATERMASTER; and DOES 1 THROUGH  
100, INCLUSIVE.

FIRST AMENDED PETITION FOR  
WRIT OF MANDATE AND  
COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF AND  
DAMAGES

18 Respondents/Defendants.

19  
20 **INTRODUCTION**

21 1. Petitioner and Plaintiff, Byron-Bethany Irrigation District ("Petitioner/Plaintiff"  
22 or "BBID"), petitions this Court to issue of a Writ of Mandate pursuant to Code of Civil  
23 Procedure sections 1085 and/or 1094.5, and submits this complaint for declaratory and injunctive  
24 relief and damages against Respondents/Defendants the California State Water Resources  
25 Control Board (SWRCB); Thomas Howard, the SWRCB's Executive Director (Executive  
26 Director); Michael George, the Delta Watermaster (Watermaster); and Does 1 through 100.

27 2. BBID requests that this Court (1) issue a Writ of Mandate pursuant to Code of  
28 Civil Procedure sections 1085 and/or 1094.5 setting aside the June 12, 2015 notice unlawfully

1 curtailment BBID's water diversions and prohibiting Respondents/Defendants from enforcing the  
2 same, the July 15, 2015 Rescission and Clarification unlawfully predetermining the  
3 unavailability of water for BBID, ENF01951, attempting to impose financial penalties on BBID  
4 for the alleged diversion of water, and the Notice of Public Hearing for ENF01951; and (2) issue  
5 a declaration of BBID's rights relative to Respondents'/Defendants' actions declaring that  
6 Respondents/Defendants failed to provide BBID with due process with respect to the curtailment  
7 and pre-determination of the lack of water availability under its vested pre-1914 water right, that  
8 Respondents'/Defendants' process for implementing the curtailments at issue herein and  
9 purported exceptions thereto are contrary to law and enjoining the SWRCB accordingly, and that  
10 Respondents'/Defendants' actions towards BBID were unlawful and done with malice towards  
11 BBID.

### 12 BACKGROUND

13 3. In California, rights to surface water are perfected in several ways. Riparian  
14 water rights exist by virtue of adjacency of a parcel of land to a water course. The SWRCB has  
15 no direct regulatory jurisdiction over these rights to water. In contrast to riparian rights,  
16 appropriative rights do not relate directly to the proximity of parcels of land to water. Rather,  
17 these rights emanate from the diversion and use of water on lands not adjacent to a water course.  
18 Two types of appropriative rights exist in California. The first are "pre-1914" water rights  
19 perfected pursuant to custom and usage or various Civil Code provisions prior to December 19,  
20 1914. The SWRCB has no direct regulatory jurisdiction over these rights to water. The second  
21 type of appropriative rights are those that emanate from the Water Commission Act of 1913  
22 which became effective on December 19, 1914. These rights, called "post-1914" water rights,  
23 are perfected through a system of permits and licenses. The SWRCB has direct regulatory  
24 authority over post-1914 water rights. Other types of surface water rights exist, but are not  
25 relevant to the instant action.

26 4. The SWRCB and the Courts have concurrent jurisdiction to determine waste and  
27 unreasonable use of water. See e.g., article X, section 2, California Constitution. In this case,  
28 there are no allegations of waste and unreasonable use of water.

1           5.       The SWRCB and the Courts have concurrent jurisdiction on the question of  
2 whether a water right is valid. That determination is a mixed question of law and fact. The  
3 SWRCB has never made a determination that BBID's pre-1914 water rights are not valid.

4           6.       The SWRCB and the Courts have concurrent jurisdiction in all water right  
5 controversies. BBID was within its legal rights to bring the instant controversy before a court of  
6 competent jurisdiction.

7           7.       BBID holds a pre-1914 appropriative water right to divert and beneficially use  
8 water from watercourses in the California Delta. The priority date for BBID's appropriative  
9 water right is at least May 18, 1914.

10          8.       On April 23, 2015, the SWRCB sent curtailment notices to all post-1914 water  
11 right holders in the San Joaquin River watershed, directing those water right holders to cease  
12 diverting water under their post-1914 water right. As stated above, the SWRCB has direct  
13 regulatory authority over post-1914 water rights.

14          9.       On or about May 1, 2015, the SWRCB sent curtailment notices to all post-1914  
15 water right holders in the Sacramento River watershed and the Delta, directing those water right  
16 holders to cease diverting under their post-1914 water right.

17          10.      On or about May 1, 2015, the SWRCB issued a curtailment notice to all water  
18 right holders with a condition known as "Term 91" in their water right permits. "Term 91" is  
19 triggered when a certain water supply condition exists in the Sacramento-San Joaquin watershed.  
20 These permits have a priority date after 1968.

21          11.      On or about June 12, 2015, the SWRCB issued a curtailment notice (Notice) to all  
22 pre-1914 water right holders in the Sacramento and San Joaquin River watersheds and the Delta  
23 with a priority date between 1903 and 1914. The Notice curtailing BBID's pre-1914 water right  
24 was sent by the Executive Director and purported to curtail BBID's pre-1914 appropriative water  
25 right and certain other pre-1914 appropriative water rights, with a priority date of 1903 or later,  
26 within the entire Sacramento and San Joaquin River watersheds, including the California Delta.  
27 The Notice was styled as a "NOTICE OF UNAVAILABILITY OF WATER AND NEED FOR  
28 IMMEDIATE CURTAILMENT FOR THOSE DIVERTING WATER IN THE

1 SACRAMENTO-SAN JOAQUIN WATERSHEDS AND DELTA WITH A PRE-1914  
2 APPROPRIATIVE CLAIM COMMENCING DURING OR AFTER 1903”. (A true and correct  
3 copy of the Notice is attached hereto as Exhibit A.)

4 12. The Notice directed BBID to “immediately stop diverting” under its “pre-1914  
5 water right[]” and further demanded that, within “seven days,” BBID complete an online  
6 Curtailment Certification Form certifying that BBID had ceased all diversions under its pre-1914  
7 right.

8 13. The Notice also provided that any further diversion of water under BBID’s  
9 pre-1914 appropriative water right subjects BBID to administrative fines, cease and desist orders,  
10 or prosecution in court as set forth as follows:

11 Those who are found to be diverting water beyond what is legally  
12 available to them may be subject to administrative penalties, cease and  
13 desist orders, or prosecution in court. If the State Water Board finds  
14 following an adjudicative proceeding that a person or entity has diverted  
15 or used water water [sic] unlawfully, the State Water Board may assess  
16 penalties of \$1,000 per day of violation and \$2,500 for each acre-foot  
17 diverted or used in excess of a valid water right. (See Water Code, §§  
1052, 1055.) Additionally, if the State Water Board issues a Cease and  
Desist Order against an unauthorized diversion, violation of any such  
order can result in a fine of \$10,000 per day. (See Water Code, §§ 1831,  
1845.)

18 14. The Notice was issued without a hearing or proceeding before the SWRCB.  
19 BBID was not provided an opportunity to test any evidence or information relied upon by the  
20 SWRCB or the Executive Director, and BBID was not provided opportunity to present the  
21 SWRCB with evidence regarding the availability of water diverted under BBID’s pre-1914  
22 appropriative water right. The Notice contains no finding that BBID diversions constitute waste  
23 and unreasonable use.

24 15. The same day the Notice was issued, the SWRCB issued a press release that  
25 provided in bold lettering “Senior Water Rights Curtailed in Delta, San Joaquin & Sacramento  
26 Watersheds.” The press release stated the following: “the State Water Resources Control Board  
27 (State Water Board) announced today that there is insufficient water available for senior water  
28 right holders with a priority date of 1903 or later in the San Joaquin and Sacramento watersheds

1 and the Delta. The need for further curtailment of more senior rights and curtailments in other  
2 watersheds is being assessed weekly. Notices are being sent to water right holders that direct  
3 recipients to stop diversions of water to protect more senior water rights and releases of  
4 previously stored water, as required by state law.”

5 16. In the June 12, 2015 press release, the SWRCB confirmed that 125 water rights  
6 were being curtailed in the Delta, including BBID’s pre-1914 water right. The press release also  
7 provided that those with water rights being curtailed would need to turn to alternate sources of  
8 water. Finally, the June 12, 2015 press release stated that the SWRCB had determined there was  
9 insufficient water available for those who received the Notice.

10 17. Taken together, the Notice and June 12, 2015 press release convey the SWRCB’s  
11 determination that there was no water available for BBID to divert under its pre-1914  
12 appropriative water right, and based on this putative finding, the SWRCB “curtailed” BBID’s  
13 pre-1914 appropriative water right.

14 18. The SWRCB’s statement, in the Notice, that BBID is required to cease all  
15 diversions is consistent with the various presentations and discussions at SWRCB workshops and  
16 SWRCB Board updates throughout 2015. At regular SWRCB Board meetings and at public  
17 workshops, the SWRCB Board members received regular updates from SWRCB management  
18 and staff, including SWRCB enforcement staff, on the availability of water and on the SWRCB’s  
19 curtailment efforts. At the various SWRCB Board meetings and Workshops, SWRCB staff and  
20 Board members stated that water right holders will be required to cease diversions upon  
21 receiving a notice of curtailment. The SWRCB saw curtailments as a ministerial function.

22 19. Had BBID immediately complied with the Notice’s command to cease diversions  
23 and certified that no water was being diverted under BBID’s pre-1914 water right, BBID would  
24 have shut-off the sole source of water supply to more than ten thousand residents in the  
25 residential community of Mountain House; BBID would have cut-off the sole source of water  
26 supply to hundred of landowners and family farmers within BBID, BBID would have  
27 immediately ceased diversions to the Mariposa Energy Project, and BBID would have  
28 immediately ceased providing fire protection water supplies to the Contra Costa airport.

1           20.     The Notice was sent via electronic mail and certified mail. BBID received the  
2 Notice via certified mail on June 15, 2015. The Notice required certification, within seven days,  
3 that diversions had ceased. While BBID disagreed with the SWRCB's authority to curtail  
4 BBID's water right and with the SWRCB's determination of unavailability of water at BBID's  
5 point of diversion, as BBID was the sole source of supply for Mountain House, the Mariposa  
6 Energy Project, fire protection water for Contra Costa Airport, and the family farms and water  
7 users within BBID, BBID reasonably believed it had seven days from the receipt, via certified  
8 mail, of the Notice to cease diversions under its pre-1914 water right.

9           21.     On or about June 18, 2015, the Banta-Carbona Irrigation District (Banta-Carbona)  
10 filed an action challenging the SWRCB's issuance of the Notice (*Banta-Carbona Irrigation*  
11 *District v. California State Water Resources Control Board, et al.*, San Joaquin County Superior  
12 Court Case No. 39-2015-00326421 (*Banta-Carbona v. SWRCB*)). As part of its action, Banta-  
13 Carbona sought a temporary restraining order and injunction. A hearing on the temporary  
14 restraining order was calendared for June 23, 2015. Prior to June 23, 2015, the SWRCB moved,  
15 under section 394 of the California Code of Civil Procedure, for a change of venue to a neutral  
16 county and, at the same time, filed opposition papers to Banta-Carbona's request for temporary  
17 restraining order. The SWRCB's opposition papers included an Opposition to Ex Parte  
18 Application for Stay or Temporary Restraining Order (SWRCB Opposition), and the supporting  
19 Declaration of John O'Hagan (O'Hagan Declaration). A copy of the O'Hagan Declaration is  
20 attached hereto as Exhibit B.

21           22.     In the O'Hagan Declaration, Mr. O'Hagan declared that he is the Assistant  
22 Deputy Director overseeing enforcement, and serves the dual role of supervising the SWRCB's  
23 staff analyses for determining whether water supplies are sufficient to meet demands.  
24 Mr. O'Hagan also declared that, in these roles, he regularly provides updates to the SWRCB on  
25 water supply availability.

26           23.     Furthermore, in the O'Hagan Declaration, Mr. O'Hagan declared that "a  
27 curtailment notice is a notification to water right holders of a certain priority of right that, due to  
28 water shortage conditions, the State Water Board has determined water is not available under

1 their priority of right.” In the O’Hagan Declaration, Mr. O’Hagan further declared that “the  
2 notice provides the affected water right holder with the State Water Board’s findings of the  
3 unavailability of water under their priority of right for a certain right and the need to cease  
4 diversions under that right.” Finally, Mr. O’Hagan testifies that the “[d]iversion of water when it  
5 is unavailable under a diverter’s priority of right constitutes an unauthorized diversion and a  
6 trespass against the state.”

7 24. Mr. O’Hagan and other SWRCB Enforcement staff regularly provide updates and  
8 presentations to SWRCB Board Members and SWRCB management regarding water supply  
9 availability and curtailments. These updates and presentations occurred at each SWRCB Board  
10 meeting in 2015. SWRCB management often present along with SWRCB Enforcement staff and  
11 BBID is informed and believes and thereon alleges that SWRCB Enforcement staff, SWRCB  
12 Management, and SWRCB Board members met regularly to discuss water supply availability,  
13 curtailments, and enforcement.

14 25. On or about June 25, 2015, the SWRCB issued another notice to BBID and other  
15 water right holders (Reminder Notice). The Reminder Notice confirms that the SWRCB  
16 determined there was no water available for BBID to divert, that the BBID water right was  
17 “curtailed,” and that BBID was required to complete a certification form confirming BBID  
18 ceased diversions. The SWRCB also states in the Reminder Notice that water right holders that  
19 fail to complete the mandatory certification form would be prioritized for inspections and  
20 enforcement. A copy of the Reminder Notice is attached hereto as Exhibit C.

21 26. On June 25, 2015, BBID filed a Petition for Reconsideration with the SWRCB  
22 regarding the Notice. The Petition for Reconsideration requests the SWRCB to rescind the  
23 Notice. The Petition for Reconsideration raises due process concerns, violations of California  
24 Water Law’s priority system, imposition of an unlawful physical solution, and raises concerns  
25 about exceptions to curtailments, and takings, among other issues. The issues raised in the  
26 Petition for Reconsideration overlap with those raised by the instant litigation. A copy of  
27 BBID’s Petition for Reconsideration is attached hereto as Exhibit D.

28 27. On or about July 10, 2015, in the related case of *West Side Irrigation District v.*

1 *State Water Resources Control Board*, Sacramento County Superior Court Case No. 34-2015-  
2 80002121 (*West Side v. SWRCB*), the Sacramento Superior Court issued an ORDER AFTER  
3 HEARING ON EX PARTE APPLICATION FOR TEMPORARY STAY RE: ENFORCEMENT  
4 OF CURTAILMENT NOTICE OR IN THE ALTERNATIVE TEMPORARY RESTRAINING  
5 ORDER AND/OR FOR ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION,  
6 finding, among other things, that the Notice violates due process, and based on this finding the  
7 Court issued a restraining order prohibiting the SWRCB from taking any action against certain  
8 water right holder based upon the Notice. On or about July 23, 2015, in *West Side v. SWRCB*,  
9 the Sacramento Superior Court issued a Temporary Restraining Order consistent with its July 10,  
10 2015 Order. A Copy of the July 10, 2015 Order in *West Side v. SWRCB* is attached hereto as  
11 Exhibit E. A copy of the Temporary Restraining Order in *West Side v. SWRCB* is attached  
12 hereto as Exhibit F.

13 28. On July 10, 2015, the same day the above-described Order was issued, the  
14 SWRCB issued a press release stating that, notwithstanding the Temporary Restraining Order in  
15 *West Side v. SWRCB*, any water right holder that received the Notice and continued to divert  
16 after the Notice was issued would be subject to fines and penalties. A copy of the July 10, 2015  
17 Press Release is attached hereto as Exhibit G.

18 29. On or about July 15, 2015, the SWRCB issued a “Partial Rescission of April, May  
19 and June 2015 Curtailment Notices and Clarification of State Water Board Position Re: Notices  
20 of Unavailability of Water For Those Diverting Water In The Sacramento River Watershed, San  
21 Joaquin River Watershed and Delta, and Scott River” (Rescission and Clarification). A copy of  
22 the Rescission and Clarification is attached hereto as Exhibit H. The stated purpose of the  
23 Rescission and Clarification is to rescind the “curtailment” portions of the prior curtailment  
24 notices, including the Notice, and to reiterate the determination in the Notice that there is no  
25 water available for BBID to divert, and further diversions would subject BBID to fines and  
26 penalties.

27 30. In an attempt to “clarify” the Notice, the SWRCB threatened BBID and other  
28 lawful diverters that, while they were not being commanded to cease diversions, if they diverted

1 any water under their pre-1914 water right, they would be subject to the SWRCB's enforcement  
2 process and subject to extensive fines and penalties.

3 31. Absent a due process hearing and consequent determination and notification from  
4 the SWRCB that an individual diverter is curtailed, water right holders are able to divert water  
5 when water is present at their point of diversion. The SWRCB's threat of enforcement against  
6 anyone who diverted water as unlawful and a violation of due process.

7 32. According to information previously published by the SWRCB, the SWRCB  
8 determined there was insufficient water available to meet post-1914 water rights in the  
9 Sacramento-San Joaquin River watershed long before the SWRCB issued curtailment notices for  
10 those post-1914 water rights. Nonetheless, the SWRCB allowed those post-1914 water right  
11 holders to continue to divert water even though, according to the SWRCB, there was no water  
12 available under their post-1914 water rights.

13 33. While according to the SWRCB there was insufficient water available to satisfy  
14 post-1914 water rights in the Sacramento-San Joaquin River watersheds prior to the SWRCB's  
15 issuance of post-1914 curtailment notices, the SWRCB has not accused any post-1914 water  
16 right holder of unlawfully diverting water based on unavailability during that intervening time,  
17 nor has the SWRCB required any post-1914 water right holder to prove water was available to  
18 that particular water right holder.

19 34. Furthermore, while the SWRCB threatened BBID with enforcement for the  
20 diversion of water under BBIDs pre-1914 water rights, the SWRCB, through its Executive  
21 Director and/or the Watermaster, has conversely authorized or sanctioned the continued use of  
22 water by certain water right claimants whether or not there is water available to them. The  
23 SWRCB has also authorized the continued diversion and use of water under post-1914 water  
24 rights, allowing water to be held in upstream storage for up to 30 days, without any regulatory  
25 or enforcement consequence.

26 35. The Notice left BBID with two options: (1) disregard the Notice and continue  
27 diverting under its pre-1914 appropriative water right in order to prevent the economic injury  
28 and threats to public health and safety that would ensue as a result of ceasing water diversion

1 and deliveries, and face enforcement proceedings and the threat of monetary penalties that could  
2 exceed BBID's ability to pay; or, (2) comply with the demand in the Notice to cease diverting  
3 under its pre-1914 appropriative water right, leaving communities within BBID without a  
4 source of drinking water, water for fire protection and basic human health and sanitation needs,  
5 and resulting in landowners losing crops, the closing of agricultural businesses, and the loss of  
6 jobs that will follow the cessation of farming within BBID. The immediate cessation of  
7 diversions would have resulted in an estimated excess of \$65 million in crop losses, and the loss  
8 of over 500 jobs. Long-term damages would exceed these immediate losses.

9 36. On or about July 20, 2015, the SWRCB issued a Draft Administrative Civil  
10 Complaint ENF01951 against BBID alleging the unlawful diversion of water from  
11 approximately June 13, 2015 through June 25, 2015 (Enforcement Action). A copy of the  
12 Enforcement Action is attached hereto as Exhibit I. The underlying basis for the Enforcement  
13 Action stated by the SWRCB is the SWRCB's "determination", as set forth in the Notice, that  
14 there was insufficient water available for diversion under BBID's water right. The Enforcement  
15 Action specifically references the Notice, and confirms that the Notice "reflects the [SWRCB's]  
16 determination that the existing water available in the Sacramento-San Joaquin watersheds and  
17 the Delta is insufficient to meet the demands of diverters with claims of pre-1914 appropriative  
18 rights with a priority date of 1903 and later." The Enforcement Action further confirms that any  
19 diversion after having received the Notice "constitutes unauthorized water diversion and use."  
20 The Enforcement Action is based on the SWRCB's assertion that "BBID was aware that the  
21 [SWRCB] had determined that there was insufficient water supply available for BBID's  
22 claimed water right." The Enforcement Action contains no allegation that BBID diversions  
23 constitute waste and unreasonable use. The period of alleged violation begins on June 13, 2015,  
24 the day following the Notice, and two days prior to BBID receiving the certified copy of the  
25 Notice.

26 37. The subject matter of the Enforcement Action is identical to the issues raised by  
27 BBID in the instant litigation.

28 38. Both the Enforcement Action and the letter accompanying the Enforcement

1 Action are signed by Mr. O'Hagan as the Assistant Deputy Director of the SWRCB's Division  
2 of Water Rights. Mr. O'Hagan is also the SWRCB staff member who regularly updates the  
3 SWRCB Board members regarding water availability and water right curtailments.

4 39. BBID is informed and believes, and thereby alleges that SWRCB Board  
5 Members, SWRCB management, including its Executive Officer, and/or one or more  
6 Enforcement staff met in secret in violation of the Bagley-Keene Open Meeting Act to discuss  
7 curtailments and enforcement actions. BBID is informed and believes, and thereby alleges, that  
8 during those secret meetings, SWRCB Board Members, SWRCB management and/or one or  
9 more Enforcement staff made determinations on water availability, water right curtailments,  
10 and/or determined to bring an enforcement action against BBID.

11 40. BBID is informed and believes, and thereby alleges that these secret meetings  
12 were held to develop and implement a strategy to allow the SWRCB to obtain a judicial  
13 determination on certain legal issues the SWRCB deemed important. As part of this strategy,  
14 SWRCB Board Members, SWRCB management, and/or one or more SWRCB Enforcement staff  
15 decided that an enforcement action against BBID would be a good "test case" to get certain of  
16 these issues resolved.

17 41. BBID is informed and believes, and thereby alleges that one or more SWRCB  
18 Enforcement staff and/or SWRCB management recommended an enforcement action against  
19 BBID as retribution for BBID's position and public statements regarding the SWRCB's  
20 inconsistent public and legal position on the curtailments.

21 42. By letter dated July 24, 2015, the SWRCB rejected BBID's Petition for  
22 Reconsideration, arguing the Notice was not a decision or order subject to reconsideration and  
23 arguing that the Notice was partially rescinded and no longer commands water right holders to  
24 cease diverting. In rejecting BBID's Petition for Reconsideration, the SWRCB declined to  
25 provide any substantive response to the issues raised in BBID's Petition for Reconsideration.  
26 Instead, the SWRCB continued to threaten enforcement should BBID continue to divert water.  
27 A copy of the July 24, 2015 letter is attached hereto as Exhibit J.

28 43. In rejecting BBID's Petition for Reconsideration, the SWRCB decided to stand

1 by its undocumented and conclusory determination that no water was available for BBID's pre-  
2 1914 water rights, and instead of providing substantive responses to BBID's Petition for  
3 Reconsideration, the SWRCB initiated an enforcement action seeking \$5.2 million in fines and  
4 penalties.

5 44. On August 19, 2015, the SWRCB issued a Notice of Public Hearing and Pre-  
6 Hearing Conference in the Enforcement Action (Hearing Notice). A copy of the Hearing Notice  
7 is attached hereto as Exhibit K. The SWRCB set the pre-hearing conference for Friday,  
8 September 25, 2015 at 9:00 a.m., and set the Public Hearing for Wednesday, October 28, 2015 at  
9 9:00 a.m. The accelerated timeframes in the Enforcement Action deprive BBID of its right to a  
10 fair hearing, as it prevents BBID from obtaining expert witness testimony with regard to water  
11 availability, to conduct appropriate modeling analyses on water availability, and from fully  
12 examining the SWRCB supply and demand database sufficient to allow BBID to address the  
13 charges against it.

14 45. The Hearing Notice provides for two "Key Issues" to be decided at the Public  
15 Hearing, as follows:

- 16 1) Whether the State Water Board should impose administrative civil liability upon BBID  
17 for trespass and, if so, in what amount and on what basis;  
18 a. What is the extent of harm caused by BBID's alleged unauthorized diversions?  
19 b. What is the nature and persistence of the alleged violation?  
20 c. What is the length of time over which the alleged violation occurred?  
21 d. What corrective actions, if any, have been taken by BBID?
- 22 2) What other relevant circumstances should be considered by the State Water Board in  
23 determining the amount of any civil liability?

24 46. The Hearing Notice does not provide for the determination of whether water was  
25 available for BBID to divert, and therefore assumes guilt, providing only for a determination of  
26 monetary penalty. A determination of whether water was available for BBID to divert was  
27 never made by the SWRCB in a due process hearing. To the extent that the SWRCB made such  
28 a determination, BBID was deprived on the opportunity to protest or cross-examine evidence of  
water availability.

47. Prior to issuing the Notice, representatives from BBID met with SWRCB  
enforcement staff, including Mr. O'Hagan and the SWRCB's Executive Director, Tom Howard.

1 At this meeting, BBID asked what it should do with respect to water supplies for the community  
2 of Mountain House if the SWRCB curtailed BBID's pre-1914 appropriative water right. Tom  
3 Howard told BBID's representatives that the SWRCB would expect BBID to continue to supply  
4 water to Mountain House, and that the SWRCB would not bring an enforcement action against  
5 BBID. Tom Howard told BBID that the SWRCB's Division of Drinking Water Programs  
6 would bring a separate enforcement action against the potable water purveyor for Mountain  
7 House, the Mountain House Community Services District, which would include a mandate to  
8 reduce residential use to 55 gallons per person per day and a moratorium on all new water  
9 hookups within the community of Mountain House. Mr. Howard also said he expected BBID to  
10 continue providing water for fire protection purposes to the Contra Costa County Airport and  
11 for local firefighting efforts, and to provide water for critical electric grid facilities, including  
12 the Mariposa Energy Project.

13 48. Notwithstanding Mr. Howard's statements and assurances, the Enforcement  
14 Action includes water delivered to the community of Mountain House, the Contra Costa Airport  
15 and other firefighting efforts, and to the Mariposa Energy Project.

16 49. Because the SWRCB has no direct regulatory jurisdiction over BBID's pre-1914  
17 water rights, and because courts have concurrent jurisdiction over water right controversies,  
18 BBID filed the instant action in this Court to vindicate the exercise of its lawful water right.  
19 Subsequent to BBID filing this action, the SWRCB initiated the Enforcement Action. Through  
20 the Enforcement Action, the SWRCB seeks to deprive BBID of its lawful right to have this  
21 Court make a determination of the issues raised by BBID. The SWRCB, through its  
22 Enforcement Action, seeks to act as the arbiter of charges brought by BBID against the  
23 SWRCB. The SWRCB attempts to avoid a trial before this Court in order to provide the  
24 SWRCB an advantage by having its own staff and Board Members adjudicate issues related to  
25 their own improper and unlawful conduct. The SWRCB's attempts to do so violate the doctrine  
26 of exclusive concurrent jurisdiction, basic concepts of due process, and are otherwise arbitrary  
27 and capricious, and done with malice against BBID.

28 50. Based on Exclusive Concurrent Jurisdiction, jurisdiction over the matters raised

1 herein vested with this Court on June 26, 2015, the date BBID originally filed this action.

2 Therefore, the SWRCB is prohibited from adjudicating the matters raised herein in any other  
3 venue.

4 51. BBID requires a judicial resolution by this Court of the issues presented herein  
5 so that it can exercise its vested pre-1914 appropriative water right without Respondents’/  
6 Defendants’ continued threats of unlawful regulatory and prosecutorial action, and the  
7 threatened imposition of civil penalties.

8 **PARTIES**

9 52. Petitioner/Plaintiff BYRON-BETHANY IRRIGATION DISTRICT is, and at all  
10 times mentioned herein was, a public agency, a California Irrigation District, formed and  
11 operating pursuant to division 11 of the Water Code sections 20500 et seq. BBID includes lands  
12 within Contra Costa County, Alameda County, and San Joaquin County. BBID’s purposes  
13 include the provision of water to lands within the District for any beneficial use, to construct the  
14 necessary works for the diversion and use of water for those beneficial uses, and to commence  
15 and maintain any action and proceeding to carry out its purposes or protect its interests. For the  
16 purposes of the Notice and challenge herein, BBID diverts water pursuant to its pre-1914  
17 appropriative water right and delivers that water for many beneficial uses.

18 53. Respondent/Defendant CALIFORNIA STATE WATER RESOURCES  
19 CONTROL BOARD is a public agency of the State of California created by the Legislature in  
20 1967 to exercise the adjudicatory and regulatory functions of the state in the field of water  
21 resources. The SWRCB is governed by a board of five members appointed by the Governor of  
22 the State of California. The SWRCB, at all times relevant herein, is charged by law with the  
23 faithful performance of all statutory duties arising under the California Water Code and with  
24 faithfully carrying out the duties and obligations arising under the California Constitution, and is  
25 limited by both the California and United States Constitutions.

26 54. Respondent/Defendant THOMAS HOWARD is the Executive Director of the  
27 SWRCB and is responsible for certain of the conduct complained of herein.

28 55. Respondent/Defendant MICHAEL GEORGE is the Delta Watermaster appointed

1 by the SWRCB and is considered the “Special Master” for the Delta. By statute, the  
2 Watermaster’s authority is limited to diversions in the Delta, and for the monitoring and  
3 enforcement of the SWRCB’s orders, and license and permit terms, and conditions that apply to  
4 water rights authorizing the diversion of water from the Delta. The Watermaster is responsible  
5 for certain of the conduct complained of herein.

6 56. Petitioner/Plaintiff does not know the true names and identities of  
7 Respondents/Defendants DOES One through One Hundred and, therefore, allege said unnamed  
8 parties by fictitious names. Petitioner/Plaintiff will seek leave of Court, as may be necessary, to  
9 amend this Petition and Complaint to include the true names and capacities of  
10 Respondents/Defendants DOES One through One Hundred when the same have been  
11 ascertained.

#### 12 JURISDICTION AND VENUE

13 57. This Court has jurisdiction over this action pursuant to Code of Civil Procedure  
14 sections 525, 526, 527, 1060, 1085, 1094.5, 187, and 863, and Government Code sections 6258  
15 and 6259. California Courts share concurrent jurisdiction with the SWRCB regarding post-1914  
16 water rights; as well as concurrent jurisdiction with respect to Constitutional allegations with  
17 respect to waste and unreasonable use. Whether the use of water is a “waste” or “unreasonable”  
18 use is not at issue in the instant controversy. The Courts and the SWRCB also have concurrent  
19 jurisdiction over the trespass on the rights to water. Any water right holder may file an action in  
20 any court of competent jurisdiction to resolve conflicts over the right to water. The SWRCB  
21 does not have direct regulatory jurisdiction over pre-1914 appropriative water rights. The  
22 SWRCB regularly declines to resolves disputes regarding pre-1914 appropriative water rights,  
23 instead directing parties to seek relief in courts of competent jurisdiction. BBID filed this action  
24 prior to the SWRCB initiating the Enforcement Action and jurisdiction is therefore vested in this  
25 Court.

26 58. BBID originally filed this action in Contra Costa County. Venue is proper in  
27 Contra Costa County Superior Court pursuant to Code of Civil Procedure sections 392(a)(1) and  
28 393(b) in that BBID has property, which lies in Contra Costa County and

1 Respondents’/Defendants’ actions impact BBID’s property and adversely impact the residential  
2 communities and landowners within BBID’s boundaries. Absent alternative supplies,  
3 Respondents’/Defendants’ purported curtailment of BBID’s pre-1914 appropriative water right  
4 would result in the cessation of water deliveries to the approximately twelve thousand (12,000)  
5 residents of the community of Mountain House, depriving the community of water desperately  
6 needed for human health and sanitation needs, fire protection, and other uses, and would result in  
7 thousands of acres of land lying fallow, the destruction of thousands of acres of annual and  
8 permanent crops, and causing significant unemployment for agricultural workers who will lose  
9 their jobs as a result of the lack of water for agricultural uses within BBID. On or about June 30,  
10 2015, the SWRCB filed a motion for change of venue pursuant to Code of Civil Procedure  
11 section 394. BBID’s action against the SWRCB is one of at least five separate actions  
12 challenging the SWRCB’s unlawful conduct. As such, and while the motion for change of venue  
13 was pending in Contra Costa Superior Court, the SWRCB filed a Petition for Coordination,  
14 pursuant to Code of Civil Procedure section 404, of the several cases challenging the SWRCB’s  
15 unlawful conduct. That Petition was granted by the Alameda County Superior Court on  
16 August 10, 2015. On August 14, 2015, the Judicial Council of California authorized the  
17 Presiding Judge of Santa Clara Superior Court to assign a trial judge in the coordinated actions.

### 18 **STANDING**

19 59. BBID’s pre-1914 appropriative water right was curtailed by the Notice and BBID  
20 is therefore directly and materially injured by the Notice. BBID holds water rights and other  
21 property in trust for the benefit of, among others, landowners within BBID. The Notice was  
22 directed to BBID and BBID is under direct threat of enforcement for failure to comply with the  
23 mandates contained in the Notice. BBID therefore has standing to challenge the Notice.  
24 Moreover, the other activities alleged herein adversely affect BBID in that they either materially  
25 affect the availability of water under BBID’s pre-1914 appropriative water right and/or fail to  
26 comply with the California law of water rights, thereby injuring BBID and the landowners within  
27 BBID.

28 60. BBID was not required to exhaust any administrative remedies prior to filing this

1 action as to the Notice or any other action alleged herein. (See Wat. Code, § 1126(b).) The  
2 SWRCB's comprehensive regulatory authority does not extend to pre-1914 appropriative water  
3 rights. The Notice was not issued pursuant to any hearing or noticed meeting by the SWRCB  
4 and the Executive Director was not delegated the authority of the SWRCB to issue any purported  
5 curtailments to pre-1914 water right holders. The determination that there was insufficient water  
6 available for diversion by BBID was not made at any hearing or meeting by the SWRCB. The  
7 actions of the Watermaster and/or the Executive Director with respect to exceptions to  
8 curtailments and/or waiver of enforcement authority was not undertaken pursuant to any  
9 officially delegated authority. Nevertheless, BBID filed a Petition for Reconsideration with the  
10 SWRCB in the event that the Court determines that the Executive Director issued the Notice  
11 under authority delegated by the SWRCB or that other actions by Respondents'/Defendants'  
12 were official acts of the SWRCB subject to reconsideration by the SWRCB. As set forth above,  
13 the SWRCB rejected BBID's Petition for Reconsideration outright and did not consider the  
14 merits of the substantive issues raised therein.

## 15 GENERAL ALLEGATIONS

### 16 **BBID's Pre-1914 Water Right and Diversion**

17 61. BBID holds a vested pre-1914 appropriative water right to divert water from  
18 watercourses within the California Delta. BBID's water right has a priority date of at least  
19 May 18, 1914. BBID diverts and delivers water pursuant to its pre-1914 appropriative water  
20 right for reasonable and beneficial uses within BBID and, on occasion, makes water diverted  
21 under its pre-1914 appropriative water right available for use on lands outside the District.  
22 BBID's pre-1914 appropriative water right is documented in the Statement of Water Diversion  
23 and Use Number S021256 filed with the SWRCB.

24 62. BBID also has a contract with the United States Bureau of Reclamation (USBR)  
25 for the use of Central Valley Project (CVP) water on a portion of the lands within BBID. For  
26 2015, BBID has received a zero (0) percent allocation under that contract and, therefore, is  
27 receiving *no* CVP water under its contract with the USBR.

28 63. BBID now diverts water under its pre-1914 appropriative water right at a point of

1 diversion that is located on the State Water Project (SWP) intake channel (Intake Channel), in  
2 Contra Costa County.

3 64. The SWP was authorized in 1960 by the California Water Resources  
4 Development Bond Act, commonly known as the Burns-Porter Act (Wat. Code, § 12930 et seq.).  
5 That Act provided for the issuance of \$1,750,000,000 in general obligation bonds to be repaid  
6 from SWP revenue. As part of the construction of the SWP, the California Department of Water  
7 Resources (DWR) constructed the California Aqueduct, Clifton Court Forebay, and the Harvey  
8 O. Banks Pumping Plant (Banks Pumping Plant). Clifton Court Forebay is operated as a  
9 regulating reservoir and serves as the beginning of the California Aqueduct. Clifton Court  
10 Forebay is connected to Banks Pumping Plant by the SWP Intake Channel. Water flows from  
11 Clifton Court Forebay down the Intake Channel to Banks Pumping Plant, where it is lifted and  
12 turned into the California Aqueduct.

13 65. When the SWP was constructed, BBID's point of diversion in the Delta was  
14 located on Italian Slough. When Clifton Court Forebay and its related facilities were  
15 constructed, DWR destroyed BBID's intake facilities at its original point of diversion. By  
16 Agreement between DWR and BBID, dated May 4, 1964, DWR destroyed a portion of the  
17 BBID's main lateral and provided funds to BBID to construct two new diversion facilities on the  
18 Intake Channel, between Clifton Court Forebay and Banks Pumping Plant.

19 66. As part of the relocation of BBID's diversion facilities to the Intake Channel,  
20 DWR consented to the permanent and perpetual use by BBID, without cost, of DWR's facilities  
21 and of that portion of DWR's right of way required for the construction, maintenance, and  
22 operation of BBID's pumping facilities.

23 67. BBID's point of diversion is in a unique location because there is always water  
24 available at BBID's diversion facilities, not only due to its location in the Delta, but also because  
25 it is located on the Intake Channel. The presence of water at BBID's diversion facilities is  
26 influenced by many factors, including sea level, ocean tides, and DWR's operation of Clifton  
27 Court Forebay and its related facilities.

28 68. Prior to the construction of the SWP, and prior to the construction of the federal

1 CVP, in each and every year since the early 1900s, BBID diverted and beneficially used water  
2 from the watercourses in the Delta for agricultural and other purposes. Even during the driest  
3 years in California's history, in the 1920s and 1930s, BBID was able to divert and deliver for  
4 beneficial use water from the Delta for agricultural uses.

5 69. BBID is currently the sole source of water and the only entity that supplies water  
6 to the community of Mountain House, a community of approximately 12,000 people with  
7 elementary schools and a high school. The fire protection system (hydrants) within Mountain  
8 House is also accessed by Cal Fire for fighting wildfire in the Altamont Pass region. BBID  
9 provides water to Mountain House for all of these uses pursuant to its pre-1914 appropriative  
10 water rights.

11 70. BBID provides water to the Mariposa Energy Project for air quality and other  
12 purposes and provides water for fire fighting purposes at the Contra Costa Airport. BBID is the  
13 sole source of water supply for these uses.

14 71. For the 2015 agricultural season, BBID is the sole source of water supply for  
15 more than 6,300 acres of agricultural crops, as follows: 636 acres of walnuts, 11 acres of olives,  
16 38 acres of nursery, 1,200 acres of grapes, 387 acres of fruit trees, 10 acres of figs, 463 acres of  
17 cherries, 789 acres of almonds, 100 acres of mixed vegetables, 326 acres of bell peppers, 275  
18 acres of tomatoes, 414 acres of sweet corn, 5 acres of strawberries, 837 acres of Sudan, 703 acres  
19 of alfalfa, 39 acres of clover, and 86 acres of pasture.

20 72. Those water users receiving their water supply from BBID have implemented  
21 state of the art conservation measures and operations within BBID and are therefore extremely  
22 efficient. Most agricultural water is applied via the use of drip tape and/or micro sprinklers.  
23 Water use within Mountain House is also efficient, as Mountain House is a relatively new  
24 community constructed using state of the art water conservation methods. Current average per-  
25 capita water use within Mountain House is approximately 97 gallons per day.

26 **Curtailments and Effects Therefrom**

27 73. On June 12, 2015, the SWRCB, through its Executive Director Thomas Howard,  
28 issued the Notice purporting to curtail BBID's pre-1914 appropriative water right.

1           74.     The Notice, among other things, purports to direct BBID “to immediately stop  
2 diverting water,” and further mandates that BBID complete an “online Curtailment Certification  
3 Form” confirming BBID’s “cessation of diversion under [its] specific pre-1914 claim of right.”

4           75.     On June 22, 2015, BBID obtained pleadings filed by the SWRCB in San Joaquin  
5 County Superior Court in the case of *Banta Carbona v. SWRCB*. The case involved Banta-  
6 Carbona Irrigation District’s challenge to the Notice. In response to Banta-Carbona’s Request  
7 for a Temporary Restraining Order or Stay of the Notice, the SWRCB filed an Opposition.

8           76.     In the Opposition, the SWRCB changed course from the Notice’s clear directive  
9 that recipients of the Notice cease diverting water. In the Opposition, the SWRCB represented  
10 that the Notice was “not directed at [any particular diverter]” and that the Notice does not subject  
11 a diverter to fines or penalties for failure to comply with the Notice. The SWRCB’s statements  
12 in the Opposition are in direct conflict with the Notice, and are inconsistent with the SWRCB’s  
13 representations to the public.

14           77.     Upon review of the Opposition and related pleadings, on June 23, 2015, BBID  
15 submitted a letter to SWRCB Executive Director Tom Howard confirming what the SWRCB  
16 articulated to the San Joaquin County Superior Court – i.e., that the Notice was not an actual  
17 water right curtailment and was solely “informational.” The SWRCB never responded to  
18 BBID’s June 23, 2015 letter and, notwithstanding the SWRCB’s conflicting public position and  
19 its position before the San Joaquin County Superior Court, BBID remained under the threat of  
20 curtailments and SWRCB enforcement for the diversion of water under its pre-1914 water right.

21           78.     The SWRCB subsequently purported to clarify that the Notice was informational  
22 but continued to threaten enforcement against anyone that diverted water based on the SWRCB’s  
23 determination that there was insufficient water to satisfy claimed rights.

24           79.     The SWRCB imposed no requirement on any post-1914 water right holders to  
25 prove availability prior to diverting water. In fact, the SWRCB actually withheld curtailment  
26 notices to post-1914 water right holders until long after the SWRCB had determined there was  
27 insufficient water available to satisfy those rights. The SWRCB has also waived its enforcement  
28 authority as to certain water right claimants even though there was insufficient water available

1 under those rights.

2 80. The SWRCB's statements through the various press releases, the Notice, the  
3 Rescission and Clarification on July 15, 2015, the various private and public communications,  
4 the presentations and discussions at the SWRCB Board Meetings and Workshops, prior sworn  
5 testimony, and behind-the-scenes discussions at the SWRCB demonstrate that the SWRCB has  
6 pre-determined that no water is available for BBID to divert, irrespective of any purported  
7 "rescission" or "clarification" of prior coercive directives by the SWRCB.

8 81. Despite the SWRCB's purported retreat from the commands contained in the  
9 Notice, a controversy still exists between BBID and the SWRCB because of the SWRCB's  
10 conflicting representations regarding the legal import of the Notice. Moreover, the SWRCB has  
11 predetermined that there is no water available to satisfy BBID's pre-1914 appropriative water  
12 right without any due process hearing and has initiated the Enforcement Action against BBID for  
13 BBID's diversion of water. Because of the SWRCB's predetermination and unlawful conduct as  
14 alleged herein, BBID would not get a fair hearing before the SWRCB in the Enforcement  
15 Proceeding or any other proceeding before the SWRCB on these issues.

16 82. The Enforcement Action brought by the SWRCB against BBID alleges no facts  
17 particular to the availability of water at BBID's point of diversion. The absence of allegations of  
18 lack of water at BBID's point of diversion demonstrates that the SWRCB did not conduct an  
19 analysis of the actual availability of water to BBID at its point of diversion. Instead, the  
20 SWRCB is attempting to use a flawed watershed-wide analysis to deprive BBID of its lawful  
21 rights to water. In addition to depriving BBID of its right to water, causing substantial damages  
22 to BBID and its landowners, the SWRCB is now seeking to impose over \$5 million in fines and  
23 penalties against BBID.

24 83. An immediate curtailment of BBID's pre-1914 appropriative water right, in the  
25 absence of alternative water supplies, will result in the loss of over 500 jobs in the Byron area.  
26 These job losses will result from the immediate closure of packing sheds and the shut down of  
27 agricultural activities within BBID. Additional job losses will occur as the impacts ripple  
28 throughout the region.



1           91.     The Notice mandates that pre-1914 water right holders cease their respective  
2 diversions of water or be faced with enforcement actions, civil penalties, and/or prosecution in  
3 court if such diversions continue.

4           92.     The SWRCB's attempt to regulate BBID's pre-1914 water right is beyond the  
5 scope of the SWRCB's legal and jurisdictional authority.

6           93.     Respondents'/Defendants' later pronouncements regarding the import of the  
7 Notice and the shifting of the burden on BBID to demonstrate the availability of water on a daily  
8 basis is contrary to law. Moreover, Respondents'/Defendants' threat of enforcement in light of  
9 its public statement that no water is available to BBID ensures BBID will not receive a fair  
10 hearing before the SWRCB.

11           94.     As a result of the Notice curtailing BBID's water right, the threats articulated by  
12 Respondents/Defendants, and the attempt to shift the burden of proof to demonstrate water  
13 availability on BBID, an actual controversy has arisen and now exists between  
14 Petitioner/Plaintiff and Respondents/Defendants regarding the scope of SWRCB's jurisdiction to  
15 issue the Notice and later pronouncements regarding BBID's right to divert water under its pre-  
16 1914 appropriative water right. As alleged herein, the Notice substantially injures BBID and  
17 landowners within BBID.

18           95.     The July 15, 2015 Rescission contains coercive language that  
19 Respondents/Defendants have determined there is no water available for diversion by BBID and,  
20 should BBID continue to divert, it will be subject to substantial fines and penalties. Even if the  
21 July 15, 2015 Rescission and Clarification was sufficient to cure any violations of due process,  
22 BBID suffered injury as a result of the Notice at least until it was rescinded.

23           96.     Respondents'/Defendants' public statements that it had determined that there was  
24 no water available for BBID under its water right without any due process hearing and that if  
25 BBID continued to divert, it would be subject to significant enforcement penalties, resulted in  
26 significant financial injury to BBID and its landowners.

27           97.     BBID desires a declaration of its rights with respect to Respondents'/Defendants'  
28 purported curtailment of BBID's pre-1914 appropriative water right.



1 Clarification.

2 107. Because the Executive Director acted in excess of his jurisdiction in issuing the  
3 Notice and the Rescission and Clarification, Petitioner/Plaintiff requests that this Court issue a  
4 Writ to the SWRCB and the Executive Director mandating the SWRCB to rescind the Notice  
5 and the Rescission and Clarification issued to BBID and enjoin the SWRCB from taking any  
6 enforcement action against BBID based on anything contained in the Notice or the Rescission  
7 and Clarification.

8 **THIRD CAUSE OF ACTION**  
9 **(Declaratory Relief / Writ of Mandate - Violation of Due Process)**

10 108. Petitioner/Plaintiff alleges and incorporates by reference the allegations contained  
11 in paragraphs 1 through 107, as though fully set forth herein.

12 109. While a water right is usufructuary in nature, once it is perfected it becomes a  
13 vested *property right*. Thus, the right to beneficially use water pursuant to a valid pre-1914  
14 appropriative water right is a real property right.

15 110. As such, BBID's pre-1914 appropriative water right is a property right subject to  
16 procedural due process protections, including proper notice and the opportunity to be heard.

17 111. To the extent the SWRCB had the authority to curtail BBID's pre-1914  
18 appropriative water right, in order to make a determination that there was no water available to  
19 BBID under its pre-1914 appropriative water right at BBID's point of diversion,  
20 Respondents/Defendants were required to make actual and specific findings with respect to  
21 BBID's diversion and use of water as part of a due process hearing. Respondents/Defendants  
22 failed to consider the specific facts related to BBID's pre-1914 appropriative water right. To the  
23 extent that Respondents/Defendants considered any facts or made findings,  
24 Respondents/Defendants have failed to provide those to BBID, and did so outside of any due  
25 process hearing.

26 112. Respondents/Defendants, in purporting to curtail BBID's pre-1914 appropriative  
27 water right by issuing the Notice, failed to provide BBID a due process hearing or other  
28 opportunity to challenge the Notice and its findings, including the finding that there was no water

1 available for BBID to divert under its pre-1914 appropriative water right.

2 113. Respondents/Defendants, in pre-determining that water was not available for  
3 diversion by BBID and initiating the Enforcement Action based on that pre-determination  
4 violates basic concepts of due process and otherwise deprives BBID and its landowners of  
5 valuable property rights.

6 114. Respondents'/Defendants' determination that there was insufficient water for  
7 BBID to divert under its pre-1914 appropriative water right had significant legal affect, and  
8 purports to change BBID's legal status as a water right holder without a hearing or any due  
9 process.

10 115. BBID is informed and believes, and thereon alleges that the SWRCB, its Board  
11 Members, SWRCB management, and/or the Executive Director, and/or SWRCB enforcement  
12 staff made the decision to curtail BBID's pre-1914 appropriative water right outside of any  
13 public process and did not provide a notice, hearing, or administrative proceeding to BBID.

14 116. BBID is informed and believes, and based upon that information and belief,  
15 alleges that the SWRCB, its Board Members, SWRCB management, and/or the Executive  
16 Director, and/or SWRCB enforcement staff determined that there was no water available for  
17 BBID to divert outside of any public process and did not provide a notice, hearing, or  
18 administrative proceeding to BBID.

19 117. BBID is informed and believes, and based upon that information and belief,  
20 alleges that the SWRCB, its Board Members, SWRCB management, and/or the Executive  
21 Director, and/or SWRCB enforcement staff worked in concert with certain Doe  
22 Respondents/Defendants to deprive BBID of its rights to divert water. BBID is informed and  
23 believes, and based upon that information and belief, alleges that those Doe  
24 Respondents/Defendants have an interest in depriving BBID of its right to water sufficient to  
25 create a conflict of interest tainting the SWRCB investigative process.

26 118. The SWRCB curtailed BBID's water right without confirming whether the  
27 claimed "senior demands" were valid. Instead, the SWRCB assumed all claimed demand was  
28 valid and curtailed BBID's water rights based on that assumption.

1           119. Respondents/Defendants curtailed BBID's water right so that certain other water  
2 right claimants could divert water BBID was otherwise entitled to divert whether or not those  
3 claimants had a legal right to water.

4           120. By failing to provide BBID with proper notice and a meaningful opportunity to be  
5 heard regarding the factual and legal basis for issuing the Notice curtailing BBID's pre-1914  
6 appropriative water right, or determining that there was insufficient water available for BBID to  
7 divert, Respondents/Defendants have deprived BBID of due process to which they are entitled,  
8 constituting a failure to proceed in the manner required by law. (Code Civ. Proc., § 1094.5(b),  
9 (f).)

10           121. Respondents'/Defendants' public statements, presentations, and other  
11 communications that there was insufficient water available to BBID to divert under its pre-1914  
12 appropriative water right ensures BBID would not get a fair hearing before the SWRCB.  
13 Moreover, Respondents'/Defendants' threat of enforcement against BBID unless BBID can  
14 demonstrate it has water available to it in excess of the needs of all other claimants to water  
15 inappropriately shifted the burden on BBID and violated BBID's due process rights.

16           122. The SWRCB Board Members, management, and staff discussions about targeting  
17 BBID for enforcement in order to resolve legal issues of interest to the SWRCB is a violation of  
18 due process and is otherwise arbitrary and capricious.

19           123. An actual controversy exists as to whether Respondents/Defendants needed to  
20 provide BBID with a hearing or similar evidentiary process prior to attempting to curtail BBID's  
21 pre-1914 appropriative water right and whether Respondents/Defendants acted improperly in  
22 targeting BBID for enforcement.

23           124. BBID therefore requests that this Court issue a declaration that  
24 Respondents/Defendants violated BBID's due process rights by failing to provide a hearing prior  
25 to curtailing BBID's pre-1914 appropriative water right and for targeting BBID for enforcement.

26           125. BBID further requests that the Court issue a Writ of Mandate directing  
27 Respondents/Defendants to rescind the Notice and enjoining Respondents/Defendants from  
28 enforcing the Notice unless and until Respondents/Defendants provides BBID with the

1 appropriate due process protections afforded by an evidentiary hearing.

2 126. BBID also requests that this Court issue a declaration that  
3 Respondents’/Defendants’ activities in targeting BBID for enforcement, for unlawfully pre-  
4 determining that there was insufficient water for BBID to divert, and for improperly making  
5 these determinations outside of any public process was improper, arbitrary, capricious, and done  
6 with malice.

7 **FOURTH CAUSE OF ACTION**  
8 **(Declaratory Relief / Writ of Mandate**  
9 **July 15, 2015 Rescission and Clarification Violates Due Process)**

10 127. Petitioner/Plaintiff alleges and incorporates by reference the allegations contained  
11 in paragraphs 1 through 126, as though fully set forth herein.

12 128. The July 15, 2015 Rescission and Clarification maintains the coercive language  
13 that permeated the Notice. While the Rescission and Clarification purports to claim that the  
14 Rescission and Clarification is only “informational,” it still conveys Respondents’/Defendants’  
15 determination that there is no water available for BBID to divert under its water right.

16 129. The Rescission and Clarification had significant legal affect, and purports to  
17 change BBID’s legal status as a water right holder without a hearing or any due process.

18 130. While the Rescission and Clarification purport to rescind any coercive language  
19 prohibiting BBID from diverting, it still conveys the coercive message that, should BBID  
20 continue to divert water, BBID will be violating the law as there is no water for BBID to divert.

21 131. Respondents/Defendants did not attempt to cure the due process violations in the  
22 Notice until July 15, 2015. Yet, Respondents/Defendants seek to impose significant penalties on  
23 BBID for the diversion of water from June 13, 2015 through June 25, 2015. All of the alleged  
24 conduct Respondents/Defendants contend was unlawful occurred during the time the SWRCB  
25 was violating BBID’s due process rights by maintaining the Notice.

26 132. The Enforcement Action establishes that the Rescission and Clarification was still  
27 a directive from Respondents/Defendants that BBID was not permitted to divert and use water.

28 133. Respondents’/Defendants’ reliance on the coercive language in the Rescission and  
Clarification is evident in the August 19, 2015 Notice of Pre-Hearing and Public Hearing, which

1 omits the requirement that the SWRCB Prosecution Staff first establish that BBID diverted water  
2 when none was available. The Notice of Public Hearing sets forth “Key Issues” to be decided at  
3 the enforcement hearing. The only Key Issues identified for hearing are related to the amount of  
4 the fine the SWRCB proposes to impose on BBID. The Notice of Public Hearing assumes guilt  
5 and moves straight to the penalty phase of the proceeding. Respondents/Defendants, therefore,  
6 never cured the due process violations contained in the Notice and continues, through the  
7 Rescission and Clarification, to violate BBID’s due process rights.

8 134. Petitioner/Plaintiff therefore requests that this Court issue declaration that the  
9 Rescission and Clarification violates due process, issue a writ to Respondents/Defendants  
10 mandating the SWRCB rescind the Enforcement Action an injunction prohibiting  
11 Respondents/Defendants from taking any enforcement action against BBID as alleged in  
12 ENF01951.

13 **FIFTH CAUSE OF ACTION**  
14 **(Declaratory Relief / Writ of Mandate –**  
15 **Violation of Due Process – Enforcement Action)**

16 135. Petitioner/Plaintiff alleges and incorporates by reference the allegations contained  
17 in paragraphs 1 through 134, as though fully set forth herein.

18 136. Respondents’/Defendants’ initiation of the Enforcement Action confirms the  
19 SWRCB’s prior findings and threats, and results in significant financial injury to BBID and its  
20 landowners.

21 137. The Enforcement Action seeks to impose liability on BBID for all diversions of  
22 water after the date the Rescission and Clarification was issued, when the SWRCB was violating  
23 BBID’s due process rights through the unlawful commands contained in the Notice.

24 138. The Enforcement Action seeks to impose liability on BBID based on information  
25 contained in the unlawful Notice.

26 139. The Enforcement Action relies on the existence of the unlawful Notice in order to  
27 impose the maximum possible financial penalty on BBID.

28 140. Notwithstanding Respondents’/Defendants’ statements in Court in this matter, the

1 Enforcement Action seeks to impose financial penalties on BBID dating back to the issuance of  
2 the Notice.

3 141. Petitioner/Plaintiff therefore requests that this Court issue declaration that the  
4 issuance of the Enforcement Action violates due process, issue a writ to Respondents/Defendants  
5 mandating the SWRCB rescind the Enforcement Action an injunction prohibiting  
6 Respondents/Defendants from taking any enforcement action against BBID as alleged in  
7 ENF01951.

8 **SIXTH CAUSE OF ACTION**  
9 **(Declaratory Relief / Writ of Mandate –**  
10 **Violation of Due Process – Hearing Notice)**

11 142. Petitioner/Plaintiff alleges and incorporates by reference the allegations contained  
12 in paragraphs 1 through 141, as though fully set forth herein

13 143. The August 19, 2015 Notice of Public Hearing and Pre-Hearing Conference  
14 (Hearing Notice) provides for certain Key Issues to be decided at the October 28, 2015 hearing.

15 144. The Key Issues contained in the Hearing Notice relate only to the amount of fines  
16 and penalties the SWRCB proposes to impose on BBID.

17 145. The Hearing Notice presumes BBID’s guilt for a “trespass”.

18 146. Respondents/Defendants purposefully set the hearing while the instant litigation  
19 was pending before the Judicial Council of California in an attempt to further deprive BBID of  
20 its due process rights.

21 147. At the July 8, 2015 proceedings in *West Side v. SWRCB*, Defendants/Respondents  
22 represented to the Court that any financial penalties would not be based on the Notice.  
23 Defendants/Respondents also represented to the Court that “the notice would in no way be  
24 evidence of anything regarding the violation for illegal diversion.”

25 148. ENF01951 alleges that the Notice “applies to [BBID] because BBID claims a  
26 priority date of May 18, 1914. BBID received an electronic copy of the [Notice] on June 12,  
27 2015.”

28 149. ENF01951 further alleges “BBID diverted a total of approximately two thousand

1 sixty-seven (2,067) acre-feet over the course of thirteen days following the [Notice], specifically  
2 from June 13 through June 25, 2015.”

3 150. Notwithstanding Defendants/Respondents representations to the Court in *West*  
4 *Side v. SWRCB* and *Banta-Carbona v. SWRCB*, ENF01951 relies on BBID’s receipt of the  
5 Notice and the fines and penalties relate back to the date the Notice was issued.

6 151. Notwithstanding Defendants/Respondents representations to various Courts with  
7 respect to the scope of any enforcement hearing and the effect of the Notice, the Hearing Notice  
8 and issues set for hearing relies on the Defendants/Respondents’ prior finding, contained in the  
9 Notice, that there was insufficient water available for BBID to divert.

10 152. Defendants/Respondents’ reliance on the prior determination of lack of  
11 availability of water supply, while representing to various Courts that it had no effect, is a  
12 purposeful deprivation of due process.

13 153. Defendants/Respondents are aware of BBID’s right to due process and have acted  
14 in such a manner to purposefully deprive BBID of those basic due process rights.

15 154. Petitioner/Plaintiff therefore requests that this Court issue declaration that the  
16 Hearing Notice violates due process and issue a writ to Defendants/Respondents mandating  
17 Defendants/Respondents rescind the Hearing Notice an injunction prohibiting the SWRCB from  
18 taking any enforcement action against BBID.

19 **SEVENTH CAUSE OF ACTION**  
20 **(Writ/Declaratory Relief - Violation of the First Amendment –**  
21 **Retaliatory Prosecution)**

22 155. Petitioner/Plaintiff alleges and incorporates by reference the allegations contained  
23 in paragraphs 1 through 154, as though fully set forth herein.

24 156. On June 22, 2015, BBID became aware of Defendants/Respondents’ changed  
25 position on the import of the Notice through its pleadings filed with the San Joaquin County  
26 Superior Court.

27 157. On June 23, 2015, BBID sent a letter to the SWRCB noting  
28 Defendants/Respondents’ conflicting positions on the import of the Notice.

158. BBID filed the instant action against Defendants/Respondents on June 26, 2015.



1 be made publicly available for inspection and copying upon request.

2 169. On July 21, 2015, BBID submitted a California Public Records Act request to the  
3 Office of Delta Watermaster. The Request was sent via electronic mail and U.S. mail.

4 170. The Public Records Act Request sought, among other things, public records  
5 related to Defendants/Respondents' finding that there was no water available for BBID to divert  
6 under its pre-1914 water right and public records otherwise related to the Enforcement Action.

7 171. As of September 2, 2015, the Office of Delta Watermaster has not provided a  
8 response to the Public Records Act Request.

9 172. On July 21, 2015, BBID submitted a California Public Records Act request to the  
10 SWRCB. By letter dated July 30, 2015, the SWRCB responded that the request sought public  
11 records in possession of the SWRCB, but that documents would not be made available for "two  
12 to three weeks, with additional rounds to follow as documents can be collected and reviewed."

13 173. As of September 2, 2015, the SWRCB has not made any documents available  
14 pursuant to the Public Records Act request.

15 174. The SWRCB has now set the Enforcement Action for a hearing on October 28,  
16 with a pre-hearing conference set for September 25, 2015.

17 175. The SWRCB and the Delta Watermaster's refusal to comply with the Public  
18 Records Act is troubling particularly because the SWRCB has apparently fast-tracked the  
19 Enforcement Action. The SWRCB and the Delta Watermaster's refusal to comply with the  
20 Public Records Act, while a violation of the Act itself, also deprives BBID of its due process  
21 rights.

22 176. Given the SWRCB and Delta Watermaster's conduct related to the curtailments  
23 and enforcement action, the refusal to comply with the Public Records Act appears intentional  
24 with the goal of preventing BBID from having access to disclosable public records.

25 177. The Public Records Act provides that "[t]he times for responsive pleadings and  
26 for hearings in these proceedings shall be set by the judge of the court with the object of securing  
27 a decision as to these matters at the earliest possible time."

28 178. Article 1, section 3(b)(1) provides an independent right of access to government

1 records.

2 179. Petitioner/Plaintiff therefore requests that this Court to issue a writ of mandate  
3 directing the SWRCB and Delta Watermaster to provide BBID with all records except those  
4 records that may be lawfully withheld and a declaration that the SWRCB and Delta  
5 Watermaster's refusal to comply with the Public Records Act resulted in a further deprivation of  
6 BBID's due process rights.

7 **NINTH CAUSE OF ACTION**  
8 **(Declaratory Relief / Writ of Mandate - Violation of Article 10, Section 2**  
9 **of the California Constitution)**

10 180. Petitioner/Plaintiff alleges and incorporates by reference the allegations contained  
11 in paragraphs 1 through 179, as though fully set forth herein.

12 181. Article X, section 2 of the California Constitution imposes a duty on  
13 Respondents/Defendants' to fashion remedies that ensure the reasonable and beneficial use of the  
14 state's water resources. (See Wat. Code, § 275; *City of Lodi v. East Bay Mun. Dist.* (1936) 7  
15 Cal.2d 316, 341; *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 288.)

16 182. The Notice ignores the unique geographic location of BBID's point of diversion  
17 in the Delta, at the downstream end of the San Joaquin River and Sacramento River watersheds.

18 183. Due to its location, there is always water available for appropriation at BBID's  
19 diversion facilities on the Intake Channel, between Clifton Court Forebay and Banks Pumping  
20 Plant.

21 184. Respondents/Defendants' failure to analyze whether BBID's geographic location  
22 in the Delta would allow it to divert water violates the directive that Respondents/Defendants'  
23 ensure that the state's water resources are beneficially used to the fullest extent of which they are  
24 capable, and therefore violates article X, section 2 of the California Constitution.

25 185. An actual controversy exists as to whether Respondents/Defendants' must ensure,  
26 when determining whether to curtail a water right, whether the state's water resources are  
27 beneficially used to the fullest extent of which they are capable.

28 186. Petitioner/Plaintiff therefore requests that this Court issue a declaration that  
Respondents/Defendants' failure to ensure water resources are put to beneficial use to the fullest

1 extent of which they are capable violates article X, section 2 of the California Constitution.

2 187. Because Respondents/Defendants', in purporting to curtail BBID's pre-1914  
3 appropriative water right, failed to ensure the state's water resources are put to beneficial use to  
4 the fullest extent of which they are capable, Petitioner/Plaintiff requests that this Court issue a  
5 writ to Respondents/Defendants' mandating Respondents/Defendants' rescind the Notice issued  
6 to BBID and an injunction prohibiting Respondents/Defendants' from taking any enforcement  
7 action against BBID based upon the Notice, the Rescission and Clarification, or the Enforcement  
8 Action.

9 **TENTH CAUSE OF ACTION**  
10 **(Declaratory Relief / Writ of Mandate - Violation of the**  
11 **Priority System of Water Rights)**

12 188. Petitioner/Plaintiff alleges and incorporates by reference the allegations contained  
13 in paragraphs 1 through 187, as though fully set forth herein.

14 189. Water right priorities are a fundamental principle of California water law.

15 190. In general, there are two ways to establish a priority date for a pre-1914  
16 appropriative water right. One way was known as "common law" appropriation whereby an  
17 appropriator could simply take water from a source. If an appropriator chose this method, the  
18 "priority date" was typically the date water was put to actual beneficial use. Another method,  
19 called "code appropriation," allowed an appropriator to record a notice in the county in which the  
20 diversion occurred, followed by the actual appropriation. Under the "code appropriation"  
21 method, the priority date is the date the notice was recorded. In assessing water supply demands,  
22 and in depriving BBID of its right to water, the SWRCB failed to ensure senior claims were  
23 based upon correct priority dates.

24 191. Respondents/Defendants failed to consider the source of available supplies in  
25 purporting to curtail pre-1914 appropriative water rights.

26 192. Respondents/Defendants failed to consider accretions to the water supply system  
27 otherwise available to BBID.

28 193. On April 23, 2015, the Executive Director of the SWRCB issued a notice to all  
post-1914 appropriative water right holders in the San Joaquin River watershed informing them

1 that all post-1914 appropriative water rights were immediately curtailed. Additionally, on May  
2 1, 2015, the Executive Director issued a notice to all post-1914 water right holders in the  
3 Sacramento River watershed informing them that all post-1914 water rights were immediately  
4 curtailed. Both notices “excepted” all post-1914 diversions for hydroelectric generation by direct  
5 diversion. The SWRCB’s method of accounting for “direct diversions” actually allows water to  
6 be held in reservoirs for up to 30 days. The SWRCB identifies water held in this manner as  
7 “regulatory storage.” The result is that post-1914 appropriative water right holders in the San  
8 Joaquin River and Sacramento River watersheds were, and are still, authorized by the SWRCB to  
9 directly divert water for hydroelectric purposes and some or all of those diversions can be held in  
10 reservoirs for up to 30 days. Allowing junior diverters to hold water in reservoirs for up to 30  
11 days when there is no water available to satisfy their water right contravenes the rule of priority  
12 and deprives downstream senior water right holders of water to which they are lawfully entitled.

13 194. Like the notices and exceptions for post-1914 appropriative water rights in the  
14 San Joaquin River and Sacramento River watersheds, the Notice “excepts” from curtailment all  
15 pre-1914 appropriative water right diversions for hydroelectric generation by direct diversion.  
16 The SWRCB’s method of accounting for “direct diversions” actually allows water to be held in  
17 reservoirs for up to 30 days. The result is that pre-1914 appropriative water right holders in the  
18 San Joaquin River and Sacramento River watersheds, some of which may be more junior than  
19 BBID’s water right, were, and are still, authorized by the SWRCB to directly divert water for  
20 hydroelectric purposes and some or all of those diversions can be held in reservoirs for up to 30  
21 days. Allowing junior diverters to hold water in reservoirs for up to 30 days when there is no  
22 water available to satisfy their water rights contravenes the rule of priority and deprives  
23 downstream senior water right holders of water to which they are lawfully entitled.

24 195. Water being held in upstream reservoirs under the SWRCB’s “regulatory storage”  
25 rules deprives downstream seniors of water to which they are lawfully entitled.

26 196. Allowing water right holders to continue to divert water that others are entitled to  
27 divert violates the priority system.

28 197. Allowing post-1914 water right holders to divert water into regulatory storage for

1 up to 30-days while prohibiting BBID to divert under its pre-1914 appropriative water right  
2 contravenes the rule of priority.

3 198. An actual controversy exists regarding Respondents/Defendants' exceptions to  
4 curtailments in the Notice. Respondents/Defendants' failure to consider the source of water  
5 available for diversion and use and Respondents/Defendants' failure to require claimants to  
6 present colorable claims are inconsistent with law and the rule of priority.

7 199. Petitioner/Plaintiff therefore requests this Court issue a declaration that  
8 Respondents/Defendants' actions and inactions violate the rule of priority and have deprived  
9 senior water right holders of the right to water to which they are entitled.

10 200. Petitioner/Plaintiff further requests this Court issue a Writ of Mandate directing  
11 Respondents/Defendants to rescind the Notice issued to BBID and to rescind the Enforcement  
12 Action.

13 **ELEVENTH CAUSE OF ACTION**  
14 **(Declaratory Relief / Writ of Mandate - Unlawful Physical Solution)**

15 201. Petitioner/Plaintiff alleges and incorporates by reference the allegations contained  
16 in paragraphs 1 through 200, as though fully set forth herein.

17 202. In apportioning water, California law mandates that water right priorities be  
18 respected. The SWRCB cannot impose a physical solution that contravenes the priority system.

19 203. Respondents/Defendants provided exceptions to water right curtailments that  
20 violate the rule of priority through the imposition of an unlawful physical solution to the State's  
21 water supply storage.

22 204. Respondents/Defendants, though their unlawful curtailments and other unlawful  
23 action, is seeking to allow others to maintain water supplies at the expense of BBID.

24 205. An actual controversy exists regarding Respondents/Defendants' exceptions to  
25 curtailments and other activities that seek to impose an unlawful physical solution that deprived  
26 BBID of its right to water.

27 206. Petitioner/Plaintiff therefore requests this Court issue a declaration that  
28 Respondents/Defendants' actions and inactions impose an unlawful physical solution and

1 deprive BBID and other water right holders of the right to water to which they are entitled.

2 207. Because Respondents/Defendants' imposition of an unlawful physical solution  
3 deprives BBID and other appropriative water right holders of water to which they are otherwise  
4 entitled, Petitioner/Plaintiff further requests this Court issue a Writ of Mandate directing  
5 Respondents/Defendants' to rescind the Notice issued to BBID and to rescind the Enforcement  
6 Action.

7 **TWELFTH CAUSE OF ACTION**  
8 **(Takings)**

9 208. Petitioner/Plaintiff alleges and incorporates by reference the allegations contained  
10 in paragraphs 1 through 207, as though fully set forth herein.

11 209. The wrongful curtailment of BBID's pre-1914 appropriative water right deprives  
12 BBID of a valuable property right without just compensation as demanded by the California and  
13 United States Constitutions.

14 210. The improper threat of enforcement action against BBID is an attempt by  
15 Respondents/Defendants to coerce BBID into not exercising its pre-1914 appropriative right  
16 sufficient to deprive BBID of a valuable property right without just compensation as demanded  
17 by the California and United States Constitutions.

18 211. The imposition of an unlawful physical solution deprives BBID of a valuable  
19 property right without just compensation, as demanded by the California and United States  
20 Constitutions.

21 212. Respondents/Defendants' exception to curtailments for junior hydropower uses,  
22 which results in storage of water for up to 30 days, deprives BBID of a valuable property right  
23 without just compensation as demanded by the California and United States Constitutions.

24 213. As a result of Respondents/Defendants' actions and/or inactions, BBID has been  
25 harmed and will suffer damages in an amount to be determined at trial.

26 **THIRTEENTH CAUSE OF ACTION**  
27 **(The SWRCB Failed to Comply With Governor's Order)**

28 214. Petitioner/Plaintiff alleges and incorporates by reference the allegations contained

1 in paragraphs 1 through 213, as though fully set forth herein.

2 215. On April 25, 2014, Governor Brown issued a Proclamation of a Continued State  
3 of Emergency (Proclamation), which provided, among other things, that the SWRCB “will adopt  
4 and implement emergency regulations pursuant to Water Code section 1058.5...to require  
5 curtailment of diversions when water is not available under the diverter’s priority of right.”

6 216. On April 1, 2015, Governor Brown issued Executive Order B-29-15, which  
7 provides, among other things, that the orders and provisions of the April 25, 2014, Proclamation  
8 remained in full force and effect.

9 217. The Notice relies, in part, on Executive Order B-29-15, for support.

10 218. At the time that Respondents/Defendants issued the Notice, valid emergency  
11 regulations authorizing the issuance of curtailments did not exist, as required by the April 25,  
12 2015, Proclamation.

13 219. As a result of Respondents’/Defendants’ failure to comply with the Governor’s  
14 April 25, 2014, Proclamation, as renewed by Executive Order B-29-15, an actual controversy has  
15 arisen and now exists between Petitioner/Plaintiff and Respondents/Defendants regarding  
16 Respondents’/Defendants’ failure to comply with the directives in the Governor’s Proclamation  
17 and Executive Order and unlawful issuance of the Notice to BBID.

18 220. BBID requests that this Court issue a declaration regarding  
19 Respondents’/Defendants’ failure to comply with the Governor’s Proclamation and Executive  
20 Order and resulting unauthorized and unlawful curtailment of BBID’s water rights.

21 221. BBID further requests that this Court issue a Writ of Mandate directing  
22 Respondents/Defendants to rescind the Notice issued to BBID and to comply with the directives  
23 in the Governor’s Proclamation and Executive Order.

24 **FOURTEENTH CAUSE OF ACTION**  
25 **(Injunctive Relief)**

26 222. Petitioner/Plaintiff alleges and incorporates by reference the allegations contained  
27 in paragraphs 1 through 221, as though fully set forth herein.

28 223. BBID is entitled to immediate relief in the form of an injunction from this Court

1 vacating the Notice, the Rescission and Clarification, and the Enforcement Action because they  
2 operate to deprive BBID of due process and was issued without legal or factual justification.

3 224. Unless and until restrained, Respondents/Defendants' continued actions related to  
4 the Notice and water right curtailments and/or water availability will continue to injure BBID.

5 225. It is highly unlikely that pecuniary compensation could afford complete relief in  
6 this matter, and it is certain that ascertaining the amount of compensation that would afford  
7 complete relief would prove extremely difficult.

8 226. BBID therefore respectfully requests the Court immediately and permanently  
9 enjoin Respondents/Defendants' from maintaining the Notice, the Rescission and Clarification,  
10 or Enforcement Action against BBID or from taking any further action without satisfying due  
11 process requirements, including providing a fair hearing and developing an appropriate  
12 evidentiary record.

13 **FIFTEENTH CAUSE OF ACTION**  
14 **(Estoppel)**

15 227. Petitioner/Plaintiff alleges and incorporates by reference the allegations contained  
16 in paragraphs 1 through 226, as though fully set forth herein.

17 228. Respondents/Defendants informed BBID that, in the event  
18 Respondents/Defendants curtailed BBID's water right, that BBID should continue diverting  
19 water for Mountain House, for the Contra Costa Airport, and for use at the Mariposa Energy  
20 Project. Respondents/Defendants informed BBID that they would not pursue an enforcement  
21 action against BBID for the diversion of water for Mountain House, the Contra Costa Airport, or  
22 the Mariposa Energy Project.

23 229. The Enforcement Action seeks to impose liability on BBID for the diversion of  
24 water for Mountain House, the Contra Costa Airport, and the Mariposa Energy Project.

25 230. Petitioner/Plaintiff continued to divert and provide water to Mountain House, the  
26 Contra Costa Airport, and the Mariposa Energy Project based on the representations made by  
27 Respondents/Defendants.

28 231. Petitioner/Plaintiff requests this Court to find and declare that

1 Respondents/Defendants are estopped from bringing any enforcement action against BBID for  
2 the diversion and provision of water to Mountain House, the Contra Costa Airport, or the  
3 Mariposa Energy Project.

4 **SIXTEENTH CAUSE OF ACTION**  
5 **(Violation of Due Process – Conflict)**

6 232. Petitioner/Plaintiff alleges and incorporates by reference the allegations contained  
7 in paragraphs 1 through 231, as though fully set forth herein.

8 233. Respondents/Defendants have failed to maintain separation between the advisory  
9 and prosecutorial functions of the SWRCB.

10 234. Throughout 2015, Prosecution Team members have been advising the SWRCB  
11 Board Members on water availability and water right curtailments.

12 235. Those same Prosecution Team members will now appear before the SWRCB in  
13 the Enforcement Action to establish issues related to water availability and water right  
14 curtailments.

15 236. The Executive Director and/or the Delta Watermaster have been working with  
16 Prosecution Team members on water availability, curtailments, and enforcement, including the  
17 Enforcement Action against BBID.

18 237. The Executive Director and/or Delta Watermaster have been meeting with  
19 SWRCB Board Members, individually or collectively, regarding water availability, curtailments,  
20 and enforcement, including the Enforcement Action against BBID.

21 238. Respondents/Defendants, any or all of them, have been working together and  
22 failing to maintain any separation to develop a strategy to select one or more enforcement actions  
23 that would allow the SWRCB to address legal issues the SWRCB deems important as it relates to  
24 water use in the Delta.

25 239. As a result of that effort, Respondents/Defendants have proceeded with the  
26 Enforcement Action against BBID.

27 240. Respondents/Defendants concerted efforts demonstrates that there is no separation  
28 between the Prosecutorial and Advisory roles at the SWRCB as it relates to the Enforcement

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Action.

241. Petitioner/Plaintiff requests a declaration from this Court that Respondents/Defendants filed to maintain any separation, or failed to maintain adequate separation, between the Prosecutorial and Advisory functions at the SWRCB and have therefore created an unlawful conflict and overlap in functions.

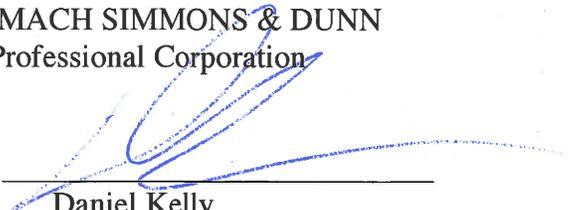
**PRAYER FOR RELIEF**

WHEREFORE, Petitioner/Plaintiff prays for:

- 1. A writ directing the Respondents/Defendants to set aside the Notice purporting to curtail BBID's pre-1914 appropriative water right and to rescind the improper actions taken by Respondents/Defendants, including the Enforcement Action and Hearing Notice, as alleged herein;
- 2. A declaration that Respondents'/Defendants' adoption of the Notice and pre-determination of water availability exceeds the scope of the SWRCB's authority and jurisdiction, violates the rule of priority, and is otherwise contrary to law;
- 3. Damages suffered as a result of the improper curtailment of BBID's pre-1914 appropriative water right, to be determined at trial;
- 4. Just compensation for the taking of BBID's water right;
- 5. Punitive Damages;
- 6. Immediate and permanent injunctive relief;
- 7. An award of attorneys' fees and costs, as allowed by law; and
- 8. Such other relief as the Court deems just and proper.

SOMACH SIMMONS & DUNN  
A Professional Corporation

Dated: September 2, 2015

By:   
Daniel Kelly  
Attorneys for Petitioner/Plaintiff  
Byron-Bethany Irrigation District

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing will be e-filed on September, 2015, and will be automatically served upon counsel of record, all of whom appear to be subscribed to receive notice from the Santa Clara County Superior Court electronic filing service.

/s/ Daniel Kelly  
Daniel Kelly

# **EXHIBIT D**

BEFORE THE  
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

IN RE THE MATTERS OF:

SWRCB Enforcement Action  
ENF01951; ENF01949

WEST SIDE IRRIGATION  
DISTRICT CEASE AND DESIST  
ORDER HEARING,

and

BYRON-BETHANY IRRIGATION  
DISTRICT ADMINISTRATIVE  
CIVIL LIABILITY HEARING.

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CERTIFIED  
COPY

DEPOSITION OF THOMAS HOWARD

VOLUME I

November 19, 2015

Reported by: THRESHA SPENCER, CSR No. 11788

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kathryndavis & associates

APPEARANCES

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5 By: JENNIFER SPALETTA  
6 Attorney at Law  
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9  
10 For the Byron-Bethany Irrigation District:

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13 LAUREN D. BERNADETT  
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16 Sacramento, California 95814

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18 For the West Side Irrigation District, Banta-Carbona  
19 Irrigation District and Patterson Irrigation District:

20 HERUM/CRABTREE/SUNTAG  
21 By: JEANNE M. ZOLEZZI  
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26 For the Westlands Water District:

27 KRONICK MOSKOVITZ TIEDEMANN & GIRARD  
28 By: REBECCA R. AKROYD  
29 Attorney at Law  
30 400 Capitol Mall, 27th Floor  
31 Sacramento, California 95814

32 For the South Delta Water Agency:

33 HARRIS, PERISHO & RUIZ  
34 By: S. DEAN RUIZ  
35 Attorney at Law  
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37 Stockton, California 95219

DEPOSITION OF THOMAS HOWARD

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APPEARANCES (Continued)

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DEPARTMENT OF JUSTICE  
OFFICE OF THE ATTORNEY GENERAL  
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State Water Resources Control Board:

STATE WATER RESOURCES CONTROL BOARD  
By: NATHANIEL E. WEAVER  
MARIANNA AUE  
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1001 I Street, 22nd Floor  
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DEPOSITION OF THOMAS HOWARD

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APPEARANCES (Continued)

For the Division of Water Rights:

SWRCB OFFICE OF ENFORCEMENT  
By: ANDREW TAURIAINEN  
Attorney at Law  
1101 I Street, 16th Floor  
Sacramento, California 95814

For the California Department of Water Resources:

DEPARTMENT OF WATER RESOURCES  
OFFICE OF THE CHIEF COUNSEL  
By: ROBIN MCGINNIS  
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For the State Water Contractors:

STATE WATER CONTRACTORS  
By: STEFANIE MORRIS  
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THE METROPOLITAN WATER DISTRICT OF SOUTHERN  
CALIFORNIA  
By: BECKY DELL SHEEHAN  
Attorney at Law  
1121 L Street, Suite 900  
Sacramento, California 95814-3974

Also Present:

RICK GILMORE  
BYRON-BETHANY IRRIGATION DISTRICT

--o0o--

DEPOSITION OF THOMAS HOWARD

1 conversations with at least Felicia Marcus, some with Dee  
2 Dee D'Adamo with respect to water availability and  
3 curtailments, and I don't want to go through them and mark  
4 them and have them all exhibits.

5 And so I'm wondering whether or not that actually  
6 refreshes your recollection as to whether or not any of this  
7 was discussed either in person or via email with any board  
8 members?

9 A Yeah. We certainly discussed the issue of us  
10 issuing curtailment notices and the issue of water  
11 availability. I don't recall whether we discussed the  
12 precise methodology and -- outside of a board meeting with  
13 the board members.

14 Q Did any board members ever give the okay to do  
15 curtailments outside of a public workshop or public meeting?

16 A I don't recall. I certainly notified the board  
17 members every time I was going to issue a curtailment  
18 notice, but I don't recall whether they ever replied back  
19 or -- I don't have any recollection of saying, "Do I have  
20 permission to issue curtailment notices?"

21 Q Okay. For example, can you look at Exhibit 49 in  
22 your binder. And 49 -- Exhibit 49 is a chain of emails that  
23 we discussed with Ms. Mrowka earlier this week, and it  
24 appears to be a lead-up to the June 12th notice because the  
25 conversations go into late May.

DEPOSITION OF THOMAS HOWARD

1           And Jeff Yeazell -- do you know who Jeff Yeazell is?

2     A           No, I don't know.

3     Q           He's a staff member of Kathy Mrowka's. Jeff Yeazell  
4     is the individual who we understand kind of operated the  
5     spreadsheet for Mr. Coats and for Mr. O'Hagan.

6           On the second page of Exhibit 49, Mr. Yeazell writes  
7     to Kathy Mrowka, "Based on the email chain and talking with  
8     Brian, it sounds like Tom wants to move forward with  
9     curtailing pre-1914 in the San Joaquin Basin along with  
10    those in the Sac Basin/Delta." And then on page -- and that  
11    was on May the 22nd.

12           And then the first email in that chain is from  
13    Barbara Evoy to a couple of other staff members at the  
14    Board, and it says, "We are working on timing right this  
15    minute. We proposed sending out curtailments on Friday but  
16    need to get the Board to nod first."

17           Do you have any idea what is meant by "need to get  
18    the Board to nod first"?

19           MR. HILDRETH: Calls for speculation.

20           THE WITNESS: I would say, you know, as he says, it  
21    does call for speculation as to what Barbara meant.

22     Q           BY MR. KELLY: I'm asking --

23     A           I have no recollection of me talking to the board  
24    members and saying, "Please, you know, agree to  
25    curtailments."

DEPOSITION OF THOMAS HOWARD

1 Q And I'm not asking specifically if they agreed to  
2 any particular curtailment. I'm asking if there was  
3 interaction with the Board with respect to curtailments  
4 outside of the workshops and public meetings.

5 MR. HILDRETH: Asked and answered.

6 THE WITNESS: I know there was some discussions with  
7 the board members. I don't recall anything in particular.  
8 Certainly there was a lot of press and whatnot about  
9 curtailments, and so I talk to the board members all the  
10 time, so I'm quite certain we discussed curtailments as part  
11 of those discussions.

12 Q BY MR. KELLY: Can you look at Exhibit 51, please,  
13 in the binder. That's an email from Ms. Mrowka to another  
14 staff member at the State Water Board on June the 2nd  
15 indicating that John, and I'm assuming, and we'll ask  
16 Mr. O'Hagan later today, that it refers to John O'Hagan.  
17 "That John just returned from briefly Felicia, he said  
18 Thursday for curtailment."

19 Do you know if you attended a briefing with Felicia  
20 on June 2nd to discuss curtailments?

21 A No, I don't recall.

22 Q So it's your -- it's your testimony and recollection  
23 that there were some meetings and briefings with some board  
24 members, but you don't recall any particular meetings?

25 A No, none.

DEPOSITION OF THOMAS HOWARD

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REPORTER'S CERTIFICATE

State of California        )  
                                  ) ss.  
County of Sacramento     )

I certify that the witness in the foregoing deposition,

THOMAS HOWARD,

was by me duly sworn to testify in the within-entitled cause; that said deposition was taken at the time and place therein named; that the testimony of said witness was reported by me, a duly Certified Shorthand Reporter of the State of California authorized to administer oaths and affirmations, and said testimony was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for either or any of the parties to said deposition, nor in any way interested in the outcome of the cause named in said deposition.

IN WITNESS WHEREOF, I have hereunto set my hand this day of November 23, 2015.

  
\_\_\_\_\_  
THRESHA SPENCER  
Certified Shorthand Reporter  
Certificate No. 11788

DEPOSITION OF THOMAS HOWARD

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DISPOSITION OF ORIGINAL TRANSCRIPT

Date \_\_\_\_\_

Check One

\_\_\_\_\_  
Signature waived.

\_\_\_\_\_  
I certify that the witness was given the statutory allowable time within which to read and sign the deposition, and the witness failed to appear for such reading and signing.

\_\_\_\_\_  
I certify that the witness has read and signed the deposition and has made any changes indicated therein.

By \_\_\_\_\_  
KATHRYN DAVIS & ASSOCIATES

--oOo--

DEPOSITION OF THOMAS HOWARD

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**KATHRYN DAVIS & ASSOCIATES**  
Certified Shorthand Reporters  
555 University Avenue, Suite 160  
Sacramento, California 95825  
(916) 567-4211

November 23, 2015

THOMAS HOWARD, Witness  
Department of Justice, Office of the Attorney General  
Attn: Russell B. Hildreth, Attorney  
1300 I Street  
Sacramento, California 94244-2550

Re: West Side Irrigation District Cease and Desist Order  
and Byron-Bethany Irrigation District Civil Hearing

Date Taken: November 19, 2015

Dear Mr. Howard:

Your deposition transcript is now available for review  
and signature, and will be available for the next 30 days.  
This review is optional. An appointment is required to  
review your transcript. Please bring this letter with you.

You may wish to discuss with your attorney whether he/she  
requires that it be read, corrected, and signed, before it  
is filed with the Court.

If you are represented by an attorney, you may read his or  
her copy of the transcript. If you read your attorney's  
copy of the transcript, please send us a photocopy of the  
Signature Line and Deponent's Change Sheet.

If you choose not to read your deposition, please sign here  
and return this letter to our office.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

Sincerely,

THRESHA SPENCER, CSR No. 11788

cc: Ms. Spaletta; Mr. Kelly; Ms. Zolezzi; Ms. Akroyd;  
Mr. O'Laughlin; Mr. Tauriainen; Mr. Knapp; Mr. Donlan;  
Ms. McGinnis; Ms. Sheehan; Ms. Morris; Mr. Ruiz

# **EXHIBIT E**

BEFORE THE  
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

IN RE THE MATTERS OF:

SWRCB Enforcement Action  
ENF01951; ENF01949

WEST SIDE IRRIGATION  
DISTRICT CEASE AND DESIST  
ORDER HEARING,

and

BYRON-BETHANY IRRIGATION  
DISTRICT ADMINISTRATIVE  
CIVIL LIABILITY HEARING.

VIDEOTAPED DEPOSITION OF THOMAS HOWARD

VOLUME II

November 25, 2015

Reported by: THRESHA SPENCER, CSR No. 11788

kathryndavis & associates  
deposition reporting

BEFORE THE  
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

IN RE THE MATTERS OF:

SWRCB Enforcement Action  
ENF01951; ENF01949

WEST SIDE IRRIGATION  
DISTRICT CEASE AND DESIST  
ORDER HEARING,

and

BYRON-BETHANY IRRIGATION  
DISTRICT ADMINISTRATIVE  
CIVIL LIABILITY HEARING.

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VIDEOTAPED DEPOSITION OF THOMAS HOWARD

VOLUME II

November 25, 2015

Reported by: THRESHA SPENCER, CSR No. 11788

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APPEARANCES

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Irrigation District and Patterson Irrigation District:

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APPEARANCES (Continued)

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STATE WATER RESOURCES CONTROL BOARD  
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For the Division of Water Rights:

SWRCB OFFICE OF ENFORCEMENT  
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APPEARANCES (Continued)

For the California Department of Water Resources:

DEPARTMENT OF WATER RESOURCES  
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For the State Water Contractors:

THE METROPOLITAN WATER DISTRICT OF SOUTHERN  
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Sacramento, California 95814-3974

Also Present:

LIA SPALETTA

The Videographer:

Sacramento Legal Video Center  
(916) 451-7600  
Eric Allen

--o0o--

1 MR. HILDRETH: Let me clarify it. If it was in a  
2 public meeting, he can answer the question.

3 Q BY MS. SPALETTA: Was it in a public meeting?

4 A No.

5 Q It was not in a public meeting?

6 A No.

7 Q Who was present?

8 A I know I've discussed this issue with board members,  
9 perhaps all of them separately. I'm not sure whether I've  
10 talked to all of them, so I can't give you a list of which  
11 ones I've discussed, but with board members.

12 Q Anyone other than board members?

13 A I'm sure my staff as well.

14 Q And were those discussions a precursor to the BBID  
15 or West Side enforcement actions?

16 A Well, not directly, no.

17 Q Okay. So they were not discussions relating to the  
18 pending enforcement actions?

19 A Oh, no.

20 Q So what did the discussions relate to?

21 MR. HILDRETH: Are you talking about his discussions  
22 with staff?

23 Q BY MS. SPALETTA: He indicated he had discussions  
24 with the various board members.

25 A And staff.

1 would have to ask Barbara who that task was assigned to.

2 Q Did you or anyone on your staff keep track of which  
3 regulatory condition was controlling the release of stored  
4 water by the projects during the summer of 2015?

5 A I believe that that was a subject of discussion --  
6 that sort of thing was a subject of discussion at the RTDOT  
7 meetings.

8 Q What's the RTDOT?

9 A Real Time Drought Operations Team.

10 Q Did you attend those meetings?

11 A No.

12 Q Who did for your staff?

13 A Les Grober and Diane Riddle.

14 Q Are they on the hearing team staff?

15 A I don't know which team they're on.

16 MS. SPALETTA: Okay. Let's take a five-minute  
17 break.

18 THE VIDEOGRAPHER: We're now going off the record at  
19 8:49 a.m.

20 (A recess was taken.)

21 THE VIDEOGRAPHER: We're now going back on the  
22 record at 9:01 a.m.

23 Q BY MS. SPALETTA: All right. We're back from a  
24 short break.

25 Mr. Howard, right before we took a break, you told



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DISPOSITION OF ORIGINAL TRANSCRIPT

Date \_\_\_\_\_

Check One

\_\_\_\_\_ Signature waived.

\_\_\_\_\_ I certify that the witness was given the statutory allowable time within which to read and sign the deposition, and the witness failed to appear for such reading and signing.

\_\_\_\_\_ I certify that the witness has read and signed the deposition and has made any changes indicated therein.

By \_\_\_\_\_  
KATHRYN DAVIS & ASSOCIATES

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KATHRYN DAVIS & ASSOCIATES  
Certified Shorthand Reporters  
555 University Avenue, Suite 160  
Sacramento, California 95825  
(916) 567-4211

December 2, 2015

THOMAS HOWARD, Witness  
Department of Justice, Office of the Attorney General  
Attn: Russell B. Hildreth, Attorney  
1300 I Street  
Sacramento, California 94244-2550

Re: West Side Irrigation District Cease and Desist Order  
and Byron-Bethany Irrigation District Civil Hearing

Date Taken: November 25, 2015

Dear Mr. Howard:

Your deposition transcript is now available for review  
and signature, and will be available for the next 30 days.  
This review is optional. An appointment is required to  
review your transcript. Please bring this letter with you.

You may wish to discuss with your attorney whether he/she  
requires that it be read, corrected, and signed, before it  
is filed with the Court.

If you are represented by an attorney, you may read his or  
her copy of the transcript. If you read your attorney's  
copy of the transcript, please send us a photocopy of the  
Signature Line and Deponent's Change Sheet.

If you choose not to read your deposition, please sign here  
and return this letter to our office.

\_\_\_\_\_  
Signature Date

Sincerely,

THRESHA SPENCER, CSR No. 11788

cc: Ms. Spaletta; Mr. Kelly; Ms. Zolezzi; Ms. Akroyd;  
Mr. O'Laughlin; Mr. Tauriainen; Mr. Hildreth; Ms. Aue;  
Ms. McGinnis; Ms. Sheehan; Mr. Ruiz; Mr. Weaver

# **EXHIBIT F**

BEFORE THE  
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

IN RE THE MATTERS OF:

SWRCB Enforcement Actions  
ENFO1951; ENFO1949

WEST SIDE IRRIGATION  
DISTRICT CEASE AND DESIST  
ORDER HEARING,

and

BYRON-BETHANY IRRIGATION  
DISTRICT ADMINISTRATIVE  
CIVIL LIABILITY HEARING.

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DEPOSITION OF JOHN O'HAGAN  
Volume I

November 19, 2015

Reported By: KATHRYN DAVIS, CSR No. 3808

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APPEARANCES

For the Central Delta Water Agency:

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Attorney at Law  
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Lodi, California 95421

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Sacramento, California 95814

For the West Side Irrigation District, Banta-Carbona  
Irrigation District and Patterson Irrigation District:

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For the San Joaquin Tributaries Authority:

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For the City and County of San Francisco:

CITY AND COUNTY OF SAN FRANCISCO  
OFFICE OF THE CITY ATTORNEY  
By: JONATHAN P. KNAPP  
Deputy City Attorney  
1300 Market Street, Suit 418  
San Francisco, California 94102

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APPEARANCES CONTINUED

For the San Francisco Public Utilities:

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For the Division of Water Rights:

SWRCB OFFICE OF ENFORCEMENT  
By: CHRISTIAN CARRIGAN, Director  
ANDREW TAURIAINEN, Senior Staff Counsel  
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For the California Department of Water Resources:

Department of Water Resources  
Office of the Chief Counsel  
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TRIPP (JAMES) MIZELL  
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For the State Water Contractors:

STATE WATER CONTRACTORS  
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1121 L Street, Suite 1050  
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For the South Delta Water Agency:

HARRIS, PERISHO & RUIZ  
By: S. DEAN RUIZ  
Attorney at Law  
3439 Brookside Road, Suite 210  
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APPEARANCES CONTINUED

Also Present:

KENNETH R. HENNEMAN  
KENNETH R. HENNEMAN CONSULTING

RICK GILMORE  
BYRON-BETHANY IRRIGATION DISTRICT

NICHOLAS BONSIGNORE, P.E.  
WAGNER & BONSIGNORE

TULLY & YOUNG  
GREG YOUNG, P.E.

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I N D E X   O F   E X A M I N A T I O N

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Examination by Ms. Spaletta.....	6
Examination by Mr. Knapp.....	114

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1 relates to BBID?

2 A All of them went into decision-making.

3 Q And what about for West Side Irrigation  
4 District?

5 A West Side received the May 1st notice because  
6 they were in the Delta downstream of Mossdale  
7 Bridge, so they received a May 1st notice.

8 Q And which supply and demand analysis supported  
9 your curtailment recommendation for the May 1st notice?

10 A Again, it would be a combination one but I  
11 can't aim at a particular one.

12 Q I haven't asked you any questions specific to  
13 the two pending enforcement actions yet today. What  
14 actions have you taken with regard to the West Side  
15 enforcement action?

16 MR. CARRIGAN: Overbroad. Vague and ambiguous.

17 THE WITNESS: I signed those enforcement  
18 actions.

19 Q BY MS. SPALETTA: Do you consider yourself part  
20 of the Prosecution Team for the West Side Irrigation  
21 District's enforcement action?

22 A Since I signed it, I would be part of the  
23 Prosecution Team because I'm signing the order.

24 Q And what work did you do to support the findings  
25 for the order that you signed?

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REPORTER'S CERTIFICATE

State of California        )  
                                  ) ss.  
County of Sacramento     )

I certify that the witness in the foregoing deposition,

                                  JOHN O'HAGAN,  
was by me duly sworn to testify in the within-entitled cause; that said deposition was taken at the time and place therein named; that the testimony of said witness was reported by me, a duly Certified Shorthand Reporter Of the State of California authorized to administer oaths and affirmations, and said testimony was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for either or any of the parties to said deposition, nor in any way interested in the outcome of the cause named in said deposition.

IN WITNESS WHEREOF, I have hereunto set my hand this 23rd day of November 2015.

\_\_\_\_\_  
KATHRYN DAVIS  
Certified Shorthand Reporter  
Certificate No. 3808

# **EXHIBIT G**

## State Water Resources Control Board

December 16, 2015

### VIA ELECTRONIC MAIL

TO: ENCLOSED SERVICE LIST OF PARTICIPANTS

### **PROCEDURAL RULING: THE WEST SIDE IRRIGATION DISTRICT DRAFT CEASE AND DESIST ORDER HEARING (ENFORCEMENT ACTION (ENF01949)) (WSID DRAFT CDO HEARING) AND THE BYRON-BETHANY IRRIGATION DISTRICT ADMINISTRATIVE CIVIL LIABILITY COMPLAINT HEARING (ENFORCEMENT ACTION (ENF01951)) (BBID ACL COMPLAINT HEARING)**

This letter addresses the November 9, 2015 [Motion to Continue Hearing Date](#) (Motion) jointly filed by The West Side Irrigation District (WSID), South Delta Water Agency (SDWA) and Central Delta Water Agency (CDWA), and the November 23, 2015 [Request to Consolidate](#) the water availability analysis portions of the hearings, submitted by WSID, Byron-Bethany Irrigation District (BBID), San Joaquin Tributaries Authority (SJTA), City and County of San Francisco (CCSF), SDWA, CDWA, and Westlands Water District (WWD).

### **PROCEDURAL BACKGROUND**

On August 19, 2015, the State Water Board issued a [Notice of Public Hearing and Pre-Hearing Conference](#) for the BBID ACL complaint hearing. In accordance with the October 2, 2015 [Ruling of Hearing Officer Doduc](#), the public hearing scheduled to be conducted on October 28, 29 and 30, 2015, was rescheduled to be conducted on March 21-25, 2016. Accordingly, the State Water Board issued on October 20, 2015, a [Revised Notice of Public Hearing and Pre-Hearing Conference](#).

On September 1, 2015, the State Water Board issued a [Notice of Public Hearing and Pre-Hearing Conference](#) for the WSID draft CDO hearing. In accordance with the October 23, 2015 [Ruling](#) and November 6, 2015 [Ruling of Hearing Officer Spivy-Weber](#), the public hearing scheduled to be conducted on November 12, 13 and 16, 2015, was postponed until January 11-15, 2016 and February 4-5, 2016. Accordingly, the State Water Board issued on November 10, 2015, a [Notice of Rescheduled Public Hearing](#) for the WSID draft CDO hearing.

### **MOTION FOR CONTINUANCE OF WSID DRAFT CDO HEARING**

The Motion filed by WSID, SDWA and CDWA requested that the WSID draft CDO hearing be continued until at least March 2016 to allow the parties to complete discovery, and review, comprehend, and respond to the materials on which the Prosecution Team is basing the enforcement action. The Hearing Team received comments from the Prosecution Team, SJTA and CCSF on the Motion. The Prosecution Team took no position on the Motion, and SJTA and CCSF supported the Motion.

In light of the request to consolidate portions of the two hearings, the motion for continuance is granted. The WSID draft CDO hearing and all document submittal deadlines for exhibits, testimony, policy and opening statements, pre-hearing briefs and motions, and written rebuttal testimony are **POSTPONED and RESECHEDULED**, as described below.

**REQUEST TO CONSOLIDATE HEARINGS**

The parties' Request to Consolidate proposed a two-phased approach to the hearings: Phase 1 (Water Availability) to be held March 21-25, 2016; and Phase 2 (Remaining Key Issues of Enforcement Actions) to be held March 28-April 1, 2016. The Hearing Team received written concurrence from the [Prosecution Team](#), Department of Water Resources, and the State Water Contractors with the general proposal to consolidate the portions of both hearings that address water availability. We appreciate the parties' coordinated proposal as to how these two hearings may proceed most efficiently and effectively.

On November 30, 2015, the [Hearing Team advised](#) the parties that the hearing officers consented to the proposed consolidation of the water availability analysis portions of the hearings, to commence on March 21, 2016 (Phase 1), and that the portions of the proceedings that are specific to each case (Phase 2) would commence immediately following completion of Phase 1. The parties were provided the opportunity to submit comments or objections to the consolidation and rescheduling of the hearings.

The Hearing Team received a comment from [Mr. Morat](#), who did not object to the consolidation if his testimony could be accommodated during the week of March 21-25, 2016. Mr. Morat is a party to the BBID ACL complaint hearing, and seeks to testify regarding the impact of unauthorized diversions on fisheries and other environmental conditions. We will allow Mr. Morat to testify during the week of March 21-25, 2016, and may discuss the timing of Mr. Morat's testimony in further detail during the second pre-hearing conference on February 8, 2016.

A formal notice of Consolidation of Public Hearings and Rescheduled Public Hearings will be issued by the State Water Board. The following table provides the rescheduled hearing dates and document submittal deadlines for both proceedings, which are substantially similar to those previously set for the BBID ACL complaint hearing. We currently intend to conduct the Phase 2 BBID ACL complaint hearing prior the Phase 2 WSID draft CDO hearing; however, this schedule may be revised:

<b>WSID CDO and BBID ACL Hearings Rescheduled Hearings and Document Submittal Deadlines</b>	
<b>Noon, Tuesday, January 19, 2016</b>	Deadline for receipt and service of witnesses' proposed testimony, exhibits, lists of exhibits, qualifications, and statement of service.
<b>Noon, Monday, January 25, 2016</b>	Deadline for receipt and service of: 1. Motions to dismiss and/or motions for summary judgment. 2. Pre-hearing briefing of legal issues. ( <u>BBID ACL Hearing Only</u> )
<b>Monday, February 8, 2016</b>	2 <sup>nd</sup> Pre-Hearing Conference: Phase 1, Phase 2-BBID, and Phase 2-WSID.
<b>Noon, Monday, February 22, 2016</b>	Deadline for receipt and service of: 1. Proposed written rebuttal testimony, exhibits, list of exhibits, qualifications, and statements of service. 2. Responsive briefing of legal issues and motions. ( <u>BBID ACL Hearing Only</u> )

Noon, Monday, February 29, 2016	Deadline for receipt and service of: 1. Written opening statements. 2. Motions in limine.
Noon, Friday, March 4, 2016	Deadline for receipt of opposition to motions in limine.
March 21, 22, 23, 24, 25, 28, 29, 30, 2016 April 1, 4 and 6, 2016	Phase 1 Hearing (Water Availability) and Phase 2 Hearing (Remaining Key Issues of Enforcement Actions).

### **SUBMITTAL OF EXHIBITS**

We expect the parties to follow the Attachment to the August 19, 2015 and September 1, 2015 Hearing Notices, "Information Concerning Appearances at Water Right Hearings" (Notice Attachment). The Notice Attachment Section 6, Written Testimony and Exhibits, states, in part:

Exhibits include written testimony, statements of qualifications of expert witnesses, and other documents to be used as evidence. Each party proposing to present testimony on factual or other evidentiary matters at the hearing shall submit such testimony in writing. Written testimony shall be designated as an exhibit, and must be submitted with the other exhibits. Oral testimony that goes beyond the scope of the written testimony may be excluded. A party who proposes to offer expert testimony must submit an exhibit containing a statement of the expert witness's qualifications.

Each party presenting a case-in-chief or written rebuttal in either proceeding shall provide **one complete Index of Exhibits** describing each sequentially numbered exhibit for Phase 1 and Phase 2. The index must indicate whether a particular exhibit is intended to be offered into evidence during Phase 1, Phase 2-BBID, or Phase 2-WSID.

Any documents submitted or served electronically must be in Adobe Portable Document Format (PDF), except for Exhibit Identification Indexes, which may be in a format supported by Microsoft Excel or Word. Electronic submittals to the State Water Board of documents less than 11 megabytes in total size (incoming mail server attachment limitation) may be sent via electronic mail to: **wrhearing@waterboards.ca.gov with a subject of "BBID/WSID Hearings"**. Electronic submittals to the State Water Board of documents greater than 11 megabytes in total size should be submitted on a compact disc (CD or DVD) or a thumb drive. **Each electronically submitted exhibit must be saved as a separate PDF file, with the name in lower case lettering (i.e., pt1, pt2 or wsid1, wsid2, etc.).**

### **SECOND PRE-HEARING CONFERENCE**

The second pre-hearing conference will address outstanding procedural issues related to the conduct of Phase 1 and Phase 2 of both hearings. We will discuss the order of proceeding, hearing time limits for presentation of cases-in-chief, cross and re-cross examination, presentation of oral summary of written rebuttal testimony, and any other matter that will facilitate the efficient conduct of the hearings.

### **SCOPE OF HEARINGS**

Based on the parties' submittals addressing the proposed consolidation and rescheduling of the hearings, the following is the revised scope of Phase 1 and Phase 2 of the hearings. Some of the key issues listed in the hearing notices for these proceedings could arise in either Phase 1 or Phase 2. We do not intend to allow key issues properly raised in Phase 1 to be revisited in Phase 2, and parties should be prepared to submit all evidence with respect to those issues at the time they are first raised.

**PHASE 1 – WATER AVAILABILITY:**

The purpose of the consolidated Phase 1 of the BBID ACL complaint and WSID draft CDO hearings is to receive evidence regarding the following issues:

1. *Was the water diverted by BBID from June 13 through June 25, 2015, if any, unavailable under its claimed pre-1914 appropriative right and all other claims of right by BBID?*
2. *Was the water diverted by WSID after May 1, 2015, if any, unavailable under License 1381 and all other claims of right by WSID?*

**PHASE 2 – REMAINING KEY ISSUES OF ENFORCEMENT ACTIONS:**

The purpose of Phase 2 of the BBID ACL complaint hearing is to receive evidence relevant to determining all issues not addressed during Phase 1 of the hearing that are within the scope of the August 19, 2015, Notice of Public Hearing.

The purpose of Phase 2 of the WSID draft CDO hearing is to receive evidence relevant to determining all issues not addressed during Phase 1 of the hearing that are within the scope of the September 1, 2015, Notice of Public Hearing.

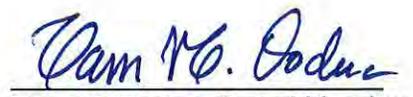
**EX PARTE COMMUNICATIONS**

We would like to remind the parties that *ex parte* communications concerning substantive or controversial procedural issues relevant to this hearing are prohibited. Please be sure to copy the service list on any correspondence to us, the other Board Members, and the hearing team related to this matter.

Thank you for your continued cooperation. Questions regarding non-controversial procedural matters should be directed to Staff Counsel Nicole Kuenzi at (916) 322-4142 or by email to [Nicole.Kuenzi@waterboards.ca.gov](mailto:Nicole.Kuenzi@waterboards.ca.gov); or Ernie Mona at (916) 341-5359 or by email to [Ernie.Mona@waterboards.ca.gov](mailto:Ernie.Mona@waterboards.ca.gov); or to Jane Farwell-Jensen at (916) 341-5349 or by email to [Jane.Farwell-Jensen@waterboards.ca.gov](mailto:Jane.Farwell-Jensen@waterboards.ca.gov) (Gov. Code, § 11430.20, subd. (b).)

Sincerely,

  
Frances Spivy-Weber, Vice-Chair  
WSID Hearing Officer

  
Tam M. Doduc, Board Member  
BBID Hearing Officer

Enclosure: Service Lists

**SERVICE LIST OF PARTICIPANTS  
THE WEST SIDE IRRIGATION DISTRICT  
CEASE AND DESIST ORDER HEARING  
(October 8, 2015)**

Parties	
THE FOLLOWING <b><u>MUST BE SERVED</u></b> WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (All have AGREED TO ACCEPT electronic service, pursuant to the rules specified in the hearing notice.)	
<p><b>DIVISION OF WATER RIGHTS</b> Prosecution Team Andrew Tauriainen, Attorney III SWRCB Office of Enforcement 1001 I Street, 16th Floor Sacramento, CA 95814 <a href="mailto:Andrew.Tauriainen@waterboards.ca.gov">Andrew.Tauriainen@waterboards.ca.gov</a></p>	<p><b>THE WEST SIDE IRRIGATION DISTRICT</b> Jeanne M. Zolezzi Karna Harrigfeld Janelle Krattiger Herum\Crabtree\Suntag 5757 Pacific Ave., Suite 222 Stockton, CA 95207 <a href="mailto:jzolezzi@herumcrabtree.com">jzolezzi@herumcrabtree.com</a> <a href="mailto:kharrigfeld@herumcrabtree.com">kharrigfeld@herumcrabtree.com</a> <a href="mailto:jkrattiger@herumcrabtree.com">jkrattiger@herumcrabtree.com</a></p>
<p><b>STATE WATER CONTRACTORS</b> Stephanie Morris 1121 L Street, Suite 1050 Sacramento, CA 95814 <a href="mailto:smorris@swc.org">smorris@swc.org</a></p>	<p><b>WESTLANDS WATER DISTRICT</b> Daniel O'Hanlon Rebecca Akroyd Kronick Moskowitz Tiedemann &amp; Girard 400 Capitol Mall, 27th Floor Sacramento, CA 95814 <a href="mailto:dohanlon@kmtg.com">dohanlon@kmtg.com</a> <a href="mailto:rakroyd@kmtg.com">rakroyd@kmtg.com</a></p> <p>Philip Williams of Westlands Water District <a href="mailto:pwilliams@westlandswater.org">pwilliams@westlandswater.org</a></p>
<p><b>SOUTH DELTA WATER AGENCY</b> John Herrick, Esq. Dean Ruiz 4255 Pacific Ave., Suite 2 Stockton, CA 95207 <a href="mailto:jherrlaw@aol.com">jherrlaw@aol.com</a> <a href="mailto:dean@hprlaw.net">dean@hprlaw.net</a></p>	<p><b>CENTRAL DELTA WATER AGENCY</b> Jennifer Spaletta Spaletta Law PC PO Box 2660 Lodi, CA 95241 <a href="mailto:jennifer@spalettalaw.com">jennifer@spalettalaw.com</a></p> <p>Dante Nomellini and Dante Nomellini, Jr. Nomellini, Grilli &amp; McDaniel <a href="mailto:ngmplcs@pacbell.net">ngmplcs@pacbell.net</a> <a href="mailto:dantejr@pacbell.net">dantejr@pacbell.net</a></p>
<p><b>CITY AND COUNTY OF SAN FRANCISCO</b> Jonathan Knapp Office of the City Attorney 1390 Market Street, Suite 418 San Francisco, CA 94102 <a href="mailto:jonathan.knapp@sfgov.org">jonathan.knapp@sfgov.org</a></p>	<p><b>SAN JOAQUIN TRIBUTARIES AUTHORITY</b> Valerie Kincaid O'Laughlin &amp; Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95814 <a href="mailto:vkinaid@olaughlinparis.com">vkinaid@olaughlinparis.com</a></p>

<p><b>CALIFORNIA DEPARTMENT OF WATER RESOURCES</b> Robin McGinnis, Attorney PO Box 942836 Sacramento, CA 94236-0001 <a href="mailto:robin.mcginnis@water.ca.gov">robin.mcginnis@water.ca.gov</a></p>	<p><b>BYRON BETHANY IRRIGATION DISTRICT</b> Daniel Kelly Somach Simmons &amp; Dunn 500 Capitol Mall, Suite 1000, Sacramento, CA 95814 <a href="mailto:dkelly@somachlaw.com">dkelly@somachlaw.com</a></p>
--	--

**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)**

<b>PARTIES</b>	
<p>THE FOLLOWING <b><u>MUST BE SERVED</u></b> WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (All have AGREED TO ACCEPT electronic service, pursuant to the rules specified in the hearing notice.)</p>	
<p><b>Division of Water Rights</b> Prosecution Team Andrew Tauriainen, Attorney III SWRCB Office of Enforcement 1001 I Street, 16th Floor Sacramento, CA 95814 <a href="mailto:andrew.tauriainen@waterboards.ca.gov">andrew.tauriainen@waterboards.ca.gov</a></p>	<p><b>Byron Bethany Irrigation District</b> Daniel Kelly Somach Simmons &amp; Dunn 500 Capitol Mall, Suite 1000, Sacramento, CA 95814 <a href="mailto:dkelly@somachlaw.com">dkelly@somachlaw.com</a></p>
<p><b>Patterson Irrigation District Banta-Carbona Irrigation District The West Side Irrigation District</b> Jeanne M. Zolezzi Herum\Crabtree\Suntag 5757 Pacific Ave., Suite 222 Stockton, CA 95207 <a href="mailto:jzolezzi@herumcrabtree.com">jzolezzi@herumcrabtree.com</a></p>	<p><b>City and County of San Francisco</b> Jonathan Knapp Office of the City Attorney 1390 Market Street, Suite 418 San Francisco, CA 94102 <a href="mailto:jonathan.knapp@sfgov.org">jonathan.knapp@sfgov.org</a></p> <p>Robert E. Donlan Ellison, Schneider &amp; Harris L.L.P. 2600 Capitol Avenue, Suite 400 Sacramento, CA 95816 (916) 447-2166 <a href="mailto:red@eslawfirm.com">red@eslawfirm.com</a></p>
<p><b>Central Delta Water Agency</b> Jennifer Spaletta Spaletta Law PC PO Box 2660 Lodi, CA 95241 <a href="mailto:jennifer@spalettalaw.com">jennifer@spalettalaw.com</a></p>	<p><b>California Department of Water Resources</b> Robin McGinnis, Attorney PO Box 942836 Sacramento, CA 94236-0001 <a href="mailto:robin.mcginnis@water.ca.gov">robin.mcginnis@water.ca.gov</a></p>

<p>Dante Nomellini and Dante Nomellini, Jr. Nomellini, Grilli &amp; McDaniel <a href="mailto:ngmplcs@pacbell.net">ngmplcs@pacbell.net</a> <a href="mailto:dantejr@pacbell.net">dantejr@pacbell.net</a></p>	
<p><b>Richard Morat</b> 2821 Berkshire Way Sacramento, CA 95864 <a href="mailto:rjmorat@gmail.com">rjmorat@gmail.com</a></p>	<p><b>San Joaquin Tributaries Authority</b> Valerie Kincaid O'Laughlin &amp; Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95814 <a href="mailto:vkinaid@olaughlinparis.com">vkinaid@olaughlinparis.com</a> <a href="mailto:lwood@olaughlinparis.com">lwood@olaughlinparis.com</a></p>
<p><b>South Delta Water Agency</b> John Herrick, Esq. 4255 Pacific Ave., Suite 2 Stockton, CA 95207 <a href="mailto:jherrlaw@aol.com">jherrlaw@aol.com</a></p> <p>Dean Ruiz, Esq. Harris, Perisho &amp; Ruiz, Attorneys at Law 3439 Brookside Road, Suite 210 Stockton, CA 95219 <a href="mailto:dean@hprlaw.net">dean@hprlaw.net</a></p>	<p><b>State Water Contractors</b> Stefani Morris, Attorney 1121 L Street, Suite 1050 Sacramento, CA 95814 <a href="mailto:smorris@swc.org">smorris@swc.org</a></p>

1 SOMACH SIMMONS & DUNN  
A Professional Corporation  
2 DANIEL KELLY, ESQ. (SBN 215051)  
MICHAEL E. VERGARA, ESQ. (SBN 137689)  
3 LAUREN D. BERNADETT, ESQ. (SBN 295251)  
500 Capitol Mall, Suite 1000  
4 Sacramento, California 95814-2403  
Telephone: (916) 446-7979  
5 Facsimile: (916) 446-8199

6 Attorneys for Petitioner/Plaintiff BYRON-  
BETHANY IRRIGATION DISTRICT  
7

8  
9 BEFORE THE  
10 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

11 ENFORCEMENT ACTION ENF01949  
12 DRAFT CEASE AND DESIST ORDER  
REGARDING UNAUTHORIZED  
13 DIVERSIONS OR THREATENED  
UNAUTHORIZED DIVERSIONS OF WATER  
14 FROM OLD RIVER IN SAN JOAQUIN  
COUNTY  
15  
16 In the Matter of ENFORCEMENT ACTION  
ENF01951 – ADMINISTRATIVE CIVIL  
LIABILITY COMPLAINT REGARDING  
17 UNAUTHORIZED DIVERSION OF WATER  
FROM THE INTAKE CHANNEL TO THE  
18 BANKS PUMPING PLANT (FORMERLY  
ITALIAN SLOUGH) IN CONTRA COSTA  
19 COUNTY

SWRCB Enforcement Action  
ENF01951 and ENF01949

DECLARATION OF LAUREN D.  
BERNADETT IN SUPPORT OF  
MOTION TO DISMISS  
ADMINISTRATIVE CIVIL  
LIABILITY COMPLAINT IN  
ENF01951 FOR LACK OF  
DELEGATION AUTHORITY

20  
21 I, Lauren D. Bernadett, declare:

22 1. I am an attorney at law licensed to practice before the courts of the State of  
23 California. I am an associate with Somach Simmons & Dunn. The following matters are  
24 within my personal knowledge and, if called as a witness, I can competently testify  
25 thereto.

26 2. Attached hereto as BBID Exhibit 202 is a true and correct copy of the  
27 Byron-Bethany Irrigation Company's Notice of Appropriation of Water, dated May 18,  
28 1914.

1           3.       Attached hereto as BBID Exhibit 277 is a true and correct copy of the State  
2 Water Resources Control Board's Administrative Civil Liability Complaint in the Matter of  
3 Unauthorized Diversion by Byron-Bethany Irrigation District (including cover letter from  
4 John O'Hagan, Assistant Deputy Director of the Division of Water Rights, to Rick  
5 Gilmore and Daniel Kelly regarding Enforcement Action ENF01951), dated July 20,  
6 2015.

7           4.       Attached hereto as BBID Exhibit 296 is a true and correct copy of the State  
8 Water Resources Control Board, Division of Water Rights, Hearings and Special  
9 Programs Branch Organization Chart, dated January 1, 2016.

10          5.       Attached hereto as BBID Exhibit 297 is a true and correct copy of the State  
11 Water Resources Control Board Organization Chart, dated January 1, 2016.

12          6.       Attached hereto as BBID Exhibit 298 is a true and correct copy of the State  
13 Water Resources Control Board's Resolution No. 2012-0029: Delegation of Authority to  
14 State Water Resources Control Board Members Individually and to the Deputy Director  
15 for Water Rights, dated June 5, 2012.

16          7.       Attached hereto as BBID Exhibit 300 is a true and correct copy of the  
17 Memorandum from Barbara Evoy, Deputy Director of the Division of Water Rights, to All  
18 Water Rights Staff, Regarding Redlegation of Authorities Pursuant to Resolution No.  
19 2012-0029, dated July 6, 2012.

20          8.       Attached hereto as BBID Exhibit 304 is a true and correct copy of the State  
21 Water Resources Control Board's Resolution No. 2012-0048: Changes in the Delegation  
22 of Authority to the Delta Watermaster, dated October 3, 2012.

23          9.       Attached hereto as Exhibit A is a true and correct copy of excerpts from the  
24 Videotape Deposition of John O'Hagan, Volume II, November 20, 2015.

25          10.       Attached hereto as Exhibit B is a true and correct copy of an email from  
26 Andrew Tauriainen, Attorney III for the State Water Resources Control Board's Office of  
27 Enforcement, to Daniel Kelly et al., Regarding BBID ACLC Hearing WSID Draft CDO  
28 Hearing – Delegations of Authority, dated November 20, 2015.

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I declare under penalty of perjury under the laws of the State of California that the facts recited above are true and correct. Executed this 25th day of January 2016 at Sacramento, California.

  
\_\_\_\_\_  
Lauren D. Bernadett

**BBID  
EXHIBIT 202**

NOTICE OF APPROPRIATION OF WATER.

NOTICE IS HEREBY GIVEN, that BYRON-BETHANY IRRIGATION COMPANY, a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in Contra Costa County, State aforesaid, does hereby claim the water flowing in Old River, at the point where the West bank of said Old River intersects the South bank of the branch or channel making South from said Old River and designated as "ITALIAN SLOUGH", and which said point is near to the center of Section Seven (7), Township One (1) South, Range Four (4) East Mount Diablo Base and Meridian in said Contra-Costa County.

That said corporation claims and intends to use the water there flowing to the extent of 40,000 inches measured under a four-inch pressure.

That the purpose for which said corporation claims said water is to furnish water to its shareholders for irrigation and domestic purposes, and the place where it is intended to use said water is upon the lands lying in the Easterly portions of Contra Costa and Alameda Counties and the Southwesterly portion of San Joaquin County.

That the means by which it is intended to divert said water and the size of the diverting agency is as follows:

FIRST, through and along Italian Slough Southerly for about two miles to a point on the Southerly Section line of Section 18, in Township One South, Range Three East Mount Diablo Base and Meridian, and distant thereon 1450 feet Westerly from the Southeast corner of said Section 18, and which said Italian Slough is about 200 feet wide and 8 feet deep at its confluence with said Old River.

Thence Westerly through and along an artificial channel 200 feet wide and 8 feet deep, now existing, 3380 feet to a point 480 feet East of the Southwest corner of said Section 18.

SECOND; thence Southeasterly 3600 feet through and along an artificial canal or channel now existing, to the point of intersection of said canal with a creek known as Bruns Creek and the Segregation line, and which said point is in the Southwest quarter of Section 24, Township One South, Range Three East Mount Diablo Base and Meridian, said artificial channel or canal which is about 25 feet wide and 6 feet deep to be enlarged to 46 feet wide at the top, 30 feet wide at the bottom and 8 feet deep.

THIRD; thence through and by a canal or channel 50 feet wide at the top, 30 feet wide at the bottom and about 10 feet deep to be cut, and following Southwesterly up and along said Bruns Creek 2600 feet to a point near the Southwest corner of the Southwest quarter of said Section 24, and at such last named point by pumps and other apparatus and appliance to lift the water into several ditches or flumes or other conveyors for distribution to the main and other laterals for use on adjacent lands.

IN WITNESS WHEREOF, said corporation has caused its corporate name to be hereunto subscribed by its President, and its corporate seal to be hereunto affixed by its Secretary, the 16th day of May, 1914.

BYRON-BETHANY IRRIGATION COMPANY

By Valney Taylor President

By R. R. Houston Secretary.

NOTICE OF APPROPRIATION OF WATER.

NOTICE IS HEREBY GIVEN, that BYRON-BETHANY IRRIGATION COMPANY, a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in Contra Costa County, State aforesaid, does hereby claim the water flowing in Old River, at the point where the West bank of said Old River intersects the South bank of the branch or channel making South from said Old River and designated as "ITALIAN SLOUGH", and which said point is near to the center of Section Seven (7), Township One (1) South, Range Four (4) East Mount Diablo Base and Meridian in said Contra Costa County.

That said corporation claims and intends to use the water there flowing to the extent of 40,000 inches measured under a four-inch pressure.

That the purpose for which said corporation claims said water is to furnish water to its shareholders for irrigation and domestic purposes, and the place where it is intended to use said water is upon the lands lying in the Easterly portions of Contra Costa and Alameda Counties and the Southwesterly portion of San Joaquin County.

That the means by which it is intended to divert said water and the size of the diverting agency is as follows:

FIRST, through and along Italian Slough Southerly for about two miles to a point on the Southerly Section line of Section 13, in Township One South, Range Three East Mount Diablo Base and Meridian, and distant thereon 1450 feet Westerly from the Southeast corner of said Section 13, and which said Italian Slough is about 200 feet wide and 8 feet deep at its confluence with said Old River.

Thence Westerly through and along an artificial channel 200 feet wide and 8 feet deep, now existing, 3350 feet to a point 400 feet East of the Southwest corner of said Section 13.

SECOND; thence Southeasterly 3600 feet through and along an artificial canal or channel now existing, to the point of intersection of said canal with a creek known as Bruns Creek and the Segregation line, and which said point is in the Southwest quarter of Section 24, Township One South, Range Three East Mount Diablo Base and Meridian, said artificial channel or canal which is about 25 feet wide and 6 feet deep to be enlarged to 46 feet wide at the top, 30 feet wide at the bottom and 8 feet deep.

State of California, )  
County of Contra Costa )

On this 19th day of May in the year one thousand nine hundred and Fourteen A. D.

before me Alfred L. Boyd, a Notary Public in and for said County, personally appeared

Wolney Taylor known to me to be the

President and R. F. Houston known to me to be the

Secretary of the Corporation that executed the within instrument, known to me to be the persons who executed the within instrument on behalf of the corporation within named, and acknowledged to me that such Corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in said County, the day and year in this certificate first above written.



Notary Public in and for the County of Contra Costa, State of California

AFFIDAVIT OF POSTING OF NOTICE OF APPROPRIATION OF WATER.

STATE OF CALIFORNIA, )  
COUNTY OF CONTRA COSTA. ) SS:

R. R. Houston

Being duly sworn, deposes and says:

That on May 18th, 1914 he posted a full, true and correct copy of the attached "NOTICE OF APPROPRIATION OF WATER" at the point where the West bank of Old River intersects the South bank of the branch or channel making South from said Old River, and designated as "Italian Slough", and which said point where said notice was posted is near to the center of Section 7, Township One South, Range 4 East Mount Diablo Base and Meridian, in Contra Costa County, State of California, by then and there affixing and fastening such copy of said "Notice of Appropriation of Water" to and upon a board firmly fixed in the ground at said above designated point;

That on May 18th, 1914, he posted a full, true and correct copy of the attached "NOTICE OF APPROPRIATION OF WATER" at the point of intersection of the East bank of "Italian Slough" at its terminus with the Eastern extremity of the South embankment of an artificial canal or channel 200 feet wide extending Westerly on the Southerly section line of Section 13 in Township One South, Range 3 East Mount Diablo Base and Meridian, in Contra Costa County, State of California, and which point is distant on such section line 1450 feet Westerly thereon from the Southeast corner of said Section 13, by then and there affixing and fastening such copy of said "Notice of Appropriation of Water" to and upon a board firmly fixed in the ground at said last above designated point;

That on May 18th, 1914, he posted a full, true and correct copy of the attached "NOTICE OF APPROPRIATION OF WATER" at the point of intersection of the South bank of the canal or channel 200 feet wide running East and West on the Southerly section line of Section 13, Township One South, Range 3 East, Mount Diablo Base and Meridian, in Contra Costa County, State of California, with the East bank of the canal or channel 25 feet wide extending Southeasterly, at the said point of intersection being 480 feet East of the Southwest corner of said Section 13, by then and there affixing and fastening such copy of said "Notice of Appropriation of Water" to and upon a board firmly fixed in the ground at said last above designated point.

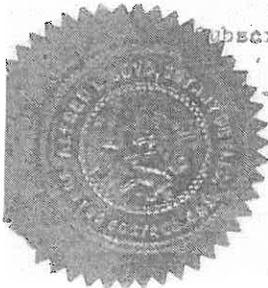
R. R. Houston

Subscribed and sworn to before me,

23  
day of May, 1914  
[Signature]

Notary Public in and for the County of  
Contra Costa, State of California.

My Commission Expires May 18, 1916





**BBID  
EXHIBIT 277**



RECEIVED

JUL 22 2015



EDMUND G. BROWN JR.  
GOVERNOR



MATTHEW RODRIGUEZ  
SECRETARY FOR  
ENVIRONMENTAL PROTECTION

State Water Resources Control Board

Byron-Bethany  
Irrigation District

JUL 20 2015

Byron-Bethany Irrigation District  
Attn: Rick Gilmore, General Manager  
7995 Bruns Road  
Byron, CA 94514

CERTIFIED MAIL NO. 7003 1680 0000 2965 9480

Daniel Kelley  
General Counsel, Byron-Bethany Irrigation District  
Somach Simmons & Dunn  
500 Capital Mall, Suite 1000  
Sacramento, CA 95814

CERTIFIED MAIL NO. 7003 1680 0000 2965 9473

Dear Messrs. Gilmore and Kelley:

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

Enclosed is an Administrative Civil Liability (ACL) Complaint relating to your diversions from the intake channel to the Banks Pumping Plant (formerly Italian Slough) after June 12, 2015. This letter serves as notice to Byron-Bethany Irrigation District (BBID) that the State Water Resources Control Board (State Water Board), Division of Water Rights (Division), intends to impose the proposed Administrative Civil Liability.

**You have 20 days from receipt of this notice to act or face additional enforcement without further notice. Therefore, this matter requires your immediate attention.**

**VIOLATION DESCRIPTION**

BBID is alleged to have diverted a total of approximately two thousand sixty-seven (2,067) acre-feet over the course of thirteen days, from June 13 through June 25, 2015, during which water was unavailable to serve BBID's water right. The violation is further described in the enclosed ACL Complaint.

**ADMINISTRATIVE CIVIL LIABILITY**

California Water Code, section 1052, prohibits the unauthorized diversion of water. Water Code section 1052 authorizes the State Water Board to administratively impose civil liability for unauthorized diversions of water during periods of drought emergency in an amount not to exceed \$1,000 per day of violation plus \$2,500 per acre-foot diverted without authorization.

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

1001 I Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 100, Sacramento, CA 95812-0100 | www.waterboards.ca.gov

♻️ 100% RECYCLED PAPER



BBID

JUL 20 2015

I am hereby issuing the enclosed ACL Complaint proposing that a liability of \$1,553,250 be imposed for your diversion of water during periods when water supplies were insufficient to fulfill your claimed right. The ACL Complaints provides for a potentially reduced penalty upon showing that water pumped during the time considered under this action was used for health and safety needs, or for critical power generation. **If you fail to respond to the ACL Complaint in one of the manners below within 20 days of receiving this notice, then the State Water Board will issue an ACL Order and seek recovery of this proposed liability amount as authorized by California Water Code section 1055.4.**

If you disagree with the facts or allegations set forth in the ACL Complaint, you may request a hearing before the State Water Board. **Your request for a hearing must be in writing, signed by you or on your behalf, and mailed or hand-delivered to ensure receipt by the State Water Board within 20 days from the date you receive this notice.** You may mail your written hearing request to: State Water Resources Control Board, Division of Water Rights, Attn: Enforcement Section, P.O. Box 2000, Sacramento, CA 95812-2000.

You may hand-deliver your written hearing request to: State Water Resources Control Board, Division of Water Rights, Records Unit, 1001 I Street, 2nd Floor, Sacramento, CA 95814.

If you request a hearing, a hearing will be scheduled before the State Water Board or a designated hearing officer. Prior to the hearing, you will be required to submit any written testimony and other evidence you would like the State Water Board to consider. You will be notified of the hearing date and the submittal deadlines as soon as they are scheduled.

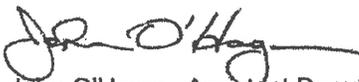
If you fail to come into compliance or request a hearing within 20 days of the date you receive this notice, the State Water Board will adopt the ACL.

#### SUMMARY OF OPTIONS

1. Submit a written request for hearing within 20 days of receiving the enclosed ACL Complaint; or
2. Do nothing, and receive a final ACL Order.

If you have any questions regarding the ACL Complaint, or if you have information that you want to provide in response to this complaint, or information that you believe the State Water Board staff should otherwise consider, please contact Kathy Mrowka, Manager, Enforcement Section at (916) 341-5363 or [Kathy.Mrowka@waterboards.ca.gov](mailto:Kathy.Mrowka@waterboards.ca.gov); or Andrew Tauriainen, Attorney III, Office of Enforcement, at (916) 341-5445 or [Andrew.Tauriainen@waterboards.ca.gov](mailto:Andrew.Tauriainen@waterboards.ca.gov), or send the information directly to them via email.

Sincerely,



John O'Hagan, Assistant Deputy Director  
Division of Water Rights

Enclosures: 1) Administrative Civil Liability Complaint

STATE OF CALIFORNIA  
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY  
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

**ADMINISTRATIVE CIVIL LIABILITY COMPLAINT**

---

In the Matter of Unauthorized Diversion by

**BYRON-BETHANY IRRIGATION DISTRICT**

---

SOURCE: Intake Channel to the Banks Pumping Plant (formerly Italian Slough)

COUNTY: Contra Costa

---

**YOU ARE HEREBY GIVEN NOTICE THAT:**

1. Byron-Bethany Irrigation District (BBID or District) is alleged to have diverted and used water in violation of California Water Code section 1052, subdivision (a), which provides that the diversion or use of water subject to Division 2 of the Water Code other than as authorized in Division 2 is a trespass.
2. Water Code section 1052, subdivision (c), provides that any person or entity committing a trespass during a period for which the Governor has issued a proclamation of a state of drought emergency may be liable in an amount not to exceed the sum of one thousand dollars (\$1,000) for each day the trespass occurs plus two thousand five hundred dollars (\$2,500) for each acre-foot of water diverted or used in excess of that diverter's rights. Water Code section 1052, subdivision (d)(2), provides that civil liability may be imposed administratively by the State Water Resources Control Board (State Water Board or Board) pursuant to Water Code section 1055.
3. Water Code section 1055, subdivision (a), provides that the Executive Director of the State Water Board may issue a complaint to any person or entity on whom Administrative Civil Liability (ACL) may be imposed. On June 5, 2012, the Executive Director delegated this authority to the Deputy Director for Water Rights. State Water Board Resolution 2012-0029 authorizes the Deputy Director for Water Rights to issue an order imposing an ACL when a complaint has been issued and no hearing has been requested within 20 days of receipt of the complaint. The Deputy Director for Water Rights has redelegated this authority to the Assistant Deputy Director for Water Rights pursuant to State Water Board Resolution 2012-0029.

**ALLEGATIONS**

4. On June 30, 2010, BBID submitted an Initial Statement of Water Diversion and Use (Statement), which the State Water Board, Division of Water Rights (Division) designated as Statement 021256 (S021256). Under S021256, BBID claims a pre-1914 appropriative water right to the Intake Channel to the Banks Pumping Plant, formerly Italian Slough, in Contra Costa County. The Statement also indicates that BBID diverted approximately 26,179 acre-feet (af) in 2009 for municipal and industrial and agricultural use within its boundaries.
5. On July 1, 2013, BBID submitted Supplemental Statements for S021256, for the years 2010, 2011 and 2012. BBID's Supplemental Statements each indicates that the District first put water to use in 1917, and that the purpose of use for the District's diversions is irrigation of 12,500 acres. The 2010 Supplement Statement indicates that BBID diverted 25,269 af and applied

- approximately 22,302 af to beneficial use. The 2011 Supplemental Statement indicates that BBID diverted 22,344 af and applied 19,779 af to beneficial use. The 2012 Supplemental Statement indicates that BBID diverted 32,167 af and applied 28,345 af to beneficial use.
6. BBID does not hold or claim any other appropriative or riparian water rights on record with the State Water Board, although S021256 indicates that BBID holds Contract No. 14-06-200-785-LTR1 with the United States Bureau of Reclamation (Reclamation). In 2014 and 2015, Reclamation's agricultural contractors in the Delta were allocated zero percent of their contract quantity (available at <http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=49115> [last accessed June 30, 2015]). BBID confirmed in a public statement dated June 12, 2015, that it had received zero water supply from Reclamation in both 2014 and 2015 (available at <http://bbid.org/wp-content/uploads/2015/06/BBID-Curtailment-Response-FINAL1.pdf> [last accessed June 30, 2015].)
  7. On January 17, 2014, Governor Edmund G. Brown Jr. issued Proclamation No. 1-17-2014, declaring a State of Emergency to exist in California due to severe drought conditions.
  8. Also on January 17, 2014, the State Water Board issued a "Notice of Surface Water Shortage and Potential Curtailment of Water Right Diversions" (2014 Shortage Notice). The 2014 Shortage Notice alerts water right holders in critically dry watersheds that water may become unavailable to satisfy beneficial uses at junior priorities.
  9. On April 25, 2014, Governor Brown issued a Proclamation of a Continued State of Emergency due to drought conditions, to strengthen the state's ability to manage water and habitat effectively in drought conditions.
  10. On May 27, 2014, the State Water Board issued a "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the Sacramento and San Joaquin River Watershed with a post-1914 Appropriative Right" (2014 Unavailability Notice), which notifies all holders of post-1914 appropriative water rights within the Sacramento and San Joaquin River watersheds of the lack of availability of water to serve their post-1914 water rights, with some minor exceptions for non-consumptive diversions. The 2014 Unavailability Notice did not apply to pre-1914 appropriative rights such as that claimed by BBID. The State Water Board notified the most senior right holders in stages as water became available to serve their rights, and by November 19, 2014, had notified all right holders of availability for all diversions in the Sacramento and San Joaquin River watersheds.
  11. On January 23, 2015, the State Water Board issued a "Notice of Surface Water Shortage and Potential for Curtailment of Water Right Diversions for 2015" (2015 Shortage Notice). The 2015 Shortage Notice alerted water right holders in critically dry watersheds that water may become unavailable to satisfy beneficial uses at junior priorities.
  12. On February 4, 2015, the State Water Board issued Order WR 2015-0002-DWR, requiring pre-1914 and riparian water right claimants representing the top 90 percent of such claimants by volume in the Sacramento and San Joaquin River watersheds and the Delta to submit information relating to their claimed water right, the monthly amounts of water diverted and the basis of right claimed for diversions in 2014, and monthly diversion information and anticipated monthly diversion information for each month starting with February, 2015, to be submitted by the 5<sup>th</sup> of each succeeding month until the drought ends.
  13. BBID is subject to Order WR 2015-0002-DWR, and in response submitted information indicating that its predecessor, the Byron-Bethany Irrigation Company, recorded notice of an appropriation of water on or around May 18, 1914. Thus, BBID claims that its pre-1914 water right has a

priority date of May 18, 1914.<sup>1</sup>

14. BBID also submitted water diversion and use information for 2014, projected monthly diversions for 2015, and actual monthly diversions through May, 2015. BBID reports that it diverted 30,204 af in 2014 and projected diversions of 25,452 af in 2015. BBID's reported actual monthly diversion amounts for January through May, 2015, are generally similar to reported diversions for the same months in prior years where such information is available. BBID's reported projected diversions are similar to the reported actual diversions for the same months in prior years where such information is available. From August 1 to October 31, 2014, BBID reports it pumped 1,573 af of water under transfer that was approved by State Water Board Order dated August 27, 2014.
15. On April 1, 2015, Governor Brown issued Executive Order B-29-15 (Executive Order) to strengthen the state's ability to manage water and habitat effectively in drought conditions and called on all Californians to redouble their efforts to conserve water. The Executive Order finds that the continuous severe drought conditions present urgent challenges across the state including water shortages for municipal water use and for agricultural production, increased wildfire activity, degraded habitat for fish and wildlife, threat of saltwater contamination, and additional water scarcity if drought conditions continue. The Executive Order confirms that the orders and provisions in the Governor's previous drought proclamations and orders, the January 17, 2014, Proclamation, April 25, 2015, Proclamation, and Executive Orders B-26-14 and B-28-14, remain in full force and effect. On April 2, 2015, the State Water Board issued another notice warning that notices of unavailability of water were likely to be issued soon.
16. On April 23, 2015, the State Water Board issued a "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the San Joaquin River Watershed with a Post-1914 Appropriative Right" (April 23 Unavailability Notice), which notifies all holders of post-1914 appropriative water rights within the San Joaquin River watershed of the lack of availability of water to serve their post-1914 water rights, with some minor exceptions for non-consumptive diversions. The State Water Board issued a similar notice for post-1914 appropriative water rights within the Sacramento River watershed on May 1, 2015 (May 1 Unavailability Notice). The April 23 and May 1 Unavailability Notices do not apply to pre-1914 appropriative rights such as that claimed by BBID.
17. On June 12, 2015, the State Water Board issued a "Notice of Unavailability of Water and Need for Immediate Curtailment for Those Diverting Water in the Sacramento-San Joaquin Watersheds and Delta with a Pre-1914 Appropriative Claim Commencing During or After 1903" (June 12 Unavailability Notice), which notifies all holders of pre-1914 appropriative water rights with a priority date of 1903 and later within the Sacramento and San Joaquin River watersheds of the lack of availability of water to serve their rights, with some minor exceptions for non-consumptive uses.
18. Drought management of water rights is necessary to ensure that water to which senior water right holders are entitled is actually available to them, which requires that some water remain in most streams to satisfy senior demands at the furthest downstream point of diversion of these senior water rights. The June 12 Unavailability Notice reflects the State Water Board's determination that the existing water available in the Sacramento-San Joaquin watersheds and the Delta is insufficient to meet the demands of diverters with claims of pre-1914 appropriative rights with a priority date of 1903 and later. Continued diversion when there is no water available under the priority of the right constitutes unauthorized water diversion and use. Unauthorized diversion is subject to enforcement. (Wat. Code § 1052.)

<sup>1</sup> The term "pre-1914" appropriative water right means those appropriative rights commenced prior to December 19, 1914, the effective date of the Water Commission Act. Therefore, it is possible to have a "pre-1914" appropriative water right with a priority date in 1914.

19. The State Water Board determines the availability of water for water rights of varying priorities in any watershed by comparing the current and projected available water supply with the total water right diversion demand.
20. To determine water availability, the Board relies upon the full natural flows of watersheds calculated by the Department of Water Resources (DWR) for certain watersheds in its Bulletin 120 and in subsequent monthly updates. "Full natural flow," or "unimpaired runoff," represents the natural water production of a river basin, unaltered by upstream diversions, storage, storage releases, or by export or import of water to or from other watersheds. The full natural flow amount is different than the measured stream flows at the given measurement points because the measured flows may be higher or lower due to upstream operations. Forecasted flow data is uncertain, so DWR provides the data in the form of "levels of exceedance" or simply "exceedance" to show the statistical probability that the forecasted supply will occur. The exceedance is simply the percent of the time that the actual flow is expected to exceed the projected flow. The 90 percent exceedance hydrology assumes inflows from rainfall and snowmelt at levels that are likely to be met or exceeded by actual flows with a 90 percent probability, or in other words, there is a ten percent or less chance of actual conditions turning out to be this dry or drier. In April and early May, the State Water Board uses the 90% and 99% exceedance amounts for its analyses due to low flow conditions. DWR's daily natural flow calculations are also used in the analysis.
21. To determine water demand, the State Water Board relies on information supplied by water right holders on annual or triennial reports of water diversion and use required to be true and accurate to the best of the knowledge of the diverters. The Board also incorporates 2014 diversion data submitted pursuant to Order WR 2015-0002. All reported monthly water diversion data is compiled by watershed, type of right and priority dates. The Board performs quality control checks and removes obvious errors, excess reporting, removes demand for direct diversion for power, and makes additional changes based on stakeholders' input. The corrected demand data includes the 2014 reported data for 90% of the watershed demand plus, for the remaining diverters, an averaged diversion amount for 2010 through 2013. These monthly diversion demands are grouped into water right types (riparian, pre-1914 and post-1914 rights).
22. The State Water Board consistently adjusts the water availability and demand analyses based on new information obtained from stakeholders, or adjustments to projected flows from the DWR. State Water Board staff reviews this information and provides revisions to its data set and graphs that are all shown on the Watershed Analysis website ([http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/analysis/](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/analysis/)).
23. The State Water Board's Watershed Analysis website provides updated graphical summations and spreadsheets containing supporting analysis of the availability and demand analyses. The graphical summations show priorities with monthly demands for the total riparian demand at bottom, the pre-1914 demands added to riparian and depicted above the riparian demand. The monthly amounts are averaged into cubic feet per second for graphical purposes. See, for example, the combined Sacramento/San Joaquin River Basin Senior Supply/Demand Analysis ([http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/analysis/docs/sacsic\\_ombined.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/analysis/docs/sacsic_ombined.pdf)). The Curtailment Analysis website also provides graphical summations of the San Joaquin River Basin Senior Supply/Demand Analysis with Proportional Delta Demand ([http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/analysis/docs/siprated.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/analysis/docs/siprated.pdf)) and the Sacramento River Basin Senior Supply/Demand Analysis with Proportional Delta Demand ([http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/analysis/docs/sacpro rated.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/analysis/docs/sacpro rated.pdf)).
24. This analysis shows that by June 12, 2015, available supply was insufficient to meet the demands of appropriative rights with priority dates of 1903 and later throughout the Sacramento and San Joaquin River watersheds and the Delta.

25. The June 12 Unavailability Notice applies to S021256 because BBID claims a priority date of May 18, 1914. BBID received an electronic copy of the June 12 Unavailability Notice on June 12, 2015, via the Board's "Drought Updates" Lyris email list system, because Rick Gilmore, BBID's General Manager is a subscriber to that system (via email address [r.gilmore@bbid.org](mailto:r.gilmore@bbid.org)). Moreover, BBID issued a public statement on June 12, 2015, in response to the June 12 Unavailability Notice (available at [http://bbid.org/wp-content/uploads/2015/06/BBID-Curtailment-Response-FINAL\\_1.pdf](http://bbid.org/wp-content/uploads/2015/06/BBID-Curtailment-Response-FINAL_1.pdf) [last accessed June 25, 2015].) BBID received a paper copy of the June 12 Unavailability Notice no later than June 15, 2015.
26. BBID's diversions are recorded by DWR and posted to the California Data Exchange Center (CDEC) (<http://cdec.water.ca.gov/cgi-progs/queryDaily?BBID>) also available at <http://www.water.ca.gov/swp/operationscontrol/docs/delta/DeltaHydrology.pdf> ). CDEC reports that BBID has diverted water each day since the June 12 Unavailability Notice:

Date	Avg Diversion Rate (cfs)	Amount Diverted (af)	Date	Avg Diversion Rate (cfs)	Amount Diverted (af)
06/13/2015	91	180	06/20/2015	96	190
06/14/2015	122	242	06/21/2015	99	196
06/15/2015	79	156	06/22/2015	62	123
06/16/2015	83	164	06/23/2015	61	121
06/17/2015	78	154	06/24/2015	67	132
06/18/2015	91	180	06/25/2015	36	71
06/19/2015	80	158	06/26/2015	0	0

27. The daily diversion rates through June 24 are comparable to the District's average daily diversion rates reported for June 2014 (4,842 af/30 days/1.9835=81.4 cfs), and those BBID reported as anticipated for June 2015. This daily rate is in excess of the basic minimum health and safety needs of Mountain House Community Service District. This indicates that BBID has continued its normal diversions following the June 12 Unavailability Notice.
28. BBID diverted a total of approximately two thousand sixty-seven (2,067) acre-feet over the course of thirteen days following the June 12 Unavailability Notice, specifically from June 13 through June 25, 2015.
29. On July 15, 2015, the State Water Board issued a Clarification to the Unavailability Notices indicating that, to the extent that any of the notices described above contain language that may be construed as an order requiring you to curtail diversions under your affected water right, that language has been rescinded. Similarly, any language requiring affected water right holders to submit curtailment certification forms has been rescinded.
30. Diversion or use of water by an appropriative water right holder when there is insufficient water supply available for that water right is an unauthorized diversion or use of water subject to Division 2 of the Water Code. Water Code section 1052, subdivision (a) provides that unauthorized diversion or use of water is a trespass.
31. This enforcement action is based on lack of available water supply under the priority of the right. The Unavailability Notices were issued for the purpose of advising the public and water diverters of the lack of available water under the priority of the rights identified in each notice; the notices are not the basis for this enforcement action.

#### PROPOSED CIVIL LIABILITY

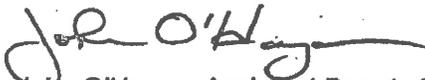
32. Water Code section 1052 provides that the maximum civil liability that can be imposed by the State Water Board in this matter for the unauthorized diversion and use of the water during a

- drought period is \$1,000 for each day of trespass plus \$2,500 for each acre-foot of water diverted or used in excess of that diverter's water rights.
33. Evidence demonstrates that BBID's unauthorized diversions began on June 13, 2015, and continued until June 25, 2015, for a total of thirteen (13) days. Over that period, BBID diverted approximately two thousand sixty-seven (2,067) acre-feet of water in excess of that available to serve its claimed water right.
  34. Therefore, the maximum civil liability for the alleged violations is \$5,180,500 [13 days at \$1,000 per day plus 2,067 acre-feet at \$2,500 per acre-foot].
  35. In determining the amount of civil liability, California Water Code section 1055.3 requires that the State Water Board consider all relevant circumstances, including, but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, and any corrective action taken by the violator.
  36. In this case, BBID has made unauthorized diversions of water from the Intake Channel to the Banks Pumping Plant (formerly Italian Slough) during the most extreme drought in decades, when there was insufficient water supply available for BBID's claimed water right. BBID was aware that the State Water Board had determined that there was insufficient water supply available for BBID's claimed water right. These unauthorized diversions have reduced or threatened to reduce the amount of water available for downstream water right holders during an extreme drought emergency. Moreover, BBID's diversions likely reduced the water available for instream resources and riparian habitat within the Delta during an extreme drought emergency.
  37. BBID received an economic advantage over other legitimate water diverters in the area by foregoing the costs of buying replacement water during the violation period. During 2015, irrigation districts north of the Delta have paid at least \$250 per acre-foot of replacement water. Thus, by illegally diverting 2,067 acre-feet of water from June 13 through June 25, BBID avoided purchased water costs of at least \$516,750.
  38. The Division estimates that its staff cost to investigate the unauthorized diversion issues and develop the enforcement documents to be \$3,000.
  39. BBID is known to be serving water to Mountain House Community Service District and to power generation facilities that may be deemed critical energy suppliers. BBID and Mountain House Community Service District took corrective actions to secure water available via contract and transfer. Although these supplies were not provided during the violation period identified above, they are recognized as progressive correction actions to prevent unauthorized diversions. Also taken into consideration is the fact that BBID has stopped its diversions from June 26.
  40. Having taken into consideration the factors described above, the Assistant Deputy Director for Water Rights recommends an ACL for the unauthorized diversion of water in the amount of \$1,653,250. The recommended penalty is based on the circumstances known to this time, BBID's continued diversions despite lack of availability of water to serve its right during extreme ongoing drought conditions, and to provide a strong disincentive for continued unauthorized diversions by BBID and any similarly-situated parties. The Prosecution Team will consider adjustment of the recommended penalty if BBID provides evidence of the amounts of water pumped that were for health and safety needs or critical power generation.
  41. Should the matter go to hearing, the State Water Board may consider a different liability based on the evidence received, including additional staff costs incurred, up to the maximum amount provided by law. It is estimated that if this this matter goes to hearing, additional staff costs incurred for the prosecution staff would be approximately \$10,000.

**RIGHT TO HEARING**

42. BBID may request a hearing on this matter before the State Water Board. Any such request for hearing must be in writing and received or postmarked within 20 days of the date this notice is received. (California Water Code, § 1055, subd. (b).)
43. If BBID requests a hearing, BBID will have an opportunity to be heard and to contest the allegations in this Complaint and the imposition of an ACL by the State Water Board. If a hearing is requested, separate notice setting the time and place for the hearing will be mailed not less than 10 days before the hearing date.
44. If BBID requests a hearing, the State Water Board will consider at the hearing whether to impose the civil liability, and, if so, whether to adjust the proposed liability within the amount authorized by statute. Based on the evidence received at the hearing, the State Water Board may take any appropriate action in accordance with sections 100, 275, and 1050 et seq. of the California Water Code and its responsibilities under the public trust doctrine. Any State Water Board order imposing an ACL shall become final and effective upon issuance.
45. If BBID does not wish to request a hearing, please remit a cashier's check or money order within 20 days of the date of this Complaint for the amount of the ACL set forth above to:  
  
State Water Resources Control Board  
Division of Water Rights  
Enforcement Section  
P.O. Box 2000  
Sacramento, CA 95812-2000
46. If BBID does not request a hearing and does not remit the ACL amount, the State Water Board may seek recovery of the ACL amount as authorized by Water Code section 1055.4.

STATE WATER RESOURCES CONTROL BOARD



*John O'Hagan, Assistant Deputy Director  
Division of Water Rights*

Dated:

**JUL 20 2015**

**BBID**  
**EXHIBIT 296**



**STATE WATER RESOURCES CONTROL BOARD  
DIVISION OF WATER RIGHTS**

**Hearings & Special Programs  
Branch  
Assistant Deputy Director  
Environmental Program  
Manager II (Sup.)  
880-300-0769-001  
Leslie Grober**

**BAY DELTA & HEARINGS  
SECTION  
Environmental Program Manager I  
(Sup.)  
880-300-0756-004  
Diane Riddle**

**BAY-DELTA: PLANNING/  
OVERSIGHT UNIT**

Environmental Program  
Manager I (Spec.)  
880-300-0756-009  
Chris Foe

Environmental Program  
Manager I (Spec.)  
880-300-0756-008  
VACANT (LT)

Environmental Program  
Manager I (Spec.)  
880-300-0756-010  
VACANT

Environmental Program  
Manager I (Spec.)  
880-300-0756-011  
VACANT

Environmental Program  
Manager I (Spec.)  
880-300-0756-012  
VACANT

**BAY-DELTA:  
SPECIALISTS**

Senior WRC Engineer  
(Spec.)  
880-300-3844-040  
Karen Niiya

Senior Environmental  
Scientist (Spec.)  
880-300-0765-012  
John Gerlach

Senior Environmental  
Scientist (Spec.)  
880-300-0765-011  
Matt Holland

Senior WRC Engineer  
(Spec.)  
880-300-3844-031  
Mark Gowdy

Senior WRC Engineer  
880-300-0765-044  
VACANT

Senior WRC Engineer  
880-300-3844-045  
VACANT

Senior Environmental  
Scientist (Spec.)  
880-300-0765-014  
VACANT

Senior WRCE  
880-300-3844-901  
Sushil Arora  
Retired Annuitant

**BAY DELTA:  
SACRAMENTO UNIT  
Senior Environmental  
Scientist (Sup.)  
880-300-0794-018  
VACANT**

WRC Engineer  
880-300-3846-085  
VACANT

WRC Engineer  
880-300-3846-084  
Scott Ligare

WRC Engineer  
880-300-3846-044  
Michael Meza

WRC Engineer  
880-300-3846-074  
Ryan Babb

Environmental Scientist  
880-300-0762-xxx  
VACANT

**BAY DELTA: SAN  
JOAQUIN UNIT  
Senior WRC Engineer  
880-300-3844-028  
Larry Lindsay**

WRC Engineer  
880-300-3846-063  
Timothy Nelson

Environmental Scientist  
880-300-0762-047  
Laurel Karren

Environmental Scientist  
880-300-0762-014  
Chris Carr

Environmental Scientist  
880-300-0762-060  
Jennifer Watts (7/8)

WRC Engineer  
880-300-3846-118  
Yongxuan Gao

**BAY-DELTA & SPECIAL  
PROJECTS UNIT  
Senior WRC Engineer  
880-300-3844-019  
Rich Satkowski**

WRC Engineer  
880-300-3846-068  
Kevin Long

WRC Engineer  
880-300-3846-097  
VACANT

Environmental Scientist  
880-300-0762-059  
Thaddeus Hunt

Environmental Scientist  
880-300-0762-038  
Ken Emanuel

**HEARINGS UNIT  
Senior Environmental  
Scientist (Sup.)  
880-300-0764-010  
Michael Buckman**

WRC Engineer  
880-300-3846-077  
Jean McCue

WRC Engineer  
880-300-3846-072  
Ernie Mona

Engineering Geologist  
880-300-3756-001  
VACANT

Environmental Scientist  
880-300-0762-005  
Jane Farwell

Environmental Scientist  
880-300-0762-041  
VACANT

**Edmund G. Brown, Jr.**  
Governor

Original signed by

*Barbara Evoy, Deputy Director  
January 1, 2016*

**BBID  
EXHIBIT 297**



**BBID**  
**EXHIBIT 298**

**STATE WATER RESOURCES CONTROL BOARD  
RESOLUTION NO. 2012-0029**

**DELEGATION OF AUTHORITY TO STATE WATER RESOURCES CONTROL BOARD  
MEMBERS INDIVIDUALLY AND TO THE DEPUTY DIRECTOR FOR WATER RIGHTS**

**WHEREAS:**

1. Pursuant to Water Code section 7, the State Water Resources Control Board (State Water Board or Board) is authorized to delegate authority to the Board Members individually and to the Deputy Director for Water Rights;
2. Water Code section 186, subdivision (b) directs the State Water Board to appoint a chief of the Division of Water Rights (Division), who shall supervise the work of the Division and act as a technical advisor to the Board on functions under his or her jurisdiction. The State Water Board refers to the chief of the Division as the Deputy Director for Water Rights (Deputy Director);
3. The State Water Board has delegated authority to the Board Members individually and to the Deputy Director as specified in the delegation document approved by Resolution No. 2007-0057; and
4. To promote efficiency in administering the water right program, it is desirable to delegate authority to the Board Members individually and to the Deputy Director to act on behalf of the State Water Board.

**THEREFORE BE IT RESOLVED THAT:**

**The State Water Board:**

1. That Resolution No. 2007-0057 is revoked.
2. That the State Water Board delegates to the Board Members individually the authority to:
  - 2.1. Act on an application or request for renewal of a conditional temporary water right permit pursuant to chapter 6.5 (commencing with section 1425) of part 2 of division 2 of the Water Code. This delegation includes the authority to:
    - 2.1.1. Hold a hearing on any application or request for renewal made pursuant to chapter 6.5.
    - 2.1.2. Make the findings required by chapter 6.5 as conditions precedent to the issuance or renewal of a temporary permit.
    - 2.1.3. Make any findings required by the California Environmental Quality Act (CEQA), Public Resources Code section 21000 et seq.

- 2.2. Act on a petition or request for renewal of a conditional temporary urgency change pursuant to chapter 6.6 (commencing with section 1435) of part 2 of division 2 of the Water Code. This delegation includes the authority to:
    - 2.2.1. Hold a hearing on any petition or request for renewal made pursuant to chapter 6.6.
    - 2.2.2. Make the findings required by chapter 6.6 as conditions precedent to the issuance or renewal of a temporary change order.
    - 2.2.3. Make any findings required by CEQA as conditions precedent to the issuance or renewal of a temporary change order.
  - 2.3. During the trial review period, act on a request for review by an applicant or protestant of Division staff determinations regarding application and petition processing under the Policy for Maintaining Flows in the Northern California Coastal Streams (Policy), prior to final Board action. The scope of issues subject to such review shall be determined by the Division pursuant to Section 3.4.3 of the Policy.
3. That the State Water Board delegates the authority herein to the Deputy Director with the following direction:
    - 3.1 The enumeration of delegated authorities in this resolution shall not be interpreted as revoking authorities already delegated, or hereafter delegated, to the Executive Director or to the Deputy Director, from the State Water Board or the Executive Director.
    - 3.2. Unless otherwise specified in this resolution, the authorities delegated to the Deputy Director under this resolution may not be redelegated except in the absence of the Deputy Director. The Deputy Director may delegate to a senior member of the Division staff the authority to act on his or her behalf when the Deputy Director is absent or recused. Where this resolution authorizes the redelegation of authority, and the Deputy Director makes such redelegation, the staff member to whom the authority has been redelegated may further delegate to a member of the Division staff the ability to act on his or her behalf when the Division staff member is absent or recused, unless the Deputy Director directs otherwise.
    - 3.3. For purposes of this resolution, and for any purposes of any other resolution, decision, or order assigning or delegating responsibility to Chief of the Division of Water Rights, that reference means the Deputy Director for Water Rights, Assistant Deputy Director for Water Rights, or other officer or employee of the State Water Board who is responsible for managing the activities of the Division of Water Rights.
    - 3.4. The Deputy Director shall administer and implement the delegation under this resolution as follows:

- 3.4.1. Maintain the delegation, including any appendices, redelegation memoranda, and subsequent resolutions that add to, amend, or revoke the authorities identified therein.
  - 3.4.2. Every two years, review the authority delegated herein and recommend to the State Water Board whether or not to revise the delegation.
  - 3.4.3. In exercising the authority delegated herein, and without restricting the authority specified, bring the following matters to the attention of the members of the State Water Board by appropriate communication:
    - 3.4.3.1. Matters of a unique or unusual nature;
    - 3.4.3.2. Matters that appear to depart from the policies of the State Water Board;
    - 3.4.3.3. Matters involving significant policy questions;
    - 3.4.3.4. Highly controversial matters;
    - 3.4.3.5. Matters that involve a substantial risk of litigation;
    - 3.4.3.6. Any matter that a Board Member requests to be brought to the attention of the State Water Board; and
    - 3.4.3.7. Any matter that, in the judgment of the Deputy Director, should be brought to the attention of the State Water Board.
4. That the State Water Board delegates to the Deputy Director the authority to take the following actions:
- 4.1. General Administration.
    - 4.1.1. Conduct and supervise the general administrative activities of the Division, including preparing and signing documents, transmitting documents adopted or approved by the State Water Board, and maintaining custody of records. This general administrative authority may be redelegated.
    - 4.1.2. Issue subpoenas for the attendance of witnesses and the introduction of evidence before the State Water Board with respect to all proceedings for which the Division has program responsibility. This authority may be redelegated.
    - 4.1.3. Amend or modify a decision or order to correct any obvious typographical or clerical error or oversight, pursuant to Water Code section 1124. This authority may be redelegated.
    - 4.1.4. Develop and maintain a list of standard permit terms in accordance with California Code of Regulations, title 23, section 780. This authority may be redelegated.

- 4.1.5. Request the Attorney General to institute appropriate proceedings in the superior court in accordance with Water Code section 1052 or 1845.
  - 4.1.6 Assess and collect fees in accordance with chapter 8 (commencing with section 1525) of part 2 of division 2 of the Water Code or section 13160.1 of the Water Code. This authority may be redelegated.
  - 4.1.7 Cancel an application, registration, petition, request, or claim for failure to pay a fee when due pursuant to Water Code section 1535, subdivision (b.) This delegation may be redelegated.
  - 4.1.8 Amend or modify water quality control plans adopted by the State Water Board to correct any obvious typographical or clerical error or oversight, or to make clarifying changes requested by the Office of Administrative Law, after notice to the Executive Director.
- 4.2 Appropriation of Water.
- 4.2.1 Prepare and sign notices of applications to appropriate water. This authority may be redelegated.
  - 4.2.2 Act on a request by an applicant for an extension of time to complete an application to appropriate water in accordance with California Code of Regulations, title 23, section 681. This authority may be redelegated.
  - 4.2.3 Request additional information from an applicant or petitioner in accordance with Water Code sections 1275, 1334, 1701.3, or 1703.5. This authority may be redelegated.
  - 4.2.4 Act on applications and change petitions pursuant to Water Code sections 1340 et seq., and 1701 et seq. after proceedings in accordance with Water Code sections 1345-1348 or 1704.1-1704.4 or in proceedings where no hearing is required in accordance with Water Code section 1351 or 1704, subdivision (c). In the case of change petitions, this authority includes the authority to issue an amended permit or license if the change petition is approved. This authority may be redelegated.
  - 4.2.5 Act on a request to allow additional time to submit information pursuant to Water Code section 1276 or 1701.4. This authority may be redelegated.
  - 4.2.6 Act on a request to approve a compliance plan, monitoring plan, conservation plan, and other programs, plans, reports, or evaluations required to be submitted to the State Water Board as a condition of a permit, license, or enforcement order. This authority may be redelegated.
  - 4.2.7 Act on a request for an extension of time to complete construction or beneficial use of water under a permit in accordance with California Code of Regulations, title 23, sections 840-848, provided that an extension may be granted only if (a) there are no competing projects that would be adversely affected; (b) there are no outstanding protests; and (c) either: (1) the extension is for ten years or less and the period of the extension in

combination with all extensions previously granted under delegated authority does not exceed 15 years; or (2) the extension is for a municipality, the period of extension in combination with all extensions previously granted under delegated authority does not exceed 25 years, and the Deputy Director finds that the time extension is necessary to serve development allowable under the applicable land-use plan for the place of use identified in the permit. This includes the authority to issue an amended permit if the extension of time is approved, consistent with the order approving the extension of time. This authority may be redelegated to the Assistant Deputy Directors.

- 4.2.8 Act on a request for an extension of time to meet a deadline, other than the time to complete construction or put water to beneficial use, contained in a permit if no Board Member objects after being informed by appropriate communication. This authority may be redelegated.
- 4.2.9 Issue permits or licenses, amendments thereto, change orders, and extension orders after the State Water Board issues a decision or order. This authority may be redelegated to the Assistant Deputy Directors.
- 4.2.10 Prepare and sign licenses when the terms and conditions have been accepted by the permittee. This authority may be redelegated.
- 4.2.11 Correct the description in an application, permit, or license of the point of diversion, place of use, purpose of use, or name of source if (a) there is no physical change in project facilities already constructed or the current use of water, or no change in the intent of the applicant or permittee regarding the proposed location of project facilities or use of water, and (b) no one could have been misled by the original description. This authority may be redelegated.
- 4.2.12 Make changes to cover incidental uses of a reservoir in accordance with California Code of Regulations, title 23, section 798. This authority may be redelegated.
- 4.2.13 Issue separate permits or licenses or act on a request to split applications to replace an existing application, permit or license when the place of use has been divided into two or more ownerships and each owner succeeds to a separate interest in the permit or license. Cancel or revoke the existing application, permit or license provided that no objection is received from any of the owners. This authority may be redelegated.
- 4.2.14 Act on an application or a request for renewal of a temporary water right permit pursuant to chapter 6.5 (commencing with section 1425) of part 2 of division 2 of the Water Code if there are no outstanding objections. This authority may be redelegated to the Assistant Deputy Directors in the absence of the Deputy Director.

#### 4.3 Protests.

- 4.3.1 Request information from a protestant in accordance with Water Code sections 1332, 1334, 1703.3, or 1703.5. This authority may be redelegated.
- 4.3.2 Act on requests to extend time for filing protests and answers to protests and approve a request upon finding that good cause has been shown. This authority may be redelegated.
- 4.3.3 Cancel a protest in accordance with Water Code section 1335 or 1703.6. This authority may be redelegated to the Assistant Deputy Directors.
- 4.3.4 Reject protests which do not substantially comply with the requirements of the Water Code or title 23 of the California Code of Regulations. This authority may be redelegated.

#### 4.4 Transfers or Temporary Changes.

- 4.4.1 Act on a petition for a temporary urgency change, or a request for renewal of a temporary change order, pursuant to chapter 6.6 (commencing with section 1435) of part 2 of division 2 of the Water Code. If the State Water Board receives any objections to a petition for a temporary urgency change, the Deputy Director shall refer the matter to the Executive Director for action under section 2.2. This authority may be redelegated to the Assistant Deputy Directors in the absence of the Deputy Director.
- 4.4.2 Act on a petition for a temporary change due to a transfer of water or water rights in accordance with Water Code sections 1725-1732 if the State Water Board does not hold a hearing. This authority may be redelegated to the Assistant Deputy Directors in the absence of the Deputy Director.
- 4.4.3 Act on a petition for a long-term transfer of water or water rights involving a change of point of diversion, place of use, or purpose of use in accordance with Water Code sections 1735-1737, following notice of the proposed transfer, if the State Water Board does not hold a hearing. This authority may be redelegated to the Assistant Deputy Directors in the absence of the Deputy Director.

#### 4.5 Cancellation or Revocation.

- 4.5.1 Issue a notice of proposed cancellation of an application pursuant to California Code of Regulations, title 23, section 845, a notice of proposed revocation of a permit pursuant to Water Code section 1410 et seq., or a notice of proposed revocation of a license pursuant to Water Code section 1675 et seq.
- 4.5.2 Prepare and sign orders canceling or revoking an application, petition, permit, or license to appropriate water, under any of the following circumstances:
  - 4.5.2.1 When requested by the applicant, petitioner, permittee, or licensee. This authority may be redelegated.

- 4.5.2.2 When an applicant or petitioner fails to timely provide information in accordance with Water Code sections 1276, 1335, 1701.4, or 1703.6, and does not show good cause for additional time to submit the requested information under Water Code section 1276 or 1701.4. This authority may be redelegated to the Assistant Deputy Directors.
- 4.5.2.3 When the application or petition is defective or incomplete and has not been perfected within the time allowed for that purpose, and no request for extension of time is filed. This authority may be redelegated to the Assistant Deputy Directors.
- 4.5.2.4 When the applicant or petitioner fails to submit complete or adequate information in accordance with Government Code section 65956. This authority may be redelegated to the Assistant Deputy Directors.
- 4.5.2.5 When fees have not been paid within the time required by law. This authority may be redelegated to the Assistant Deputy Directors.
- 4.5.2.6 When the applicant or petitioner fails to file an affidavit of posting or publication of notice as required by law. This authority may be redelegated to the Assistant Deputy Directors.
- 4.5.2.7 When an application is conditionally approved and the applicant fails to comply with the conditions or to inform the State Water Board that it has complied, within a reasonable time or the time provided, pursuant to California Code of Regulations, title 23, section 845, except when the applicant requests a hearing after notice of the proposed cancellation. This authority may be redelegated to the Assistant Deputy Directors.
- 4.5.2.8 When a permit is issued subject to continuing compliance with one or more specified conditions and the permittee fails to certify compliance with the conditions, or it is discovered that the permittee is not complying with a specified condition, pursuant to California Code of Regulations, title 23, section 845, except when the permittee requests a hearing after notice of proposed revocation. This authority may be redelegated to the Assistant Deputy Directors.
- 4.5.2.9 After notice of proposed revocation pursuant to Water Code section 1410 or 1675 has been sent to the permittee or licensee and no request for hearing has been received. This authority may be redelegated.
- 4.5.2.10 When the stream has been declared fully appropriated in accordance with Water Code section 1206, subdivision (a), Board Order WR 98-08, and any orders that supersede or modify Order WR 98-08. This authority may be redelegated to the Assistant Deputy Directors.

- 4.5.3 Act on requests to set aside the revocation of a permit or license, in accordance with Water Code section 1410.2 or 1675.2.
- 4.6 Small Domestic Use, Small Irrigation Use or Livestock Stockpond Use.
  - 4.6.1 Act on claims for stockpond certificates and registrations (including renewal of registrations) for small domestic use, small irrigation use, or livestock stockpond use in accordance with Water Code sections 1226 et seq. and 1228 et seq., including revoking a certificate or registration pursuant to Water Code section 1226.4 or 1228.4, except that the Deputy Director is not authorized to revoke a certificate or registration if a notice of proposed revocation has been sent to the certificate holder or registrant and a request for hearing has been received. This authority may be redelegated.
  - 4.6.2 Establish and revise a list of general conditions to be applied to small domestic use or livestock stockpond use registrations as authorized by Water Code section 1228.6, and to small irrigation use registrations as authorized by Water Code sections 1228.6 and 1229. This authority may be redelegated.
- 4.7 Determination of Rights.
  - 4.7.1 Prepare and announce draft reports of referee in accordance with Water Code section 2010 et seq.
  - 4.7.2 Apportion the State Water Board's expenses among the parties, request the court to order interim or partial payment of expenses, and take steps necessary to ensure collection of the expenses in accordance with Water Code section 2040 et seq.
  - 4.7.3 Perform the following duties pursuant to "Order of Appointment of California State Water Resources Control Board as Special Master," issued by the United States District Court for the District of Nevada, on April 9, 1990, in *United States of America v. Walker River Irrigation District*, In Equity No. C-125 ("the Walker River Action"), and the accompanying Administrative Rules and Regulations (as amended by "Final Order Pursuant to Stipulation," issued on June 3, 1996):
    - 4.7.3.1 Accept, or reject as defective or incomplete, compliance applications (as defined in the Administrative Rules and Regulations) and applications to change point of diversion, manner of use, or place of use of water in the exercise in California of water rights identified in the decree in the Walker River Action. This authority may be redelegated to the Assistant Deputy Directors.

- 4.7.3.2 Process applications in the manner required by the Order of Appointment, including publishing and mailing notices, acting on protests, conducting a field investigation, preparing and announcing the draft report of Special Master, accepting objections to the draft report and, if there are no issues that require a hearing before the State Water Board, adopting the final report of Special Master. This authority may be redelegated to the Assistant Deputy Directors.
- 4.7.3.3 Following final action by the State Water Board to approve or reject the change application, prepare a statement of total expense incurred by the State Water Board in conducting the proceeding, together with an equitable apportionment of such total expense among the parties to the proceeding. This authority may be redelegated to the Assistant Deputy Directors.
- 4.7.3.4 Prepare, announce, serve, and file the Report of Special Master, including therein the statement of total expense and the equitable apportionment thereof. This authority may be redelegated to the Assistant Deputy Directors.
- 4.7.3.5 Prepare and transmit to the court a certified copy of the record of proceeding for judicial review of the Report of Special Master. This authority may be redelegated to the Assistant Deputy Directors.

#### 4.8 Statutory Adjudications.

- 4.8.1 Prepare, issue, cause to be published, and record notices of statutory adjudication proceedings in accordance with Water Code sections 2526-2529. This authority may be redelegated.
- 4.8.2 Conduct investigations of stream systems in accordance with Water Code section 2550 et seq., including providing notice of investigations, conducting field investigations, and determining facts. This authority may be redelegated.
- 4.8.3 Issue any notices, copies of factual determinations, reports, objections, orders, or other correspondence or documents authorized by chapter 3 (commencing with section 2500) of part 3 of division 2 of the Water Code. This authority may be redelegated.
- 4.8.4 Prepare and issue a notice of inspection of proofs and evidence in accordance with Water Code section 2625 et seq. This authority may be redelegated.
- 4.8.5 Prepare and issue the report, preliminary order of determination, and notice in accordance with Water Code sections 2600-2604.

- 4.8.6 Take actions to file the final State Water Board order with the superior court in accordance with Water Code sections 2750-2756, including filing the required documents and communicating with the superior court, and mailing and causing the order to be published.
  - 4.8.7 Furnish copies of the decree or supplemental decree and notice of entry to water right claimants in accordance with Water Code sections 2825-2826.
  - 4.8.8 Take actions to apportion and collect the State Water Board's expenses and costs against the parties to the proceeding in accordance with Water Code section 2850 et seq., including mailing statements of expense, ordering interim or partial payments, and taking steps necessary to ensure collection of the expenses.
- 4.9 Enforcement of Water Rights and Complaints.
- 4.9.1 Issue a notice of cease and desist order and, when a hearing has not been timely requested, issue a cease and desist order in accordance with Water Code section 1831 et seq. This authority may be redelegated to the Assistant Deputy Directors.
  - 4.9.2 Issue an order imposing administrative civil liability when a complaint has been issued and no hearing has been requested within the period provided under Water Code section 1055. This authority may be redelegated to the Assistant Deputy Directors.
  - 4.9.3 Take actions to collect unpaid fees and initiate subsequent enforcement actions, including revocation of permits or licenses, pursuant to Water Code section 1535 et seq. This authority may be redelegated to the Assistant Deputy Directors.
  - 4.9.4 Dismiss an incomplete complaint filed pursuant to California Code of Regulations, title 23, section 820. This authority may be redelegated.
  - 4.9.5 Dismiss a complaint filed under California Code of Regulations, title 23, sections 820 or 856, or under the public trust, where: (a) the complainant does not show good cause for the State Water Board to investigate an allegation of misuse of water; (b) an investigation results in the determination that no violation or misuse of water has occurred; (c) the alleged violation or misuse of water that forms the basis of the complaint has been remedied; or (d) the State Water Board declines to exercise its discretion to investigate or prosecute an allegation that a violation has occurred. This authority may be redelegated to the Assistant Deputy Directors.
- 4.10 California Environmental Quality Act.
- 4.10.1 Take actions to comply with CEQA for all projects carried out or approved by the State Water Board in connection with the administration of the water right program to the extent authorized under section 15025 of the State CEQA Guidelines (Cal. Code Regs., tit. 14, § 15000 et seq.). This authority shall be

exercised in conformity with the State CEQA Guidelines and the State Water Board's regulations. This authority may be redelegated.

#### 4.11 Certification of Water Right.

4.11.1 In response to a request for certification made pursuant to Public Resources Code section 26013 or Public Utilities Code section 2821, certify or decline to certify that:

4.11.1.1 The State Water Board has issued a water right permit for the appropriation of water for the operation of a hydroelectric facility; or

4.11.1.2 In the opinion of the State Water Board, the energy producer possesses riparian or other water rights that authorize the operation of a hydroelectric facility.

#### 4.12 Water Quality.

4.12.1 Enter into or decline to enter into collaborative communication protocol agreements for licensing and relicensing of hydroelectric projects pursuant to the Federal Energy Regulatory Commission's regulation at 18 Code of Federal Regulations part 4.34(i)(3)(ii). In recognition of the State Water Board's adjudicative responsibilities, and the requirement that it avoid bias, prejudice, or interest in contested matters subject to its approval, this delegation applies only to agreements that do not bind or commit the State Water Board to approve or disapprove an application for water quality certification, water right permit application, or petition for water right change order, or any term or condition of such an approval. This authority may be redelegated to the Assistant Deputy Directors.

4.12.2 Establish monitoring, inspection, entry, reporting and recordkeeping requirements and require other information as may reasonably be required, pursuant to Water Code section 13383, for activities subject to water quality certification under section 401 of the Clean Water Act that involve the diversion of water for beneficial use. This authority may be redelegated.

4.12.3 Request the Attorney General to institute appropriate proceedings in the superior court in accordance with Water Code sections 13350, 13385 or 13386, if the violation relates to water quality certification of an activity involving the diversion of water for beneficial use.

#### 4.13 Groundwater Extraction Recordation Program.

4.13.1 Designate local agencies, in accordance with the requirements of Water Code section 5009, to administer the groundwater extraction recordation program. This authority may be redelegated to the Assistant Deputy Director.

4.14 Policy for Maintaining Instream Flows in Northern California Coastal Streams

4.14.1 Implement the Policy for Maintaining Instream Flows in Northern California Coastal Streams (Policy) by approving, denying approval, or retracting approval of watershed group project charters and diversion management plans; making the preliminary determinations necessary to process applications, petitions and registrations pursuant to the policy; and approving or denying exceptions to policy provisions as outlined in the policy, except case-by-case exceptions to policy provisions sought pursuant to section 9.0 of the policy. This authority does not include the authority to act on the merits of applications or petitions where there are unresolved protests, or any other authority not subject to delegation. This authority may be redelegated.

**CERTIFICATION**

The undersigned Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Board held on June 5, 2012.

AYE: Chairman Charles R. Hoppin  
Vice Chair Frances Spivy-Weber  
Board Member Tam M. Doduc  
Board Member Steven Moore

NAY: None

ABSENT: None

ABSTAIN: None

  
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Jeanine Townsend  
Clerk to the Board

**BBID**  
**EXHIBIT 300**

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State Water Resources Control Board

MEMORANDUM

TO: All Water Rights Staff

FROM:   
Barbara Evoy, Deputy Director  
DIVISION OF WATER RIGHTS

DATE: July 6, 2012

SUBJECT: REDELEGATION OF AUTHORITIES PURSUANT TO RESOLUTION NO. 2012-0029

On June 5, 2012, the State Water Resources Control Board (State Water Board or Board) adopted Resolution No. 2012-0029. Pursuant to Resolution No. 2012-0029, the State Water Board delegated to the State Water Board's Deputy Director for Water Rights (Deputy Director) certain authorities that may be redelegated. This memorandum specifies those authorities which are redelegated by the Deputy Director. For your convenience, this redelegation memorandum contains the original delegations to individual Board members and to the Deputy Director, including various provisions where no redelegation exists. Where there is a redelegation, it follows the original delegation and is listed in bold italics. Except where specifically stated otherwise, all delegated authorities of an immediate superior are redelegated to staff appointed to act in the absence of that immediate superior or where that immediate superior is recused.

**DELEGATIONS TO BOARD MEMBERS INDIVIDUALLY**

- 2.1. Act on an application or request for renewal of a conditional temporary water right permit pursuant to chapter 6.5 (commencing with section 1425) of part 2 of division 2 of the Water Code. This delegation includes the authority to:
  - 2.1.1. Hold a hearing on any application or request for renewal made pursuant to chapter 6.5.
  - 2.1.2. Make the findings required by chapter 6.5 as conditions precedent to the issuance or renewal of a temporary permit.
  - 2.1.3. Make any findings required by the California Environmental Quality Act (CEQA), Public Resources Code section 21000 et seq.
- 2.2. Act on a petition or request for renewal of a conditional temporary urgency change pursuant to chapter 6.6 (commencing with section 1435) of part 2 of division 2 of the Water Code. This delegation includes the authority to:

- 2.2.1. Hold a hearing on any petition or request for renewal made pursuant to chapter 6.6.
- 2.2.2. Make the findings required by chapter 6.6 as conditions precedent to the issuance or renewal of a temporary change order.
- 2.2.3. Make any findings required by CEQA as conditions precedent to the issuance or renewal of a temporary change order.
- 2.3. During the trial review period, act on a request for review by an applicant or protestant of Division staff determinations regarding application and petition processing under the Policy for Maintaining Flows in the Northern California Coastal Streams (Policy), prior to final Board action. The scope of issues subject to such review shall be determined by the Division pursuant to Section 3.4.3 of the Policy.

### DELEGATIONS TO THE DEPUTY DIRECTOR FOR WATER RIGHTS

3. That the State Water Board delegates the authority herein to the Deputy Director with the following direction:
  - 3.1. The enumeration of delegated authorities in this resolution shall not be interpreted as revoking authorities already delegated, or hereafter delegated, to the Executive Director or to the Deputy Director, from the State Water Board or the Executive Director. ***The Deputy Director redelegates to the staff as specified below in bold italics, the authority to take the actions listed in subsections 3.1 through 4.14.1 of this document.***
  - 3.2. Unless otherwise specified in this resolution, the authorities delegated to the Deputy Director under this resolution may not be redelegated except in the absence of the Deputy Director. The Deputy Director may delegate to a senior member of the Division staff the authority to act on his or her behalf when the Deputy Director is absent or recused. Where this resolution authorizes the redelegation of authority, and the Deputy Director makes such redelegation, the staff member to whom the authority has been redelegated may further delegate to a member of the Division staff the ability to act on his or her behalf when the Division staff member is absent or recused, unless the Deputy Director directs otherwise.
  - 3.3. For purposes of this resolution, and for any purposes of any other resolution, decision, or order assigning or delegating responsibility to Chief of the Division of Water Rights, that reference means the Deputy Director for Water Rights, Assistant Deputy Director for Water Rights, or other officer or employee of the State Water Board who is responsible for managing the activities of the Division of Water Rights.
  - 3.4. The Deputy Director shall administer and implement the delegation under this resolution as follows:
    - 3.4.1. Maintain the delegation, including any appendices, redelegation memoranda, and subsequent resolutions that add to, amend, or revoke the authorities identified therein.

- 3.4.2. Every two years, review the authority delegated herein and recommend to the State Water Board whether or not to revise the delegation.
- 3.4.3. In exercising the authority delegated herein, and without restricting the authority specified, bring the following matters to the attention of the members of the State Water Board by appropriate communication: **Persons exercising authority redelegated by the Deputy Director are directed to bring the following matters to the attention of the Deputy Director:**
  - 3.4.3.1. Matters of a unique or unusual nature;
  - 3.4.3.2. Matters that appear to depart from the policies of the State Water Board;
  - 3.4.3.3. Matters involving significant policy questions;
  - 3.4.3.4. Highly controversial matters;
  - 3.4.3.5. Matters that involve a substantial risk of litigation;
  - 3.4.3.6. Any matter that a Board Member requests to be brought to the attention of the State Water Board; and
  - 3.4.3.7. Any matter that, in the judgment of the Deputy Director, should be brought to the attention of the State Water Board.
  - 3.4.3.8. **Any proposed term or condition developed by outside parties in order to settle a protest which the outside parties request to be included in a permit, license or order.**

- 4. That the State Water Board delegates to the Deputy Director the authority to take the following actions:

General Administration.

- 4.1.1. Conduct and supervise the general administrative activities of the Division, including preparing and signing documents, transmitting documents adopted or approved by the State Water Board, and maintaining custody of records. This general administrative authority may be redelegated. **This authority is redelegated to the Assistant Deputy Directors, all Section Managers, and all Unit Seniors. This authority is redelegated to the staff level for routine correspondence within their areas of expertise at the discretion and direction of their supervisor. In addition, authority for maintaining custody of records is delegated to the Analyst(s) in responsible charge of the records of the Division.**
- 4.1.2. Issue subpoenas for the attendance of witnesses and the introduction of evidence before the State Water Board with respect to all proceedings for which the Division has program responsibility. This authority may be redelegated. **This authority is redelegated to the Assistant Deputy Directors in the absence of the Deputy Director.**

- 4.1.3. Amend or modify a decision or order to correct any obvious typographical or clerical error or oversight, pursuant to Water Code section 1124. This authority may be redelegated. ***This authority is redelegated to the Assistant Deputy Directors within each Assistant Deputy Director's area of authority and to the Section Managers within each Section Manager's area of authority.***
- 4.1.4. Develop and maintain a list of standard permit terms in accordance with California Code of Regulations, title 23, section 780. This authority may be redelegated. ***This authority is redelegated to the Assistant Deputy Director of the Permitting and Enforcement Branch in the absence of the Deputy Director.***
- 4.1.5. Request the Attorney General to institute appropriate proceedings in the superior court in accordance with Water Code section 1052 or 1845.
- 4.1.6. Assess and collect fees in accordance with chapter 8 (commencing with section 1525) of part 2 of division 2 of the Water Code or section 13160.1 of the Water Code. This authority may be redelegated. ***The authority to assess and collect annual fees is redelegated to the Assistant Deputy Directors in the absence of the Deputy Director. The authority to assess and collect filing fees is redelegated to the Assistant Deputy Directors within each Assistant Deputy Director's area of authority and to Section Managers within each Section Manager's area of authority in the absence of the applicable Assistant Deputy Director. The authority to request that the Board of Equalization cancel a liability which has expired is delegated to the Water Rights Fee Coordinator.***
- 4.1.7. Cancel an application, registration, petition, request, or claim for failure to pay a fee when due pursuant to Water Code section 1535, subdivision (b).) This delegation may be redelegated. ***This authority is redelegated to the Assistant Deputy Director of the Permitting and Enforcement Branch. The authority to cancel a registration, request, or a statement of water diversion and use claim for failure to pay a filing fee when due is also delegated to the Manager of the Permitting and Licensing Section, all Unit Seniors in the Permitting and Licensing Section and to the Water Right Fee Coordinator.***
- 4.1.8. Amend or modify water quality control plans adopted by the State Water Board to correct any obvious typographical or clerical error or oversight, or to make clarifying changes requested by the Office of Administrative Law, after notice to the Executive Director.
- 4.2. Appropriation of Water.
  - 4.2.1. Prepare and sign notices of applications to appropriate water. This authority may be redelegated. ***This authority is redelegated to the Assistant Deputy Directors, the Managers of the Permitting and Licensing Section and of the Hearings and Special Projects Section, and all Unit Seniors in the Permitting and Licensing Section.***
  - 4.2.2. Act on a request by an applicant for an extension of time to complete an application to appropriate water in accordance with California Code of Regulations, title 23, section 681. This authority may be redelegated. ***This authority is redelegated to the Assistant Deputy Director of the Permitting and Enforcement Branch, the***

**Manager of the Permitting and Licensing Section, and all Unit Seniors in the Permitting and Licensing Section.**

- 4.2.3. Request additional information from an applicant or petitioner in accordance with Water Code sections 1275, 1334, 1701.3, or 1703.5. This authority may be redelegated. ***This authority is redelegated to the Assistant Deputy Directors, the Managers of the Permitting and Enforcement Sections and the Hearings and Special Programs Section, the Unit Seniors in the Permitting and Licensing Section and to the Senior of the Hearings Unit.***
- 4.2.4. Act on applications and change petitions pursuant to Water Code sections 1340 et seq., and 1701 et seq. after proceedings in accordance with Water Code sections 1345-1348 or 1704.1-1704.4 or in proceedings where no hearing is required in accordance with Water Code section 1351 or 1704, subdivision (c). In the case of change petitions, this authority includes the authority to issue an amended permit or license if the change petition is approved. This authority may be redelegated. ***This authority is redelegated to the Assistant Deputy Directors and the Section Managers of the Permitting and Enforcement Branch and the Hearings and Special Programs Section.***
- 4.2.5. Act on a request to allow additional time to submit information pursuant to Water Code section 1276 or 1701.4. This authority may be redelegated. ***This authority is redelegated to the Assistant Deputy Directors and the Section Managers of the Permitting and Enforcement Branch and the Section Manager of the Hearings and Special Programs Section.***
- 4.2.6. Act on a request to approve a compliance plan, monitoring plan, conservation plan, and other programs, plans, reports, or evaluations required to be submitted to the State Water Board as a condition of a permit, license, or enforcement order. This authority may be redelegated. ***This authority is redelegated to the Assistant Deputy Directors and Program and the Section Managers of the Permitting and Enforcement Section and the Hearings and Special Programs Sections. If the program, plan, report or evaluation involves engineering work, and the Section Manager is not a registered engineer, then the Section Manager must obtain concurrence on the sections of the program, plan, report or evaluation that involve engineering work from a registered State Water Board engineer.***
- 4.2.7. Act on a request for an extension of time to complete construction or beneficial use of water under a permit in accordance with California Code of Regulations, title 23, sections 840-848, provided that an extension may be granted only if (a) there are no competing projects that would be adversely affected; (b) there are no outstanding protests; and (c) either: (1) the extension is for ten years or less and the period of the extension in combination with all extensions previously granted under delegated authority does not exceed 15 years; or (2) the extension is for a municipality, the period of extension in combination with all extensions previously granted under delegated authority does not exceed 25 years, and the Deputy Director finds that the time extension is necessary to serve development allowable under the applicable land-use plan for the place of use identified in the permit. This includes the authority to issue an amended permit if the extension of time is approved, consistent with the order approving the extension of time. This authority

may be redelegated to the Assistant Deputy Directors. ***This authority is redelegated to the Assistant Deputy Directors.***

- 4.2.8. Act on a request for an extension of time to meet a deadline, other than the time to complete construction or put water to beneficial use, contained in a permit if no Board Member objects after being informed by appropriate communication. This authority may be redelegated. ***This authority is redelegated to the Assistant Deputy Directors and to each Section Manager, but may be exercised only upon notification by the Deputy Director that no Board Member objects.***
  - 4.2.9. Issue permits or licenses, amendments thereto, change orders, and extension orders after the State Water Board issues a decision or order. This authority may be redelegated to the Assistant Deputy Directors. ***This authority is redelegated to the Assistant Deputy Directors.***
  - 4.2.10. Prepare and sign licenses when the terms and conditions have been accepted by the permittee. This authority may be redelegated. ***This authority is redelegated to the Assistant Deputy Directors and to the Section Managers of the Permitting and Enforcement Branch and to the Section Manager of the Hearings and Special Programs Section.***
  - 4.2.11. Correct the description in an application, permit, or license of the point of diversion, place of use, purpose of use, or name of source if (a) there is no physical change in project facilities already constructed or the current use of water, or no change in the intent of the applicant or permittee regarding the proposed location of project facilities or use of water, and (b) no one could have been misled by the original description. This authority may be redelegated. ***This authority is redelegated to the Assistant Deputy Directors and to the Section Managers of the Permitting and Enforcement Branch and the Hearings and Special Programs Section.***
  - 4.2.12. Make changes to cover incidental uses of a reservoir in accordance with California Code of Regulations, title 23, section 798. This authority may be redelegated. ***This authority is redelegated to the Assistant Deputy Director and the Section Managers of the Permitting and Enforcement Branch.***
  - 4.2.13. Issue separate permits or licenses or act on a request to split applications to replace an existing application, permit or license when the place of use has been divided into two or more ownerships and each owner succeeds to a separate interest in the permit or license. Cancel or revoke the existing application, permit or license provided that no objection is received from any of the owners. This authority may be redelegated. ***This authority is redelegated to the Assistant Deputy Director of the Permitting and Enforcement Section and to the Section Managers of the Permitting and Enforcement Branch.***
  - 4.2.14. Act on an application or a request for renewal of a temporary water right permit pursuant to chapter 6.5 (commencing with section 1425) of part 2 of division 2 of the Water Code if there are no outstanding objections. This authority may be redelegated to the Assistant Deputy Directors in the absence of the Deputy Director. ***This authority is redelegated to the Assistant Deputy Directors.***
- 4.3. Protests.

- 4.3.1. Request information from a protestant in accordance with Water Code sections 1332, 1334, 1703.3, or 1703.5. This authority may be redelegated. ***This authority is redelegated to the Assistant Deputy Directors, to the Section Managers in the Permitting and Licensing Section, to the Section Manager of the Hearings and Special Programs Section, and to the Unit Seniors in the Permitting and Licensing Section.***
  - 4.3.2. Act on requests to extend time for filing protests and answers to protests and approve a request upon finding that good cause has been shown. This authority may be redelegated. ***This authority is redelegated to the Assistant Deputy Directors and to the Section Managers in the Permitting and Enforcement Branch and the Hearings and Special Programs Section.***
  - 4.3.3. Cancel a protest in accordance with Water Code section 1335 or 1703.6. This authority may be redelegated to the Assistant Deputy Directors. ***This authority is redelegated to the Assistant Deputy Directors.***
  - 4.3.4. Reject protests which do not substantially comply with the requirements of the Water Code or title 23 of the California Code of Regulations. This authority may be redelegated. ***This authority is redelegated to the Assistant Deputy Directors and to the Managers of the Permitting and Licensing Section and the Hearings and Special Programs Section if the protest does not comply with the requirements of Water Code sections 1331(a), 1331(b), or 1331(e).***
- 4.4. Transfers or Temporary Changes.
- 4.4.1. Act on a petition for a temporary urgency change, or a request for renewal of a temporary change order, pursuant to chapter 6.6 (commencing with section 1435) of part 2 of division 2 of the Water Code. If the State Water Board receives any objections to a petition for a temporary urgency change, the Deputy Director shall refer the matter to the Executive Director for action under section 2.2. This authority may be redelegated to the Assistant Deputy Directors in the absence of the Deputy Director. ***This authority is redelegated to the Assistant Deputy Directors in the absence of the Deputy Director.***
  - 4.4.2. Act on a petition for a temporary change due to a transfer of water or water rights in accordance with Water Code sections 1725-1732 if the State Water Board does not hold a hearing. This authority may be redelegated to the Assistant Deputy Directors in the absence of the Deputy Director. ***This authority is redelegated to the Assistant Deputy Directors in the absence of the Deputy Director.***
  - 4.4.3. Act on a petition for a long-term transfer of water or water rights involving a change of point of diversion, place of use, or purpose of use in accordance with Water Code sections 1735-1737, following notice of the proposed transfer, if the State Water Board does not hold a hearing. This authority may be redelegated to the Assistant Deputy Directors in the absence of the Deputy Director. ***This authority is redelegated to the Assistant Deputy Directors in the absence of the Deputy Director.***
- 4.5. Cancellation or Revocation.

- 4.5.1. Issue a notice of proposed cancellation of an application pursuant to California Code of Regulations, title 23, section 845, a notice of proposed revocation of a permit pursuant to Water Code section 1410 et seq., or a notice of proposed revocation of a license pursuant to Water Code section 1675 et seq.
- 4.5.2. Prepare and sign orders canceling or revoking an application, petition, permit, or license to appropriate water, under any of the following circumstances:
  - 4.5.2.1. When requested by the applicant, petitioner, permittee, or licensee. This authority may be redelegated. ***This authority is redelegated to the Assistant Deputy Directors, and to all Section Managers and Unit Seniors in the Permitting, Enforcement, and Hearings and Special Programs Sections when all rights to hearing and reconsideration have been waived in writing by the applicant, petitioner, permittee, or licensee.***
  - 4.5.2.2. When an applicant or petitioner fails to timely provide information in accordance with Water Code sections 1276, 1335, 1701.4, or 1703.6, and does not show good cause for additional time to submit the requested information under Water Code section 1276 or 1701.4. This authority may be redelegated to the Assistant Deputy Directors. ***This authority is redelegated to the Assistant Deputy Directors.***
  - 4.5.2.3. When the application or petition is defective or incomplete and has not been perfected within the time allowed for that purpose, and no request for extension of time is filed. This authority may be redelegated to the Assistant Deputy Directors. ***This authority is redelegated to the Assistant Deputy Directors.***
  - 4.5.2.4. When the applicant or petitioner fails to submit complete or adequate information in accordance with Government Code section 65956. This authority may be redelegated to the Assistant Deputy Directors. ***This authority is redelegated to the Assistant Deputy Directors.***
  - 4.5.2.5. When fees have not been paid within the time required by law. This authority may be redelegated to the Assistant Deputy Directors. ***This authority is redelegated to the Assistant Deputy Directors.***
  - 4.5.2.6. When the applicant or petitioner fails to file an affidavit of posting or publication of notice as required by law. This authority may be redelegated to the Assistant Deputy Directors. ***This authority is redelegated to the Assistant Deputy Directors.***
  - 4.5.2.7. When an application is conditionally approved and the applicant fails to comply with the conditions or to inform the State Water Board that it has complied, within a reasonable time or the time provided, pursuant to California Code of Regulations, title 23, section 845, except when the applicant requests a hearing after notice of the proposed cancellation. This authority may be redelegated to the Assistant Deputy Directors. ***This authority is redelegated to the Assistant Deputy Directors.***

- 4.5.2.8. When a permit is issued subject to continuing compliance with one or more specified conditions and the permittee fails to certify compliance with the conditions, or it is discovered that the permittee is not complying with a specified condition, pursuant to California Code of Regulations, title 23, section 845, except when the permittee requests a hearing after notice of proposed revocation. This authority may be redelegated to the Assistant Deputy Directors. ***This authority is redelegated to the Assistant Deputy Directors.***
- 4.5.2.9. After notice of proposed revocation pursuant to Water Code section 1410 or 1675 has been sent to the permittee or licensee and no request for hearing has been received. This authority may be redelegated. ***This authority is redelegated to the Assistant Deputy Director of and the Section Managers in the Permitting and Enforcement Branch.***
- 4.5.2.10. When the stream has been declared fully appropriated in accordance with Water Code section 1206, subdivision (a), Board Order WR 98-08, and any orders that supersede or modify Order WR 98-08. This authority may be redelegated to the Assistant Deputy Directors. ***This authority is redelegated to the Assistant Deputy Directors.***
- 4.5.3. Act on requests to set aside the revocation of a permit or license, in accordance with Water Code section 1410.2 or 1675.2.
- 4.6. Small Domestic Use, Small Irrigation Use or Livestock Stockpond Use.
- 4.6.1. Act on claims for stockpond certificates and registrations (including renewal of registrations) for small domestic use, small irrigation use, or livestock stockpond use in accordance with Water Code sections 1226 et seq. and 1228 et seq., including revoking a certificate or registration pursuant to Water Code section 1226.4 or 1228.4, except that the Deputy Director is not authorized to revoke a certificate or registration if a notice of proposed revocation has been sent to the certificate holder or registrant and a request for hearing has been received. This authority may be redelegated. ***The authority to act on registrations under Water Code Article 2.7, section 1228 et seq., is redelegated to the Assistant Deputy Director of the Permitting and Enforcement Branch. The authority to issue and renew certificates of registration is redelegated to the Section Manager and Unit Seniors of the Permitting and Licensing Section. The authority to issue a notice of revocation of a stockpond certificate or registration is redelegated to the Assistant Deputy Director and Section Managers of the Permitting and Enforcement Branch. The authority to confirm revocation of a registration by operation of law is redelegated to the Section Managers and Unit Seniors of the Permitting and Enforcement Branch.***
- 4.6.2. Establish and revise a list of general conditions to be applied to small domestic use or livestock stockpond use registrations as authorized by Water Code section 1228.6, and to small irrigation use registrations as authorized by Water Code sections 1228.6 and 1229. This authority may be redelegated. ***This authority is***

**redelegated to the Assistant Deputy Director of the Permitting and Enforcement Branch.**

4.7. Determination of Rights.

- 4.7.1. Prepare and announce draft reports of referee in accordance with Water Code section 2010 et seq.
- 4.7.2. Apportion the State Water Board's expenses among the parties, request the court to order interim or partial payment of expenses, and take steps necessary to ensure collection of the expenses in accordance with Water Code section 2040 et seq.
- 4.7.3. Perform the following duties pursuant to "Order of Appointment of California State Water Resources Control Board as Special Master," issued by the United States District Court for the District of Nevada, on April 9, 1990, in *United States of America v. Walker River Irrigation District*, In Equity No. C-125 ("the Walker River Action"), and the accompanying Administrative Rules and Regulations (as amended by "Final Order Pursuant to Stipulation," issued on June 3, 1996):
  - 4.7.3.1. Accept, or reject as defective or incomplete, compliance applications (as defined in the Administrative Rules and Regulations) and applications to change point of diversion, manner of use, or place of use of water in the exercise in California of water rights identified in the decree in the Walker River Action. This authority may be redelegated to the Assistant Deputy Directors. ***This authority is redelegated to the Assistant Deputy Directors.***
  - 4.7.3.2. Process applications in the manner required by the Order of Appointment, including publishing and mailing notices, acting on protests, conducting a field investigation, preparing and announcing the draft report of Special Master, accepting objections to the draft report and, if there are no issues that require a hearing before the State Water Board, adopting the final report of Special Master. This authority may be redelegated to the Assistant Deputy Directors. ***This authority is redelegated to the Assistant Deputy Directors.***
  - 4.7.3.3. Following final action by the State Water Board to approve or reject the change application, prepare a statement of total expense incurred by the State Water Board in conducting the proceeding, together with an equitable apportionment of such total expense among the parties to the proceeding. This authority may be redelegated to the Assistant Deputy Directors. ***This authority is redelegated to the Assistant Deputy Directors.***
  - 4.7.3.4. Prepare, announce, serve, and file the Report of Special Master, including therein the statement of total expense and the equitable apportionment thereof. This authority may be redelegated to the Assistant Deputy Directors.

- 4.7.3.5. Prepare and transmit to the court a certified copy of the record of proceeding for judicial review of the Report of Special Master. This authority may be redelegated to the Assistant Deputy Directors.

#### 4.8. Statutory Adjudications.

- 4.8.1. Prepare, issue, cause to be published, and record notices of statutory adjudication proceedings in accordance with Water Code sections 2526-2529. This authority may be redelegated. ***This authority is redelegated to the Assistant Deputy Directors and to the Section Managers of the Permitting and Enforcement Branch and of the Hearings and Special Programs Section.***
- 4.8.2. Conduct investigations of stream systems in accordance with Water Code section 2550 et seq., including providing notice of investigations, conducting field investigations, and determining facts. This authority may be redelegated. ***This authority is redelegated to the Assistant Deputy Directors and to the Section Managers of the Permitting and Enforcement Branch and of the Hearings and Special Programs Section.***
- 4.8.3. Issue any notices, copies of factual determinations, reports, objections, orders, or other correspondence or documents authorized by chapter 3 (commencing with section 2500) of part 3 of division 2 of the Water Code. This authority may be redelegated. ***This authority is redelegated to the Assistant Deputy Directors and to the Section Managers of the Permitting and Enforcement Branch and of the Hearings and Special Programs Section.***
- 4.8.4. Prepare and issue a notice of inspection of proofs and evidence in accordance with Water Code section 2625 et seq. This authority may be redelegated. ***This authority is redelegated to the Assistant Deputy Directors and to the Section Managers of the Permitting and Enforcement Branch and of the Hearings and Special Programs Section.***
- 4.8.5. Prepare and issue the report, preliminary order of determination, and notice in accordance with Water Code sections 2600 -2604.
- 4.8.6. Take actions to file the final State Water Board order with the superior court in accordance with Water Code sections 2750-2756, including filing the required documents and communicating with the superior court, and mailing and causing the order to be published.
- 4.8.7. Furnish copies of the decree or supplemental decree and notice of entry to water right claimants in accordance with Water Code sections 2825-2826.
- 4.8.8. Take actions to apportion and collect the State Water Board's expenses and costs against the parties to the proceeding in accordance with Water Code section 2850 et seq., including mailing statements of expense, ordering interim or partial payments, and taking steps necessary to ensure collection of the expenses.

#### 4.9. Enforcement of Water Rights and Complaints.

- 4.9.1. Issue a notice of cease and desist order and, when a hearing has not been timely requested, issue a cease and desist order in accordance with Water Code section 1831 et seq. This authority may be redelegated to the Assistant Deputy Directors. ***This authority is redelegated to the Assistant Deputy Director of the Permitting and Enforcement Branch.***
- 4.9.2. Issue an order imposing administrative civil liability when a complaint has been issued and no hearing has been requested within the period provided under Water Code section 1055. This authority may be redelegated to the Assistant Deputy Directors. ***This authority is redelegated to the Assistant Deputy Director of the Permitting and Enforcement Branch.***
- 4.9.3. Take actions to collect unpaid fees and initiate subsequent enforcement actions, including revocation of permits or licenses, pursuant to Water Code section 1535 et seq. This authority may be redelegated to the Assistant Deputy Directors. ***This authority is redelegated to the Assistant Deputy Director of the Permitting and Enforcement Branch.***
- 4.9.4. Dismiss an incomplete complaint filed pursuant to California Code of Regulations, title 23, section 820. This authority may be redelegated. ***This authority is redelegated to the Assistant Deputy Director of the Permitting and Enforcement Branch and to the Manager and Unit Seniors of the Enforcement Section.***
- 4.9.5. Dismiss a complaint filed under California Code of Regulations, title 23, sections 820 or 856, or under the public trust doctrine, where: (a) the complainant does not show good cause for the State Water Board to investigate an allegation of misuse of water; (b) an investigation results in the determination that no violation or misuse of water has occurred; (c) the alleged violation or misuse of water that forms the basis of the complaint has been remedied; or (d) the State Water Board declines to exercise its discretion to investigate or prosecute an allegation that a violation has occurred. This authority may be redelegated to the Assistant Deputy Directors. ***This authority is redelegated to the Assistant Deputy Director of the Permitting and Enforcement Branch and to the Manager of the Enforcement Section when both the complainant and the respondent have been informed that an investigation (a) has resulted in the preliminary determination that no violation or misuse of water has occurred or (b) that the alleged violation or misuse of water that forms the basis of the complaint has been remedied, and the complainant has not submitted additional information to support the alleged violation or misuse of water within the time provided.***

#### 4.10. California Environmental Quality Act.

- 4.10.1. Take actions to comply with CEQA for all projects carried out or approved by the State Water Board in connection with the administration of the water right program to the extent authorized under section 15025 of the State CEQA Guidelines (Cal. Code Regs., tit. 14, § 15000 et seq.). This authority shall be exercised in conformity with the State CEQA Guidelines and the State Water Board's regulations. This authority may be redelegated. ***The authority to enter into or decline to enter into a memorandum of understanding for the preparation of CEQA documents is redelegated to the Assistant Deputy Directors and to the***

**Section Managers of the Permitting, Enforcement, Hearings and Special Programs, and Water Quality Certification and Public Trust Sections. The authority to issue Notices of Preparation and Notices of Exemption is redelegated to the Assistant Deputy Directors and to the Section Managers of the Permitting, Enforcement, Hearings and Special Programs, and Water Quality Certification and Public Trust Sections. The authority to prepare responses to comments on CEQA documents and to approve an Initial Study for CEQA documents within their program area is redelegated to all Section Managers and Unit Seniors. Where this memorandum or a future action by the Deputy Director redelegates the authority over an action that requires CEQA compliance, the authority to prepare a negative declaration or Environmental Impact Report for that action is redelegated to the person with authority over the underlying activity.**

#### 4.11. Certification of Water Right.

4.11.1. In response to a request for certification made pursuant to Public Resources Code section 26013 or Public Utilities Code section 2821, certify or decline to certify that:

4.11.1.1. The State Water Board has issued a water right permit for the appropriation of water for the operation of a hydroelectric facility; or

4.11.1.2. In the opinion of the State Water Board, the energy producer possesses riparian or other water rights that authorize the operation of a hydroelectric facility.

#### 4.12. Water Quality.

4.12.2. Enter into or decline to enter into collaborative communication protocol agreements for licensing and relicensing of hydroelectric projects pursuant to the Federal Energy Regulatory Commission's regulation at 18 Code of Federal Regulations part 4.34(l)(3)(ii). In recognition of the State Water Board's adjudicative responsibilities, and the requirement that it avoid bias, prejudice, or interest in contested matters subject to its approval, this delegation applies only to agreements that do not bind or commit the State Water Board to approve or disapprove an application for water quality certification, water right permit application, or petition for water right change order, or any term or condition of such an approval. This authority may be redelegated to the Assistant Deputy Directors. ***This authority is redelegated to the Assistant Deputy Directors.***

4.12.3. Establish monitoring, inspection, entry, reporting and recordkeeping requirements and require other information as may reasonably be required, pursuant to Water Code section 13383, for activities subject to water quality certification under section 401 of the Clean Water Act that involve the diversion of water for beneficial use. This authority may be redelegated. ***This authority is redelegated to the Assistant Deputy Directors.***

4.12.4. Request the Attorney General to institute appropriate proceedings in the superior court in accordance with Water Code sections 13350, 13385 or 13386, if the violation relates to water quality certification of an activity involving the diversion of water for beneficial use.

4.13. Groundwater Extraction Recordation Program.

- 4.13.1. Designate local agencies, in accordance with the requirements of Water Code section 5009, to administer the groundwater extraction recordation program. This authority may be redelegated to the Assistant Deputy Director. ***This authority is redelegated to the Assistant Deputy Directors.***

4.14. Policy for Maintaining Instream Flows in Northern California Coastal Streams

- 4.14.1. Implement the Policy for Maintaining Instream Flows in Northern California Coastal Streams (Policy) by approving, denying approval, or retracting approval of watershed group project charters and diversion management plans; making the preliminary determinations necessary to process applications, petitions and registrations pursuant to the policy; and approving or denying exceptions to policy provisions as outlined in the policy, except case-by-case exceptions to policy provisions sought pursuant to section 9.0 of the policy. This authority does not include the authority to act on the merits of applications or petitions where there are unresolved protests, or any other authority not subject to delegation. This authority may be redelegated. ***This authority is redelegated to the Assistant Deputy Director of the Permitting and Enforcement Branch and to the Section Manager of the Permitting and Licensing Section.***

**BBID  
EXHIBIT 304**

**STATE WATER RESOURCES CONTROL BOARD  
RESOLUTION NO. 2012-0048**

CHANGES IN THE DELEGATION OF AUTHORITY TO THE DELTA WATERMASTER.

WHEREAS:

1. Pursuant to Water Code section 85230 subdivision (a), the State Water Resources Control Board (Board) appoints a special master for the Delta, whose title is "the Delta Watermaster."
2. Pursuant to Water Code section 7, the Board is empowered to delegate authority to authorized persons.
3. Water Code section 85230 subdivision (b) provides that the Delta Watermaster shall exercise specified delegated authorities.
4. Water Code Section 85230 subdivision (b) states that the Delta Watermaster's authority shall be limited to diversions in the Delta, and for the monitoring and enforcement of Board orders and license and permit terms and conditions that apply to conditions in the Delta.
5. Water Code section 85230 subdivision (c) provides that the Board may delegate additional duties to the Delta Watermaster as necessary for effective day-to-day enforcement of its decisions.
6. Water Code section 1051 authorizes the Board to investigate streams, lakes, and other bodies of water.
7. Government Code section 11415.50 states that an adjudicative proceeding is not required for informal fact-finding, an informal investigatory hearing, or a decision to initiate or not initiate an adjudicatory proceeding.
8. Government Code section 11415.60 authorizes the Board to delegate the power to formulate and issue decisions by settlement.
9. On October 5, 2010, the Board adopted Resolution No. 2010-0048 delegating authority to the Delta Watermaster.
10. Resolution 2010-0048 provides that the delegation will be brought back before the Board within two years for reconsideration of its terms.
11. It is appropriate to modify the resolution to delegate authority regarding temporary water right permits and statements of water diversion and use.

THEREFORE BE IT RESOLVED THAT:

1. The Board delegates to the Delta Watermaster the following duties related to water diversion within the Delta and the monitoring and enforcement of Board orders and license and permit terms and conditions that apply to conditions in the Delta, as defined in Water Code section 12220:
  - 1.1 Require monitoring and reporting by holders of Board-issued water right permits or licenses. This authority may be re-delegated to the Deputy Director for Water Rights or other appropriate staff within the Division of Water Rights.
  - 1.2 Issue approvals delegated to an officer or employee of the Board by the terms of water right permits or licenses. This authority may be re-delegated to the Deputy Director for Water Rights or other appropriate staff within the Division of Water Rights.
  - 1.3 Require monitoring and reporting by persons filing statements of water diversion and use pursuant to Water Code sections 5100-5107. This authority may be re-delegated to the Deputy Director for Water Rights or other appropriate staff within the Division of Water Rights.
  - 1.4 Act on petitions or requests to approve or renew temporary permits pursuant to Chapter 6.5 (commencing with section 1425) or temporary urgency changes pursuant to chapter 6.6 (commencing with section 1435) of Part 2 of Division 2 of the Water Code. If no objections to an application for a temporary permit or a petition for a temporary urgency change are received, this authority may be re-delegated to the Deputy Director for Water Rights or appropriate staff within the Division of Water Rights. This delegation includes the authority to:
    - 1.4.1 Hold a hearing on any applications, or petition or request for renewal made pursuant to Chapter 6.5 or 6.6.
    - 1.4.2 Make the findings required by Chapter 6.5 or 6.6 as conditions precedent to the issuance or renewal of a temporary permit or temporary change order.
    - 1.4.3 Make any findings required by CEQA as conditions precedent to the issuance or renewal of a temporary change order.
  - 1.4 At the preadjudicative stage, conduct informal fact-finding or informal investigatory hearings regarding alleged unlawful diversions of water, violations of water right permits or licenses, violations involving statements of water diversion and use, or waste and unreasonable use.
  - 1.5 Issue notices of proposed cease and desist orders, and, when a hearing has not been timely requested, issue cease and desist orders in accordance with Water Code section 1831 et seq.
  - 1.6 Issue proposed administrative civil liability complaints, and, when a hearing has not been requested, issue an order imposing administrative civil liability in accordance with Water Code section 1055 et seq.

- 1.7 Convene settlement conferences up until the time a formal adjudication has commenced by the noticing of a hearing.
- 1.8 Formulate and issue decisions by settlement under Government Code section 11415.60 in matters raised by investigations or complaints, or where notices of proposed cease and desist orders or administrative civil liability have been issued but a hearing has not been noticed.
- 1.9 Request the Attorney General to institute appropriate proceedings in the superior court in accordance with Water Code section 1052 (unlawful diversions) or Water Code section 1845 (violation of cease and desist orders).
2. Adjudicative orders and decisions issued by the Delta Watermaster, including but not limited to decisions by settlement, are subject to reconsideration by the Board pursuant to Water Code section 1122 et seq.
3. The enumeration of delegated authorities in this resolution shall not be interpreted as revoking authorities already delegated, except as specified below. This resolution augments Resolution No. 2012-0029, Delegation of Authority to State Water Resources Control Board Members Individually and to the Deputy Director for Water Rights, and supersedes it only to the extent of any inconsistency. Specifically, the delegation to the Deputy Director to issue notices of proposed cease and desist orders and administrative civil liability complaints is revoked as applied to diversions in the Delta and enforcement of Board orders and license and permit terms and conditions that apply to conditions in the Delta, except to the extent the Delta Watermaster expressly authorizes the Deputy Director for Water Rights or appropriate staff within the Division of Water Rights to proceed.
4. This resolution supersedes Resolution 2010-0048.
5. This resolution will be brought back before the Board within two years for reconsideration of its terms.

#### CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on October 3, 2012.

AYE: Chairman Charles R. Hoppin  
 Vice Chair Frances Spivy-Weber  
 Board Member Steven Moore  
 Board Member Felicia Marcus

NAY: None

ABSENT: Board Member Tam M. Doduc

ABSTAIN: None

  
 \_\_\_\_\_  
 Jeanine Townsend  
 Clerk to the Board

# **EXHIBIT A**

**BEFORE THE  
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

**IN RE THE MATTERS OF:**

**SWRCB Enforcement Actions  
ENFO1951; ENFO1949**

**WEST SIDE IRRIGATION  
DISTRICT CEASE AND DESIST  
ORDER HEARING,**

**and**

**BYRON-BETHANY IRRIGATION  
DISTRICT ADMINISTRATIVE  
CIVIL LIABILITY HEARING.**

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**VIDEOTAPE DEPOSITION OF JOHN O'HAGAN  
Volume II**

**November 20, 2015**

**Reported By: KATHRYN DAVIS, CSR No. 3808**

**kathryndavis** & associates  
deposition reporting

BEFORE THE  
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

IN RE THE MATTERS OF:

SWRCB Enforcement Actions  
ENFO1951; ENFO1949

WEST SIDE IRRIGATION  
DISTRICT CEASE AND DESIST  
ORDER HEARING,

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BYRON-BETHANY IRRIGATION  
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CIVIL LIABILITY HEARING.

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VIDEOTAPE DEPOSITION OF JOHN O'HAGAN  
Volume II

November 20, 2015

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APPEARANCES CONTINUED

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Videography Company:

SACRAMENTO LEGAL VIDEO COMPANY  
Videographer: CANDACE KNIGHT  
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DEPOSITION OF JOHN O'HAGAN, VOLUME II

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APPEARANCES CONTINUED

RICK GILMORE  
BYRON-BETHANY IRRIGATION DISTRICT  
  
NICHOLAS BONSIGNORE, P.E.  
WAGNER & BONSIGNORE  
  
TULLY & YOUNG  
GREG YOUNG, P.E.

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DEPOSITION OF JOHN O'HAGAN, VOLUME II

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1 the molecules of the stored water that may have  
2 reached them.

3 Q Mr. O'Hagan, in the work that you did, did you  
4 make any recommendations on enforcement this year?

5 MR. CARRIGAN: Overbroad.

6 THE WITNESS: I signed -- on behalf of the  
7 Division of Water Rights, I'm delegated to sign  
8 enforcement actions.

9 Q BY MR. KELLY: Do you know what that delegation  
10 is under? You said you signed the enforcement actions  
11 -- under delegation from whom?

12 A I am redelegated from the Deputy Director.  
13 And under water code for the Administrative Civil  
14 Liabilities and Cease and Desist Orders, that is  
15 authorized by water code to the Executive Director.  
16 He has delegated that down to the Deputy Director  
17 for Water Rights, and then she has redelegated that  
18 to me.

19 Q Do you know where that redelegation appears?

20 A On our redelegation documents.

21 Q When you say "redelegation documents," what do  
22 you mean?

23 A The Board has redelegation documents.

24 Q Are those -- you said the Board. Did the Board  
25 adopt a resolution or approve some type of redelegation

1 that I could find in the Board's records?

2 A We can supply you with a copy of the  
3 delegation document and of the redelegation  
4 document. Whether it is a Board order or an  
5 Executive Director -- because the water code gives  
6 him the authority, the Executive Director the  
7 authority. He is doing the redelegation or he is  
8 doing the delegation. And then it is being  
9 redelegated again.

10 Q Okay. So did you make -- other than signing the  
11 draft enforcement documents, did you make any decisions  
12 related to enforcement?

13 MR. CARRIGAN: Overbroad. Vague.

14 THE WITNESS: I make the decisions whether to  
15 issue it or not.

16 Q BY MR. KELLY: And so in making those decisions,  
17 was it your view that people were diverting illegally if  
18 there was insufficient water available or were they  
19 diverting illegally if they diverted after having  
20 received the notice from the Board?

21 MR. CARRIGAN: Incomplete hypothetical. Calls  
22 for a legal conclusion.

23 THE WITNESS: The enforcement actions are based  
24 on unauthorized diversions.

25 Q BY MR. KELLY: And what makes the diversion

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REPORTER'S CERTIFICATE

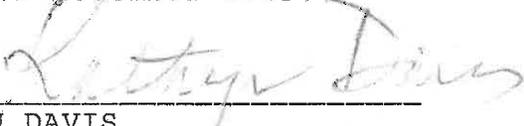
State of California     )  
                                  ) ss.  
County of Sacramento    )

I certify that the witness in the foregoing deposition,

JOHN O'HAGAN,  
was by me duly sworn to testify in the within-entitled cause; that said deposition was taken at the time and place therein named; that the testimony of said witness was reported by me, a duly Certified Shorthand Reporter Of the State of California authorized to administer oaths and affirmations, and said testimony was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for either or any of the parties to said deposition, nor in any way interested in the outcome of the cause named in said deposition.

IN WITNESS WHEREOF, I have hereunto set my hand this 24th day of November 2015.

  
\_\_\_\_\_  
KATHRYN DAVIS  
Certified Shorthand Reporter  
Certificate No. 3808

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DISPOSITION OF ORIGINAL TRANSCRIPT

Date \_\_\_\_\_

Check One

\_\_\_\_\_ Signature waived.

\_\_\_\_\_ I certify that the witness was given the statutory allowable time within which to read and sign the deposition, and the witness failed to appear for such reading and signing.

\_\_\_\_\_ I certify that the witness has read and signed the deposition and has made any changes indicated therein.

By \_\_\_\_\_  
KATHRYN DAVIS & ASSOCIATES

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**KATHRYN DAVIS & ASSOCIATES**  
Certified Shorthand Reporters  
555 University Avenue, Suite 160  
Sacramento, California 95825  
(916) 567-4211

November 24, 2015

State Water Resources Control Board  
Office of Enforcement  
Attn: CHRISTIAN CARRIGAN  
1001 I Street, 16th Floor  
Sacramento, California 95814

Re: West Side Irrigation District Cease and Desist  
Order & Byron-Bethany Irrigation District Civil Hearing

Date Taken: November 20, 2015

Dear Mr. John O'Hagan:

Your deposition transcript is now available for review  
And signature, and will be available for the next 30  
days. This review is optional. An appointment is  
required to review your transcript. Please bring this  
letter with you.

You may wish to discuss with your attorney whether  
he/she requires that it be read, corrected, and signed,  
before it is filed with the Court.

If you are represented by an attorney, you may read his  
or her copy of the transcript. If you read your  
attorney's copy of the transcript, please send us a  
photocopy of the Signature Line and Deponent's Change  
Sheet.

If you choose not to read your deposition, please sign  
here and return this letter to our office.

\_\_\_\_\_  
Signature Date

Sincerely,  
  
KATHRYN DAVIS, CSR No. 3808

cc: Ms. Spaletta; Mr. Kelly; Ms. Zolezzi; Ms. Leeper;  
Mr. Ruiz; Mr. O'Laughlin; Mr. Tauriainen; Ms. McGinnis;  
Ms. Morris; Mr. Knapp; Mr. Donlon

# **EXHIBIT B**

**Subject:** Fwd: BBID ACLC Hearing WSID Draft CDO Hearing - Delegations of Authority

**Date:** Friday, November 20, 2015 at 1:03:05 PM Pacific Standard Time

**From:** Dan Kelly

**To:** Louinda Lacey, Michael Vergara, Lauren D. Bernadett

Daniel Kelly  
Somach, Simmons & Dunn  
500 Capitol Mall, Suite 1000  
Sacramento, CA 95814  
Office 916.446.7979  
[dkelly@somachlaw.com](mailto:dkelly@somachlaw.com)  
<http://www.somachlaw.com>

Begin forwarded message:

**From:** "Tauriainen, Andrew@Waterboards" <[Andrew.Tauriainen@waterboards.ca.gov](mailto:Andrew.Tauriainen@waterboards.ca.gov)>  
**Date:** November 20, 2015 at 12:18:36 PM PST  
**To:** "Dan Kelly ([dkelly@somachlaw.com](mailto:dkelly@somachlaw.com))" <[dkelly@somachlaw.com](mailto:dkelly@somachlaw.com)>, Jeanne Zolezzi <[zolezzi@herumcrabtree.com](mailto:zolezzi@herumcrabtree.com)>, "kharrigfeld@herumcrabtree.com" <[kharrigfeld@herumcrabtree.com](mailto:kharrigfeld@herumcrabtree.com)>, Janelle Krattiger <[jkrattiger@herumcrabtree.com](mailto:jkrattiger@herumcrabtree.com)>, "Jonathan Knapp ([jonathan.knapp@sfgov.org](mailto:jonathan.knapp@sfgov.org))" <[jonathan.knapp@sfgov.org](mailto:jonathan.knapp@sfgov.org)>, Rob Donlan <[red@eslawfirm.com](mailto:red@eslawfirm.com)>, "Jennifer Spaletta' ([jennifer@spalettalaw.com](mailto:jennifer@spalettalaw.com))" <[jennifer@spalettalaw.com](mailto:jennifer@spalettalaw.com)>, "ngmplcs@pacbell.net" <[ngmplcs@pacbell.net](mailto:ngmplcs@pacbell.net)>, "McGinnis, Robin C. @DWR" <[Robin.McGinnis@water.ca.gov](mailto:Robin.McGinnis@water.ca.gov)>, "Dante Nomellini, Jr." ([dantejr@pacbell.net](mailto:dantejr@pacbell.net))" <[dantejr@pacbell.net](mailto:dantejr@pacbell.net)>, "rjmorat@gmail.com" <[rjmorat@gmail.com](mailto:rjmorat@gmail.com)>, Valerie Kincaid <[vkinaid@olaughlinparis.com](mailto:vkinaid@olaughlinparis.com)>, "Linda Wood ([lwood@olaughlinparis.com](mailto:lwood@olaughlinparis.com))" <[lwood@olaughlinparis.com](mailto:lwood@olaughlinparis.com)>, "Herrick, John @aol.com" <[jherrlaw@aol.com](mailto:jherrlaw@aol.com)>, "Dean Ruiz ([dean@hprlaw.net](mailto:dean@hprlaw.net))" <[dean@hprlaw.net](mailto:dean@hprlaw.net)>, "Stefanie Morris ([smorris@swc.org](mailto:smorris@swc.org))" <[smorris@swc.org](mailto:smorris@swc.org)>, "O'Hanlon, Daniel" <[dohanlon@kmtg.com](mailto:dohanlon@kmtg.com)>, "Akroyd, Rebecca@KMTG" <[rakroyd@kmtg.com](mailto:rakroyd@kmtg.com)>, "Philip Williams ([pwilliams@westlandswater.org](mailto:pwilliams@westlandswater.org))" <[pwilliams@westlandswater.org](mailto:pwilliams@westlandswater.org)>, "Unit, Wr\_Hearing@Waterboards" <[Wr\\_Hearing.Unit@waterboards.ca.gov](mailto:Wr_Hearing.Unit@waterboards.ca.gov)>  
**Cc:** "Carrigan, Cris@Waterboards" <[Cris.Carrigan@waterboards.ca.gov](mailto:Cris.Carrigan@waterboards.ca.gov)>, "O'Hagan, John@Waterboards" <[John.O'Hagan@waterboards.ca.gov](mailto:John.O'Hagan@waterboards.ca.gov)>  
**Subject:** BBID ACLC Hearing WSID Draft CDO Hearing - Delegations of Authority

Attached please find the delegations of authority inquired about by BBID's counsel this morning.

Andrew Tauriainen, Attorney III  
State Water Resources Control Board  
Office of Enforcement  
1001 I Street, 16th Floor  
Sacramento, CA 95814  
tel: (916) 341-5445  
fax: (916)341-5896  
[atauriainen@waterboards.ca.gov](mailto:atauriainen@waterboards.ca.gov)

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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.

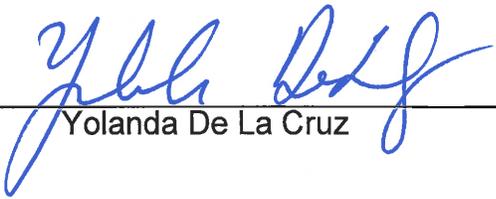
On January 25, 2016, I served the following document(s):

**DECLARATION OF LAUREN D. BERNADETT IN SUPPORT OF MOTION TO DISMISS ADMINISTRATIVE CIVIL LIABILITY COMPLAINT IN ENF01951 FOR LACK OF DELEGATION AUTHORITY**

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 January 25, 2016 at Sacramento, California.

  
\_\_\_\_\_  
Yolanda De La Cruz

**SERVICE LIST OF PARTICIPANTS  
BYRON-BETHANY IRRIGATION DISTRICT  
ADMINISTRATIVE CIVIL LIABILITY HEARING**  
(Revised 9/2/15; Revised: 9/11/15)

SOMACH SIMMONS & DUNN  
A Professional Corporation

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<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>Division of Water Rights Prosecution Team Andrew Tauriainen, Attorney III SWRCB Office of Enforcement 1001 I Street, 16th Floor Sacramento, CA 95814 <a href="mailto:andrew.tauriainen@waterboards.ca.gov">andrew.tauriainen@waterboards.ca.gov</a></p>	<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>Byron-Bethany Irrigation District Daniel Kelly Somach Simmons &amp; Dunn 500 Capitol Mall, Suite 1000 Sacramento, CA 95814 <a href="mailto:dkelly@somachlaw.com">dkelly@somachlaw.com</a></p>
<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>Patterson Irrigation District Banta-Carbona Irrigation District The West Side Irrigation District Jeanne M. Zolezzi Herum\Crabtree\Suntag 5757 Pacific Avenue, Suite 222 Stockton, CA 95207 <a href="mailto:jzolezzi@herumcrabtree.com">jzolezzi@herumcrabtree.com</a></p>	<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>City and County of San Francisco Jonathan Knapp Office of the City Attorney 1390 Market Street, Suite 418 San Francisco, CA 94102 <a href="mailto:jonathan.knapp@sfgov.org">jonathan.knapp@sfgov.org</a></p>
<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>Central Delta Water Agency Jennifer Spaletta Law PC P.O. Box 2660 Lodi, CA 95241 <a href="mailto:jennifer@spalettalaw.com">jennifer@spalettalaw.com</a></p> <p>Dante John Nomellini Daniel A. McDaniel Dante John Nomellini, Jr. NOMELLINI, GRILLI &amp; MCDANIEL 235 East Weber Avenue Stockton, CA 95202 <a href="mailto:ngrnpics@pacbell.net">ngrnpics@pacbell.net</a> <a href="mailto:dantejr@pacbell.net">dantejr@pacbell.net</a></p>	<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>California Department of Water Resources Robin McGinnis, Attorney P.O. Box 942836 Sacramento, CA 94236-0001 <a href="mailto:robin.mcgininis@water.ca.gov">robin.mcgininis@water.ca.gov</a></p>
<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>Richard Morat 2821 Berkshire Way Sacramento, CA 95864 <a href="mailto:rmorat@gmail.com">rmorat@gmail.com</a></p>	<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>San Joaquin Tributaries Authority Tim O'Laughlin Valerie C. Kincaid O'Laughlin &amp; Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95816 <a href="mailto:towater@olaughlinparis.com">towater@olaughlinparis.com</a> <a href="mailto:vkincaid@olaughlinparis.com">vkincaid@olaughlinparis.com</a></p>

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<u>VIA ELECTRONIC MAIL</u>	<u>VIA ELECTRONIC MAIL</u>
South Delta Water Agency John Herrick Law Offices of John Herrick 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 Email: Jherrlaw@aol.com	State Water Contractors Stefani Morris 1121 L Street, Suite 1050 Sacramento, CA 95814 <a href="mailto:smorris@swc.org">smorris@swc.org</a>

**SERVICE LIST  
WEST SIDE IRRIGATION DISTRICT  
CEASE AND DESIST ORDER HEARING**

**SOMACH SIMMONS & DUNN**  
A Professional Corporation

<p>1 2 3 4 5 6 7 8 9</p>	<p>Division of Water Rights Prosecution Team Andrew Tauriainen, Attorney III SWRCB Office of Enforcement 1001 I Street, 16th Floor Sacramento, CA 95814 <a href="mailto:andrew.tauriainen@waterboards.ca.gov">andrew.tauriainen@waterboards.ca.gov</a></p>	<p>The West Side Irrigation District Jeanne M. Zolezzi Karna Harringfeld Janelle Krattiger Herum\Crabtree\Suntag 5757 Pacific Avenue, Suite 222 Stockton, CA 95207 <a href="mailto:izolezzi@herumcrabtree.com">izolezzi@herumcrabtree.com</a> <a href="mailto:kharringfeld@herumcrabtree.com">kharringfeld@herumcrabtree.com</a> <a href="mailto:jkrattiger@herumcrabtree.com">jkrattiger@herumcrabtree.com</a></p>
<p>10 11 12 13 14 15 16</p>	<p>State Water Contractors Stefani Morris 1121 L Street, Suite 1050 Sacramento, CA 95814 <a href="mailto:smorris@swc.org">smorris@swc.org</a></p>	<p>Westlands Water District Daniel O'Hanlon Rebecca Akroyd Kronick Moskowitz Tiedemann &amp; Girad 400 Capitol Mall, 27<sup>th</sup> Floor Sacramento, CA 95814 <a href="mailto:dohanion@kmtg.com">dohanion@kmtg.com</a> <a href="mailto:rakroyd@kmtg.com">rakroyd@kmtg.com</a></p> <p>Phillip Williams of Westlands Water District <a href="mailto:pwilliams@westlandswater.org">pwilliams@westlandswater.org</a></p>
<p>17 18 19 20 21 22</p>	<p>South Delta Water Agency John Herrick Law Offices of John Herrick 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 Email: <a href="mailto:jherrlaw@aol.com">jherrlaw@aol.com</a></p>	<p>Central Delta Water Agency Jennifer Spaletta Law PC P.O. Box 2660 Lodi, CA 95241 <a href="mailto:jennifer@spalettalaw.com">jennifer@spalettalaw.com</a></p> <p>Dante Nomellini and Dante Nomellini, Jr. NOMELLINI, GRILLI &amp; MCDANIEL <a href="mailto:ngmpics@pacbell.net">ngmpics@pacbell.net</a> <a href="mailto:dantejr@pacbell.net">dantejr@pacbell.net</a></p>
<p>23 24 25 26 27 28</p>	<p>City and County of San Francisco Jonathan Knapp Office of the City Attorney 1390 Market Street, Suite 418 San Francisco, CA 94102 <a href="mailto:jonathan.knapp@sfgov.org">jonathan.knapp@sfgov.org</a></p>	<p>San Joaquin Tributaries Authority Valerie C. Kincaid O'Laughlin &amp; Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95816 <a href="mailto:vkincaid@olaughlinparis.com">vkincaid@olaughlinparis.com</a></p>

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Byron-Bethany Irrigation District Daniel Kelly Somach Simmons & Dunn 500 Capitol Mall, Suite 1000 Sacramento, CA 95814 <a href="mailto:dkelly@somachlaw.com">dkelly@somachlaw.com</a>	California Department of Water Resources Robin McGinnis, Attorney P.O. Box 942836 Sacramento, CA 94236-0001 <a href="mailto:robin.mcginnis@water.ca.gov">robin.mcginnis@water.ca.gov</a>
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1 SOMACH SIMMONS & DUNN  
A Professional Corporation  
2 DANIEL KELLY, ESQ. (SBN 215051)  
MICHAEL E. VERGARA, ESQ. (SBN 137689)  
3 LAUREN D. BERNADETT, ESQ. (SBN 295251)  
500 Capitol Mall, Suite 1000  
4 Sacramento, California 95814-2403  
Telephone: (916) 446-7979  
5 Facsimile: (916) 446-8199

6 Attorneys for Petitioner/Plaintiff BYRON-  
BETHANY IRRIGATION DISTRICT

7  
8  
9 BEFORE THE  
10 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

11 ENFORCEMENT ACTION ENF01949  
12 DRAFT CEASE AND DESIST ORDER  
REGARDING UNAUTHORIZED  
13 DIVERSIONS OR THREATENED  
UNAUTHORIZED DIVERSIONS OF WATER  
14 FROM OLD RIVER IN SAN JOAQUIN  
COUNTY  
15 In the Matter of ENFORCEMENT ACTION  
16 ENF01951 – ADMINISTRATIVE CIVIL  
LIABILITY COMPLAINT REGARDING  
17 UNAUTHORIZED DIVERSION OF WATER  
FROM THE INTAKE CHANNEL TO THE  
18 BANKS PUMPING PLANT (FORMERLY  
ITALIAN SLOUGH) IN CONTRA COSTA  
19 COUNTY

SWRCB Enforcement Action  
ENF01951 and ENF01949

DECLARATION OF LAUREN D.  
BERNADETT IN SUPPORT OF  
BYRON-BETHANY IRRIGATION  
NOTICE OF POSITION  
REGARDING THE STATE WATER  
RESOURCES CONTROL BOARD  
AUTHORITY TO ISSUE  
CURTAILMENTS

20 I, Lauren D. Bernadett, declare:

21 1. I am an attorney at law licensed to practice before the courts of the State of  
22 California. I am an associate with Somach Simmons & Dunn. The following matters are  
23 within my personal knowledge and, if called as a witness, I can competently testify  
24 thereto.

25 2. Attached hereto as BBID Exhibit 228 is a true and correct copy of "Proving  
26 Illegal Water Grabs Tough in California's Drought," CBS Sacramento, dated July 22,  
27 2015.

28 3. Attached hereto as BBID Exhibit 277 is a true and correct copy of the State

1 Water Resources Control Board's Administrative Civil Liability Complaint in the Matter of  
2 Unauthorized Diversion by Byron-Bethany Irrigation District (including cover letter from  
3 John O'Hagan, Assistant Deputy Director of the Division of Water Rights, to Rick  
4 Gilmore and Daniel Kelly regarding Enforcement Action ENF01951), dated July 20,  
5 2015.

6 4. Attached hereto as BBID Exhibit 279 is a true and correct copy of the State  
7 Water Resources Control Board's Partial Rescission of April, May and June 2015  
8 Curtailment Notices and Clarification of State Water Board Position Re: Notices of  
9 Unavailability of Water for Those Diverting Water in the Sacramento River Watershed,  
10 San Joaquin River Watershed and Delta, and Scott River, dated July 15, 2015.

11 5. Attached hereto as BBID Exhibit 323 is a true and correct copy of the  
12 Transcript of a portion of the State Water Resources Control Board's Board  
13 Meeting/Hearing, Video File 11, on May 20, 2015.

14 6. Attached hereto as BBID Exhibit 324 is a true and correct copy of the  
15 Transcript of a portion of the State Water Resources Control Board's Board  
16 Meeting/Hearing, Video File 12, on May 20, 2015.

17 7. Attached hereto as Exhibit A is a true and correct copy of the State Water  
18 Resources Control Board's Opposition to Petitioners' Motion for Stay of Administrative  
19 Enforcement Actions Pending Ruling on Petition for Writ of Mandate, Prohibition, or  
20 Other Appropriate Relief, Byron-Bethany Irrigation District and the West Side Irrigation  
21 District v. Superior Court of the State of California for the County of Santa Clara, Case  
22 No. H042878, Court of Appeal of the State of California Sixth Appellate District, dated  
23 January 12, 2016.

24 8. Attached hereto as Exhibit B is a true and correct copy of the Letter from  
25 Tam M. Doduc, Hearing Officer, regarding the State Water Resources Control Board's  
26 Ruling on Motion for Protective Order and Other Procedural Issues in the Matter of the  
27 Administrative Civil Liability Complaint Issued Against Byron-Bethany Irrigation District,  
28 dated October 30, 2015.

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9. Attached hereto as Exhibit C is a true and correct copy of an email from Michael Buckman to Daniel Kelly et al., regarding "Clarifications-Byron Bethany Irrigation District and West Side Irrigation District Hearings," dated January 14, 2016.

I declare under penalty of perjury under the laws of the State of California that the facts recited above are true and correct. Executed this 25th day of January 2016 at Sacramento, California.

  
\_\_\_\_\_  
Lauren D. Bernadett

**BBID  
EXHIBIT 228**

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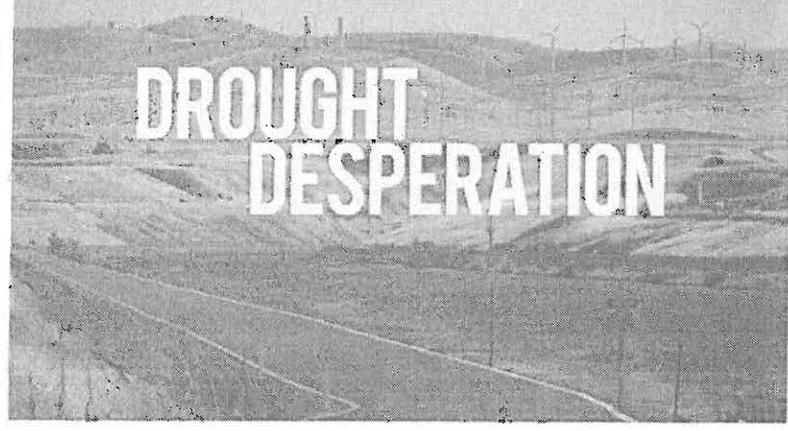
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## Proving Illegal Water Grabs Tough In California's Drought

July 22, 2015 2:51 PM

Filed Under: California Drought, Central Valley, State Water Resources Control Board, stealing water



**f** SACRAMENTO, Calif. (AP) — California's vast network of reservoirs, canals and rivers is among the world's most engineered water systems, but it is tough to prove when water is illegally siphoned because of sparse metering, infrequent reporting and a complex web of tens of thousands of water rights.

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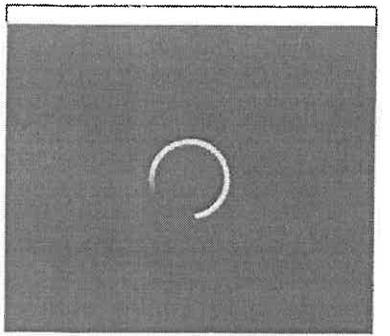
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Now, water regulators are proposing their first prosecution for unauthorized water diversions in the drought. They say unusually detailed records spare them the usual challenges involving such cases as they seek to show they are serious about enforcing widespread cutbacks.

The State Water Resources Control Board's proposed \$1.5 million fine of the Byron-Bethany Irrigation District, which serves 160 farming families and a suburban community in the Central Valley, also allows it to test its authority to say when water supplies are stressed.

Prosecutors allege the district pumped 675 million gallons from a channel in June, even after regulators warned it was running too low to provide water.

Unlike other districts that take water with little oversight, Byron-Bethany's diversions from the channel are closely monitored because it feeds into the 444-mile California Aqueduct, a major artery of the state's water delivery system built in the 1960s.

"In many ways, this is a very straightforward case," said Andrew Tauriainen, lead prosecutor on the case. "It will be a good test case for the state water board to consider what I think are the bigger-picture questions."

Those questions include whether the state fairly calculates water supply.

Regulators monitor the state's waterways to determine if there's enough water to irrigate crops, serve homes and fuel industrial production.

The forecasting takes into account rainfall, how much water is in snow and is seeping in soil, releases from reservoirs, and stream levels. Numbers are readjusted daily with the slightest precipitation.

Still, the state is essentially guessing how much water is available.

Byron-Bethany attorney Daniel Kelly says the state's approach is too broad, focusing on entire watersheds rather than smaller waterways, and

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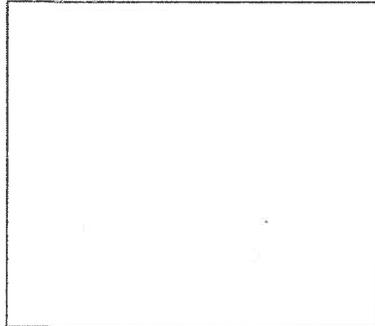
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Byron-Bethany attorney Daniel Kelly says the state's approach is too broad, focusing on entire watersheds rather than smaller waterways, and relies on faulty data. The district asserts the state can't prove it illegally took water if it can't even prove there wasn't enough for it.

The district also lies in the Sacramento-San Joaquin River Delta, considered the heart of California's water system because it has been engineered over time to redirect water to Southern California cities and other users. A long-running dispute has raged over what water naturally flows for farmers in the delta and what's released from reservoirs for cities.

Even if the question of how much water is available is resolved, keeping track of what's left is another challenge.

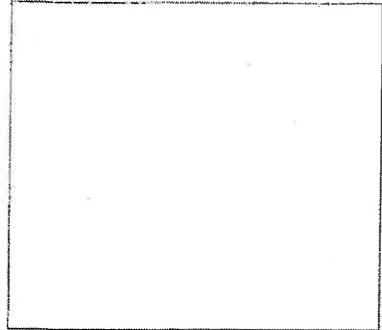
The water board has ordered conservation from cities, businesses and agriculture industry during the four-year dry spell. Under a century-old water rights system, water is prioritized based on who has the earliest rights.

Byron-Bethany is among those holding prized senior water rights – claims to waterways established before the advent of government regulation in 1914. Cities, individuals and corporations with these rights don't regularly report consumption and don't have to meter water use.

"The data is not great," said Eric Garner, a water attorney who is not involved in the case. "It's not like you have an app that tells you how fast every car on the freeway is going. There's nothing similar for water."

Other Western states have remote sensors and aerial monitors tracking water diversions.

In California, the water board conducts hundreds of inspections to check if pumps are operating or irrigation ditches are flowing from rivers. Some farmers will contest they are taking water entitled to them under other rights, making matters more complicated. Investigations from last year are still pending.



**MORE NEWS**



**Injury Report: Packers Have Two Out To Go With Long List Of Injured Players**



**Sacramento Atheist Files Suit Against 'In God We Trust' On Money**



**Broncos Injury Report: Osweiler: Only Player Questionable For Sunday's**



But no inspectors or subpoenas were needed in the Byron-Bethany case.



It only had one right to one state-monitored channel. The state measures water diversions from that channel daily and posts them online – rather than relying on self-reporting staggered every three years for other senior water rights holders.

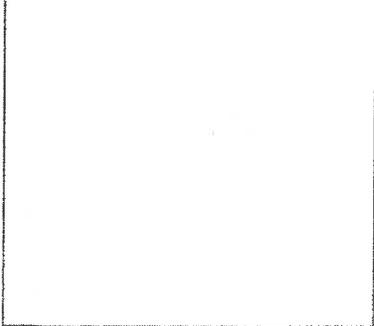


Tauriainen, the water prosecutor, says ideally future generations will track where precious and dwindling water supplies are going in real-time, especially if the historic drought becomes the new normal.

“Every drought teaches different lessons, and that’s the lesson this drought is going to teach,” he said.

Follow Fenit Nirappil on Twitter at [www.twitter.com/FenitN](http://www.twitter.com/FenitN)

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**Injury Report: Packers Have Two Out To Go With Long List Of Injured Players**

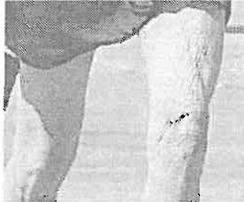


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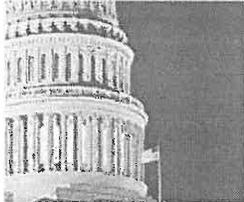
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**BBID  
EXHIBIT 277**



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JUL 22 2015



EDMUND G. BROWN JR.  
GOVERNOR



MATTHEW RODRIGUEZ  
SECRETARY FOR  
ENVIRONMENTAL PROTECTION

State Water Resources Control Board

Byron-Bethany  
Irrigation District

JUL 20 2015

Byron-Bethany Irrigation District  
Attn: Rick Gilmore, General Manager  
7995 Bruns Road  
Byron, CA 94514

CERTIFIED MAIL NO. 7003 1680 0000 2965 9480

Daniel Kelley  
General Counsel, Byron-Bethany Irrigation District  
Somach Simmons & Dunn  
500 Capital Mall, Suite 1000  
Sacramento, CA 95814

CERTIFIED MAIL NO. 7003 1680 0000 2965 9473

Dear Messrs. Gilmore and Kelley:

**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**

Enclosed is an Administrative Civil Liability (ACL) Complaint relating to your diversions from the intake channel to the Banks Pumping Plant (formerly Italian Slough) after June 12, 2015. This letter serves as notice to Byron-Bethany Irrigation District (BBID) that the State Water Resources Control Board (State Water Board), Division of Water Rights (Division), intends to impose the proposed Administrative Civil Liability.

**You have 20 days from receipt of this notice to act or face additional enforcement without further notice. Therefore, this matter requires your immediate attention.**

**VIOLATION DESCRIPTION**

BBID is alleged to have diverted a total of approximately two thousand sixty-seven (2,067) acre-feet over the course of thirteen days, from June 13 through June 25, 2015, during which water was unavailable to serve BBID's water right. The violation is further described in the enclosed ACL Complaint.

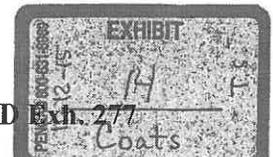
**ADMINISTRATIVE CIVIL LIABILITY**

California Water Code, section 1052, prohibits the unauthorized diversion of water. Water Code section 1052 authorizes the State Water Board to administratively impose civil liability for unauthorized diversions of water during periods of drought emergency in an amount not to exceed \$1,000 per day of violation plus \$2,500 per acre-foot diverted without authorization.

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

1001 I Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 100, Sacramento, CA 95812-0100 | www.waterboards.ca.gov

♻️ 100% RECYCLED PAPER



BBID Exh. 277

JUL 20 2015

I am hereby issuing the enclosed ACL Complaint proposing that a liability of \$1,553,250 be imposed for your diversion of water during periods when water supplies were insufficient to fulfill your claimed right. The ACL Complaint provides for a potentially reduced penalty upon showing that water pumped during the time considered under this action was used for health and safety needs, or for critical power generation. **If you fail to respond to the ACL Complaint in one of the manners below within 20 days of receiving this notice, then the State Water Board will issue an ACL Order and seek recovery of this proposed liability amount as authorized by California Water Code section 1055.4.**

If you disagree with the facts or allegations set forth in the ACL Complaint, you may request a hearing before the State Water Board. **Your request for a hearing must be in writing, signed by you or on your behalf, and mailed or hand-delivered to ensure receipt by the State Water Board within 20 days from the date you receive this notice.** You may mail your written hearing request to: State Water Resources Control Board, Division of Water Rights, Attn: Enforcement Section, P.O. Box 2000, Sacramento, CA 95812-2000.

You may hand-deliver your written hearing request to: State Water Resources Control Board, Division of Water Rights, Records Unit, 1001 I Street, 2nd Floor, Sacramento, CA 95814.

If you request a hearing, a hearing will be scheduled before the State Water Board or a designated hearing officer. Prior to the hearing, you will be required to submit any written testimony and other evidence you would like the State Water Board to consider. You will be notified of the hearing date and the submittal deadlines as soon as they are scheduled.

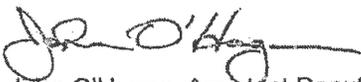
If you fail to come into compliance or request a hearing within 20 days of the date you receive this notice, the State Water Board will adopt the ACL.

#### SUMMARY OF OPTIONS

1. Submit a written request for hearing within 20 days of receiving the enclosed ACL Complaint; or
2. Do nothing, and receive a final ACL Order.

If you have any questions regarding the ACL Complaint, or if you have information that you want to provide in response to this complaint, or information that you believe the State Water Board staff should otherwise consider, please contact Kathy Mrowka, Manager, Enforcement Section at (916) 341-5363 or [Kathy.Mrowka@waterboards.ca.gov](mailto:Kathy.Mrowka@waterboards.ca.gov); or Andrew Tauriainen, Attorney III, Office of Enforcement, at (916) 341-5445 or [Andrew.Tauriainen@waterboards.ca.gov](mailto:Andrew.Tauriainen@waterboards.ca.gov), or send the information directly to them via email.

Sincerely,



John O'Hagan, Assistant Deputy Director  
Division of Water Rights

Enclosures: 1) Administrative Civil Liability Complaint

STATE OF CALIFORNIA  
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY  
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT

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In the Matter of Unauthorized Diversion by

BYRON-BETHANY IRRIGATION DISTRICT

---

SOURCE: Intake Channel to the Banks Pumping Plant (formerly Italian Slough)

COUNTY: Contra Costa

---

YOU ARE HEREBY GIVEN NOTICE THAT:

1. Byron-Bethany Irrigation District (BBID or District) is alleged to have diverted and used water in violation of California Water Code section 1052, subdivision (a), which provides that the diversion or use of water subject to Division 2 of the Water Code other than as authorized in Division 2 is a trespass.
2. Water Code section 1052, subdivision (c), provides that any person or entity committing a trespass during a period for which the Governor has issued a proclamation of a state of drought emergency may be liable in an amount not to exceed the sum of one thousand dollars (\$1,000) for each day the trespass occurs plus two thousand five hundred dollars (\$2,500) for each acre-foot of water diverted or used in excess of that diverter's rights. Water Code section 1052, subdivision (d)(2), provides that civil liability may be imposed administratively by the State Water Resources Control Board (State Water Board or Board) pursuant to Water Code section 1055.
3. Water Code section 1055, subdivision (a), provides that the Executive Director of the State Water Board may issue a complaint to any person or entity on whom Administrative Civil Liability (ACL) may be imposed. On June 5, 2012, the Executive Director delegated this authority to the Deputy Director for Water Rights. State Water Board Resolution 2012-0029 authorizes the Deputy Director for Water Rights to issue an order imposing an ACL when a complaint has been issued and no hearing has been requested within 20 days of receipt of the complaint. The Deputy Director for Water Rights has re-delegated this authority to the Assistant Deputy Director for Water Rights pursuant to State Water Board Resolution 2012-0029.

ALLEGATIONS

4. On June 30, 2010, BBID submitted an initial Statement of Water Diversion and Use (Statement), which the State Water Board, Division of Water Rights (Division) designated as Statement 021256 (S021256). Under S021256, BBID claims a pre-1914 appropriative water right to the intake Channel to the Banks Pumping Plant, formerly Italian Slough, in Contra Costa County. The Statement also indicates that BBID diverted approximately 26,179 acre-feet (af) in 2009 for municipal and industrial and agricultural use within its boundaries.
5. On July 1, 2013, BBID submitted Supplemental Statements for S021256, for the years 2010, 2011 and 2012. BBID's Supplemental Statements each indicates that the District first put water to use in 1917, and that the purpose of use for the District's diversions is irrigation of 12,500 acres. The 2010 Supplement Statement indicates that BBID diverted 25,269 af and applied

- approximately 22,302 af to beneficial use. The 2011 Supplemental Statement indicates that BBID diverted 22,344 af and applied 19,779 af to beneficial use. The 2012 Supplemental Statement indicates that BBID diverted 32,167 af and applied 28,345 af to beneficial use.
6. BBID does not hold or claim any other appropriative or riparian water rights on record with the State Water Board, although S021256 indicates that BBID holds Contract No. 14-06-200-785-LTR1 with the United States Bureau of Reclamation (Reclamation). In 2014 and 2015, Reclamation's agricultural contractors in the Delta were allocated zero percent of their contract quantity (available at <http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=49115> [last accessed June 30, 2015]). BBID confirmed in a public statement dated June 12, 2015, that it had received zero water supply from Reclamation in both 2014 and 2015 (available at <http://bbid.org/wp-content/uploads/2015/06/BBID-Curtailment-Response-FINAL1.pdf> [last accessed June 30, 2015].)
  7. On January 17, 2014, Governor Edmund G. Brown Jr. issued Proclamation No. 1-17-2014, declaring a State of Emergency to exist in California due to severe drought conditions.
  8. Also on January 17, 2014, the State Water Board issued a "Notice of Surface Water Shortage and Potential Curtailment of Water Right Diversions" (2014 Shortage Notice). The 2014 Shortage Notice alerts water right holders in critically dry watersheds that water may become unavailable to satisfy beneficial uses at junior priorities.
  9. On April 25, 2014, Governor Brown issued a Proclamation of a Continued State of Emergency due to drought conditions, to strengthen the state's ability to manage water and habitat effectively in drought conditions.
  10. On May 27, 2014, the State Water Board issued a "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the Sacramento and San Joaquin River Watershed with a post-1914 Appropriative Right" (2014 Unavailability Notice), which notifies all holders of post-1914 appropriative water rights within the Sacramento and San Joaquin River watersheds of the lack of availability of water to serve their post-1914 water rights, with some minor exceptions for non-consumptive diversions. The 2014 Unavailability Notice did not apply to pre-1914 appropriative rights such as that claimed by BBID. The State Water Board notified the most senior right holders in stages as water became available to serve their rights, and by November 19, 2014, had notified all right holders of availability for all diversions in the Sacramento and San Joaquin River watersheds.
  11. On January 23, 2015, the State Water Board issued a "Notice of Surface Water Shortage and Potential for Curtailment of Water Right Diversions for 2015" (2015 Shortage Notice). The 2015 Shortage Notice alerted water right holders in critically dry watersheds that water may become unavailable to satisfy beneficial uses at junior priorities.
  12. On February 4, 2015, the State Water Board issued Order WR 2015-0002-DWR, requiring pre-1914 and riparian water right claimants representing the top 90 percent of such claimants by volume in the Sacramento and San Joaquin River watersheds and the Delta to submit information relating to their claimed water right, the monthly amounts of water diverted and the basis of right claimed for diversions in 2014, and monthly diversion information and anticipated monthly diversion information for each month starting with February, 2015, to be submitted by the 5<sup>th</sup> of each succeeding month until the drought ends.
  13. BBID is subject to Order WR 2015-0002-DWR, and in response submitted information indicating that its predecessor, the Byron-Bethany Irrigation Company, recorded notice of an appropriation of water on or around May 18, 1914. Thus, BBID claims that its pre-1914 water right has a

priority date of May 18, 1914.<sup>1</sup>

14. BBID also submitted water diversion and use information for 2014, projected monthly diversions for 2015, and actual monthly diversions through May, 2015. BBID reports that it diverted 30,204 af in 2014 and projected diversions of 25,452 af in 2015. BBID's reported actual monthly diversion amounts for January through May, 2015, are generally similar to reported diversions for the same months in prior years where such information is available. BBID's reported projected diversions are similar to the reported actual diversions for the same months in prior years where such information is available. From August 1 to October 31, 2014, BBID reports it pumped 1,573 af of water under transfer that was approved by State Water Board Order dated August 27, 2014.
15. On April 1, 2015, Governor Brown issued Executive Order B-29-15 (Executive Order) to strengthen the state's ability to manage water and habitat effectively in drought conditions and called on all Californians to redouble their efforts to conserve water. The Executive Order finds that the continuous severe drought conditions present urgent challenges across the state including water shortages for municipal water use and for agricultural production, increased wildfire activity, degraded habitat for fish and wildlife, threat of saltwater contamination, and additional water scarcity if drought conditions continue. The Executive Order confirms that the orders and provisions in the Governor's previous drought proclamations and orders, the January 17, 2014, Proclamation, April 25, 2015, Proclamation, and Executive Orders B-26-14 and B-28-14, remain in full force and effect. On April 2, 2015, the State Water Board issued another notice warning that notices of unavailability of water were likely to be issued soon.
16. On April 23, 2015, the State Water Board issued a "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the San Joaquin River Watershed with a Post-1914 Appropriative Right" (April 23 Unavailability Notice), which notifies all holders of post-1914 appropriative water rights within the San Joaquin River watershed of the lack of availability of water to serve their post-1914 water rights, with some minor exceptions for non-consumptive diversions. The State Water Board issued a similar notice for post-1914 appropriative water rights within the Sacramento River watershed on May 1, 2015 (May 1 Unavailability Notice). The April 23 and May 1 Unavailability Notices do not apply to pre-1914 appropriative rights such as that claimed by BBID.
17. On June 12, 2015, the State Water Board issued a "Notice of Unavailability of Water and Need for Immediate Curtailment for Those Diverting Water in the Sacramento-San Joaquin Watersheds and Delta with a Pre-1914 Appropriative Claim Commencing During or After 1903" (June 12 Unavailability Notice), which notifies all holders of pre-1914 appropriative water rights with a priority date of 1903 and later within the Sacramento and San Joaquin River watersheds of the lack of availability of water to serve their rights, with some minor exceptions for non-consumptive uses.
18. Drought management of water rights is necessary to ensure that water to which senior water right holders are entitled is actually available to them, which requires that some water remain in most streams to satisfy senior demands at the furthest downstream point of diversion of these senior water rights. The June 12 Unavailability Notice reflects the State Water Board's determination that the existing water available in the Sacramento-San Joaquin watersheds and the Delta is insufficient to meet the demands of diverters with claims of pre-1914 appropriative rights with a priority date of 1903 and later. Continued diversion when there is no water available under the priority of the right constitutes unauthorized water diversion and use. Unauthorized diversion is subject to enforcement. (Wat. Code § 1052.)

<sup>1</sup> The term "pre-1914" appropriative water right means those appropriative rights commenced prior to December 19, 1914, the effective date of the Water Commission Act. Therefore, it is possible to have a "pre-1914" appropriative water right with a priority date in 1914.

19. The State Water Board determines the availability of water for water rights of varying priorities in any watershed by comparing the current and projected available water supply with the total water right diversion demand.
20. To determine water availability, the Board relies upon the full natural flows of watersheds calculated by the Department of Water Resources (DWR) for certain watersheds in its Bulletin 120 and in subsequent monthly updates. "Full natural flow," or "unimpaired runoff," represents the natural water production of a river basin, unaltered by upstream diversions, storage, storage releases, or by export or import of water to or from other watersheds. The full natural flow amount is different than the measured stream flows at the given measurement points because the measured flows may be higher or lower due to upstream operations. Forecasted flow data is uncertain, so DWR provides the data in the form of "levels of exceedance" or simply "exceedance" to show the statistical probability that the forecasted supply will occur. The exceedance is simply the percent of the time that the actual flow is expected to exceed the projected flow. The 90 percent exceedance hydrology assumes inflows from rainfall and snowmelt at levels that are likely to be met or exceeded by actual flows with a 90 percent probability, or in other words, there is a ten percent or less chance of actual conditions turning out to be this dry or drier. In April and early May, the State Water Board uses the 90% and 99% exceedance amounts for its analyses due to low flow conditions. DWR's daily natural flow calculations are also used in the analysis.
21. To determine water demand, the State Water Board relies on information supplied by water right holders on annual or triennial reports of water diversion and use required to be true and accurate to the best of the knowledge of the diverters. The Board also incorporates 2014 diversion data submitted pursuant to Order WR 2015-0002. All reported monthly water diversion data is compiled by watershed, type of right and priority dates. The Board performs quality control checks and removes obvious errors, excess reporting, removes demand for direct diversion for power, and makes additional changes based on stakeholders' input. The corrected demand data includes the 2014 reported data for 90% of the watershed demand plus, for the remaining diverters, an averaged diversion amount for 2010 through 2013. These monthly diversion demands are grouped into water right types (riparian, pre-1914 and post-1914 rights).
22. The State Water Board consistently adjusts the water availability and demand analyses based on new information obtained from stakeholders, or adjustments to projected flows from the DWR. State Water Board staff reviews this information and provides revisions to its data set and graphs that are all shown on the Watershed Analysis website ([http://www.waterboards.ca.gov/waterights/water\\_issues/programs/drought/analysis/](http://www.waterboards.ca.gov/waterights/water_issues/programs/drought/analysis/)).
23. The State Water Board's Watershed Analysis website provides updated graphical summations and spreadsheets containing supporting analysis of the availability and demand analyses. The graphical summations show priorities with monthly demands for the total riparian demand at bottom, the pre-1914 demands added to riparian and depicted above the riparian demand. The monthly amounts are averaged into cubic feet per second for graphical purposes. See, for example, the combined Sacramento/San Joaquin River Basin Senior Supply/Demand Analysis ([http://www.waterboards.ca.gov/waterights/water\\_issues/programs/drought/analysis/docs/sacsic\\_omibined.pdf](http://www.waterboards.ca.gov/waterights/water_issues/programs/drought/analysis/docs/sacsic_omibined.pdf)). The Curtailment Analysis website also provides graphical summations of the San Joaquin River Basin Senior Supply/Demand Analysis with Proportional Delta Demand ([http://www.waterboards.ca.gov/waterights/water\\_issues/programs/drought/analysis/docs/sjprorate\\_d.pdf](http://www.waterboards.ca.gov/waterights/water_issues/programs/drought/analysis/docs/sjprorate_d.pdf)) and the Sacramento River Basin Senior Supply/Demand Analysis with Proportional Delta Demand ([http://www.waterboards.ca.gov/waterights/water\\_issues/programs/drought/analysis/docs/sacprorate\\_d.pdf](http://www.waterboards.ca.gov/waterights/water_issues/programs/drought/analysis/docs/sacprorate_d.pdf)).
24. This analysis shows that by June 12, 2015, available supply was insufficient to meet the demands of appropriative rights with priority dates of 1903 and later throughout the Sacramento and San Joaquin River watersheds and the Delta.

25. The June 12 Unavailability Notice applies to S021256 because BBID claims a priority date of May 18, 1914. BBID received an electronic copy of the June 12 Unavailability Notice on June 12, 2015, via the Board's "Drought Updates" Lyris email list system, because Rick Gilmore, BBID's General Manager is a subscriber to that system (via email address [r.gilmore@bbid.org](mailto:r.gilmore@bbid.org)). Moreover, BBID issued a public statement on June 12, 2015, in response to the June 12 Unavailability Notice (available at <http://bbid.org/wp-content/uploads/2015/06/BBID-Curtailment-Response-FINAL1.pdf> [last accessed June 25, 2015].) BBID received a paper copy of the June 12 Unavailability Notice no later than June 15, 2015.
26. BBID's diversions are recorded by DWR and posted to the California Data Exchange Center (CDEC) (<http://cdec.water.ca.gov/cgi-procs/queryDaily?SB>) also available at <http://www.water.ca.gov/swr/operationscontrol/docs/delta/DeltaHydrology.pdf>). CDEC reports that BBID has diverted water each day since the June 12 Unavailability Notice:

Date	Avg Diversion Rate (cfs)	Amount Diverted (af)	Date	Avg Diversion Rate (cfs)	Amount Diverted (af)
06/13/2015	91	190	06/20/2015	96	190
06/14/2015	122	242	06/21/2015	99	196
06/15/2015	79	156	06/22/2015	62	123
06/16/2015	83	164	06/23/2015	61	121
06/17/2015	78	154	06/24/2015	67	132
06/18/2015	91	180	06/25/2015	36	71
06/19/2015	80	158	06/26/2015	0	0

27. The daily diversion rates through June 24 are comparable to the District's average daily diversion rates reported for June 2014 (4,842 af/30 days/1.9835=81.4 cfs), and those BBID reported as anticipated for June 2015. This daily rate is in excess of the basic minimum health and safety needs of Mountain House Community Service District. This indicates that BBID has continued its normal diversions following the June 12 Unavailability Notice.
28. BBID diverted a total of approximately two thousand sixty-seven (2,067) acre-feet over the course of thirteen days following the June 12 Unavailability Notice, specifically from June 13 through June 25, 2015.
29. On July 15, 2015, the State Water Board issued a Clarification to the Unavailability Notices indicating that, to the extent that any of the notices described above contain language that may be construed as an order requiring you to curtail diversions under your affected water right, that language has been rescinded. Similarly, any language requiring affected water right holders to submit curtailment certification forms has been rescinded.
30. Diversion or use of water by an appropriative water right holder when there is insufficient water supply available for that water right is an unauthorized diversion or use of water subject to Division 2 of the Water Code. Water Code section 1052, subdivision (a) provides that unauthorized diversion or use of water is a trespass.
31. This enforcement action is based on lack of available water supply under the priority of the right. The Unavailability Notices were issued for the purpose of advising the public and water diverters of the lack of available water under the priority of the rights identified in each notice; the notices are not the basis for this enforcement action.

#### PROPOSED CIVIL LIABILITY

32. Water Code section 1052 provides that the maximum civil liability that can be imposed by the State Water Board in this matter for the unauthorized diversion and use of the water during a

- drought period is \$1,000 for each day of trespass plus \$2,500 for each acre-foot of water diverted or used in excess of that diverter's water rights.
33. Evidence demonstrates that BBID's unauthorized diversions began on June 13, 2015, and continued until June 25, 2015, for a total of thirteen (13) days. Over that period, BBID diverted approximately two thousand sixty-seven (2,067) acre-feet of water in excess of that available to serve its claimed water right.
  34. Therefore, the maximum civil liability for the alleged violations is \$5,180,500 [13 days at \$1,000 per day plus 2,067 acre-feet at \$2,500 per acre-foot].
  35. In determining the amount of civil liability, California Water Code section 1055.3 requires that the State Water Board consider all relevant circumstances, including, but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, and any corrective action taken by the violator.
  36. In this case, BBID has made unauthorized diversions of water from the Intake Channel to the Banks Pumping Plant (formerly Italian Slough) during the most extreme drought in decades, when there was insufficient water supply available for BBID's claimed water right. BBID was aware that the State Water Board had determined that there was insufficient water supply available for BBID's claimed water right. These unauthorized diversions have reduced or threatened to reduce the amount of water available for downstream water right holders during an extreme drought emergency. Moreover, BBID's diversions likely reduced the water available for instream resources and riparian habitat within the Delta during an extreme drought emergency.
  37. BBID received an economic advantage over other legitimate water diverters in the area by foregoing the costs of buying replacement water during the violation period. During 2015, irrigation districts north of the Delta have paid at least \$250 per acre-foot of replacement water. Thus, by illegally diverting 2,067 acre-feet of water from June 13 through June 25, BBID avoided purchased water costs of at least \$516,750.
  38. The Division estimates that its staff cost to investigate the unauthorized diversion issues and develop the enforcement documents to be \$3,000.
  39. BBID is known to be serving water to Mountain House Community Service District and to power generation facilities that may be deemed critical energy suppliers. BBID and Mountain House Community Service District took corrective actions to secure water available via contract and transfer. Although these supplies were not provided during the violation period identified above, they are recognized as progressive correction actions to prevent unauthorized diversions. Also taken into consideration is the fact that BBID has stopped its diversions from June 26.
  40. Having taken into consideration the factors described above, the Assistant Deputy Director for Water Rights recommends an ACL for the unauthorized diversion of water in the amount of \$1,653,250. The recommended penalty is based on the circumstances known to this time, BBID's continued diversions despite lack of availability of water to serve its right during extreme ongoing drought conditions, and to provide a strong disincentive for continued unauthorized diversions by BBID and any similarly-situated parties. The Prosecution Team will consider adjustment of the recommended penalty if BBID provides evidence of the amounts of water pumped that were for health and safety needs or critical power generation.
  41. Should the matter go to hearing, the State Water Board may consider a different liability based on the evidence received, including additional staff costs incurred, up to the maximum amount provided by law. It is estimated that if this matter goes to hearing, additional staff costs incurred for the prosecution staff would be approximately \$10,000.

**RIGHT TO HEARING**

42. BBID may request a hearing on this matter before the State Water Board. Any such request for hearing must be in writing and received or postmarked within 20 days of the date this notice is received. (California Water Code, § 1055, subd. (b).)
43. If BBID requests a hearing, BBID will have an opportunity to be heard and to contest the allegations in this Complaint and the imposition of an ACL by the State Water Board. If a hearing is requested, separate notice setting the time and place for the hearing will be mailed not less than 10 days before the hearing date.
44. If BBID requests a hearing, the State Water Board will consider at the hearing whether to impose the civil liability, and, if so, whether to adjust the proposed liability within the amount authorized by statute. Based on the evidence received at the hearing, the State Water Board may take any appropriate action in accordance with sections 100, 275, and 1050 et seq. of the California Water Code and its responsibilities under the public trust doctrine. Any State Water Board order imposing an ACL shall become final and effective upon issuance.
45. If BBID does not wish to request a hearing, please remit a cashier's check or money order within 20 days of the date of this Complaint for the amount of the ACL set forth above to:  
  
State Water Resources Control Board  
Division of Water Rights  
Enforcement Section  
P.O. Box 2000  
Sacramento, CA 95812-2000
46. If BBID does not request a hearing and does not remit the ACL amount, the State Water Board may seek recovery of the ACL amount as authorized by Water Code section 1055.4.

STATE WATER RESOURCES CONTROL BOARD



*John O'Hagan, Assistant Deputy Director  
Division of Water Rights*

Dated:

**JUL 20 2015**

**BBID  
EXHIBIT 279**



July 15, 2015

Please note that information available to the State Water Board continues to indicate that there is insufficient water available for the categories of junior water users identified in the State Water Board's prior correspondence, identified above. If you believe you received this notice in error, or have information that you want to provide in response to this notice, or have information you believe the State Water Board staff should otherwise consider, you may submit that information via email to: [SWRCB-Drought-Availability@waterboards.ca.gov](mailto:SWRCB-Drought-Availability@waterboards.ca.gov)

Diversion is always subject to water availability limitations, and diversions under your affected water right may be subject to enforcement should the State Water Board find such diversions are or were unauthorized. The State Water Board is continuing its drought-year inspections to determine whether diverters are using water to which they are not entitled.

**Diversion when there is no available water under the priority of your right is an unauthorized diversion and use and is subject to enforcement by the State Water Board.** Those who are found to be diverting water beyond what is legally available to them may be subject to administrative penalties, cease and desist orders, or prosecution in court. If the State Water Board finds following an adjudicative proceeding that a person or entity has diverted or used water unlawfully, the State Water Board may assess penalties of up to \$1,000 per day of violation and \$2,500 for each acre-foot diverted or used in excess of a valid water right. (See Water Code, §§ 1052, 1055.) Additionally, if the State Water Board issues a Cease and Desist Order against an unauthorized diversion, violation of any such order can result in penalties of up to \$10,000 per day. (See Water Code, §§ 1831, 1845.) Any State Water Board enforcement action will be based upon the availability of water and be consistent with the reasonable and beneficial use requirement contained in article X, section 2 of the California Constitution. This notice does not establish or impose any new compliance responsibilities. Non-compliance with this notice shall not constitute a basis for the State Water Board's initiation of any enforcement action.

Consistent with the partial rescission of the prior notices, you are not required to complete and file the Curtailment Certification Form (Form) attached to the prior notices. The prior notices stated that there are no exceptions to curtailment, but provided opportunity for persons to inform the State Water Board, through the Form, whether they were under directives issued by the Division of Drinking Water or local health or drinking water regulation to provide continued water service to meet minimum health and safety standards. Although you are not required to complete the Form, you can voluntarily advise the State Water Board of directives regarding your domestic water system operation to facilitate the State Water Board's response to the drought conditions.

The State Water Board also encourages water right holders to assist in the prevention of unlawful diversion of water and in discouraging any waste or unreasonable use of water. To assist the State Water Board, you may file a complaint at: [http://www.dtsc.ca.gov/database/CalEPA\\_Complaint/Index.cfm](http://www.dtsc.ca.gov/database/CalEPA_Complaint/Index.cfm).

We recognize the burden and loss that California's historic drought is causing, and want to assure that others do not illegally benefit from your compliance with the Water Code.

Sincerely,



Thomas Howard  
Executive Director

**BBID**  
**EXHIBIT 323**

STATE WATER RESOURCES CONTROL BOARD  
BOARD MEETING/HEARING  
(Portion)

MAY 20, 2015

Coastal Hearing Room - Second Floor  
1001 I Street  
Sacramento, California 95814

scribed by: Thresha Spencer, CSR No. 11788

**kathryndavis** & associates  
deposition reporting

STATE WATER RESOURCES CONTROL BOARD  
BOARD MEETING/HEARING  
(Portion)

MAY 20, 2015

Coastal Hearing Room - Second Floor  
1001 I Street  
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Transcribed by: Thresha Spencer, CSR No. 11788

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STATE WATER RESOURCES CONTROL BOARD  
BOARD MEMBERS

- Chair Felicia Marcus
- Vice-Chair Frances Spivy-Weber
- Board Member Tam M. Doduc
- Board Member Steven Moore
- Board Member Dorene D'Adamo

1 PORTION OF TRANSCRIPT OF PROCEEDINGS

2 (File 11 - all)

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4 CHAIR FELICIA MARCUS: Jennifer Spaletta followed by  
5 Jeanne Zolezzi.

6 JENNIFER SPALETTA: Thank you. First of all, I want  
7 to thank staff and the Board Members for working very hard  
8 this year to try and get additional information, better  
9 information than we had last year and for encouraging the  
10 regulative water community to do its part through voluntary  
11 agreements, and I think we've made a lot of progress this  
12 year. I know I've had some very good conversations, not  
13 just with people in this room, but with other people  
14 associated with the export projects and the contractors that  
15 we hadn't had before, and I think they've been really,  
16 really good at moving the ball forward on a lot of difficult  
17 factual and legal issues that we can narrow and, I think we  
18 can all agree, need to be resolved.

19 Unfortunately, the more we talk and the more we  
20 learn and even through the process of gathering better data  
21 about water availability, I think the more we realize that  
22 when you get down to the nitty-gritty at any individual  
23 point of diversion, the risk of being wrong with broad brush  
24 analysis is very, very high.

25 And that's why, regardless of these big legal

1 issues, that we know we need to resolve. We also know they  
2 won't be resolved this week, and they probably won't be  
3 resolved this summer.

4 And that's why many of us in the Delta who have  
5 clients who are sitting here biting their nails wondering if  
6 they're going to plant something and cultivate it for three  
7 months only to receive a curtailment order have said, "Can  
8 we offer something voluntarily that saves water, helps us  
9 all get through the summer collectively," moves the ball  
10 forward without waving our rights on these bigger legal  
11 issues. And that is what we've proposed at this 25 percent  
12 voluntary program.

13 And we've worked with Michael George, obviously, and  
14 Tom Howard to put kind of the meat on what the program would  
15 look like. But, essentially, it would be farmers who say,  
16 "Okay. I'm still at a point in my cropping planning for the  
17 summer where I can make adjustments. I can either do some  
18 water conservation here, I can choose a different crop or I  
19 can plow a certain land and achieve a 25 percent reduction.  
20 We'll keep track of it, we'll document it, we'll make sure  
21 that it can be verified. We may actually learn something  
22 about the way the Delta works for those that participate in  
23 the program.

24 You, in exchange, will get four months of 25 percent  
25 reduction, which is a lot of water, if we're talking about

1 the system.

2 And they, in exchange, of course, receive some  
3 regulatory certainty that they can irrigate their other  
4 acreage, as they have been, and get through the summer from  
5 a business perspective. So it's really a practical  
6 solution.

7 It's a voluntary program, obviously, we hope get a  
8 lot of growers to sign up, but it's a practical solution.  
9 It's an on-the-ground practical solution to get people  
10 through the summer, achieve water savings, which is  
11 important to the system, and save this dialogue and these  
12 important legal issues to be resolved, but to a time where  
13 they can be resolved properly.

14 CHAIR FELICIA MARCUS: It's -- it's interesting.  
15 And again, not an opinion yet, but interesting to  
16 contemplate. We are in this funny -- funny is not the right  
17 word. We are in this challenging -- I think the word  
18 "unprecedented" has been used a lot, and recently a  
19 situation both hydrologically but also in terms of actually  
20 exercising the water right system to an extent it has not  
21 been exercised before. And so the challenge is on all sorts  
22 of fronts. So it's interesting to think interestingly about  
23 it and look at other options.

24 But I have a specific question that's sort of  
25 prompted by Mr. Nomellini's point. Which is one of the

1 things, at least for me, that I'd like to see is that we do  
2 resolve some of these issues that have been hanging around.  
3 Because my perspective, just dancing in and out of it over  
4 the decades, is that there's a -- there are very  
5 strongly-held views about the law or -- and other things,  
6 even the hydrology, about the law, let alone what's right  
7 and wrong. And those same arguments have gone for decades  
8 without helping us resolve anything.

9           And it strikes me that there's a moment where when I  
10 left, people seemed very comfortable in their rhetorical  
11 certainty and they take their chances on what might happen  
12 out in the world, and that seemed to be in a place of  
13 comfort. What I'm seeing in this crisis is people saying,  
14 "Let's resolve some of these things finally and move on."

15           But I guess I'd like us to resolve them in a way.  
16 One thing I'd be concerned about is buying time and then  
17 punting. So in your conversation --

18           JENNIFER SPALETTA: We don't want to do that, no.

19           CHAIR FELICIA MARCUS: -- there has been a strategy  
20 for how to lay out -- maybe there's ten, maybe there's  
21 twenty, maybe there's seven key issues that need to be  
22 resolved. And I'm hoping -- I'm hoping certainly with the  
23 assistance of our Delta Water Master and his acumen and  
24 energy on this, to be able to tee up those issues for  
25 discussion in the nearer future rather than the later

1 future.

2 Is that a part of your conversation?

3 JENNIFER SPALETTA: I would like to meet today,  
4 frankly. I wish that we -- I wish that there's evidentiary  
5 hearing and that I could have asked questions of the people  
6 who put the charts up on your screen today.

7 I mean, frankly, we have to get to the bottom of it  
8 because there's a lot of people who put up information, but  
9 we've never had the opportunity to ask each other the hard  
10 questions about those graphs and really get down to the  
11 nitty-gritty of the spreadsheet.

12 I mean, I heard what Terry said about missing  
13 35 percent of the stored water, and we need to get to the  
14 bottom of that. The projects have to be able to operate and  
15 account for their stored water. And if they can't account  
16 for it now, there's a problem, we need to understand it.

17 So the way I view this voluntary program and any  
18 voluntary program that you would enter into to get through  
19 this year is it is just that. It is an emergency agreement  
20 to get operations through this year that operates on a  
21 parallel track with resolving these tough issues. And they  
22 really are two different things. One is operations, making  
23 a difference on the ground to get us through the year. And  
24 then the second is rolling up our sleeves and digging in on  
25 the tough legal and factual issues. We should be doing

1 both; we should be doing both at the same time.

2           The reason that we like these practical voluntary  
3 programs is there are literally hundreds of individual  
4 farmers who are having a very hard time this year making  
5 basic decisions, and I have a fear that if you roll out a  
6 curtailment in the middle of the summer, that the compliance  
7 with that curtailment will be sparse. And, frankly, that's  
8 not good for the system. It's not good for their mental  
9 health, it's not good for the economy of the area, and it  
10 doesn't achieve your goal. It may help us resolve the legal  
11 issues, but it doesn't actually do what we need to do, which  
12 is save water and make the system work better.

13           So I think what we're offering with this program is  
14 an opportunity to do both, to actually do some water savings  
15 and allow these people to operate in a way that makes some  
16 business sense. And, at the same time, let's dig in on  
17 these legal and factual issues and get to the bottom of them  
18 one way or the other.

19           CHAIR FELICIA MARCUS: Thank you.

20           JENNIFER SPALETTA: Thank you.

21           CHAIR FELICIA MARCUS: Question, Tam?

22           BOARD MEMBER TAM M. DODUC: Actually, I do have a  
23 few questions. Actually, the proposal is very intriguing.  
24 So just a couple of questions just to clarify in my mind.  
25 I'm sure I will get the details later on, but as far as what

1 you are thinking.

2 A voluntary 25 percent in, I guess I understand it,  
3 either reduction in diversion or 25 percent fallowing of  
4 land that would normally be put into production in the  
5 critical three months.

6 So with respect to the first one, a 25 percent  
7 reduction in diversion, are you thinking that will be  
8 25 percent less -- I think you're talking about a 2013  
9 baseline, so that would be reduction from actual diversion  
10 or reduction from the water rights of diversion?

11 JENNIFER SPALETTA: Well, I don't think there will  
12 be an impact on water rights with just one year's activity,  
13 but there will be an impact on how much water is actually  
14 taken out of the river, I guess.

15 BOARD MEMBER TAM M. DODUC: No, no, no. I meant,  
16 were you doing the calculation of the 25 percent --

17 CHAIR FELICIA MARCUS: 25 percent of what?

18 JENNIFER SPALETTA: Of the riparian rights.

19 THOMAS HOWARD: Perhaps I can answer because we're  
20 the ones that are actually writing it up, and I had  
21 discussions with staff about that issue. And it seemed to  
22 me that what we do is this year in the information order, we  
23 asked the 90 percent largest diverters to tell us what they  
24 intended to use this year.

25 And so we have, for a large fraction of the

1 diverters in the Central Valley, an estimate that they  
2 provided us saying, "Here's what we intend to use."

3 We also have some of the data of 2013 use, and we  
4 will certainly have more as these statements roll in over  
5 the year. So we'll ask the parties, "If you want the  
6 25 percent reduction, you should have two numbers available  
7 to you. You should have what you already told us you were  
8 going to do last year -- that you were going to do this year  
9 as you were projecting this year's diversions, and you have  
10 what you did in 2013, take the lower of those two and take  
11 off 25 percent." That's what the form said.

12 JENNIFER SPALETTA: And that would be a major  
13 problem if that's what the form said because the projected  
14 numbers for this year, in many cases, already accounted for  
15 conservation measures that were being implemented by the  
16 farmers. So that, of course, would be very unfair.

17 But if we're talking about a 2013 baseline --

18 CHAIR FELICIA MARCUS: Uh-huh. That's what I  
19 assume.

20 JENNIFER SPALETTA: It's a very basic concept. If  
21 you had a 100-acre field that was irrigated in alfalfa and  
22 they put on five acre feet of water during the summer month  
23 period, and since that time they have invested in drip  
24 irrigation and they are planting a shorter crop, maybe  
25 cucumbers for 60 days on drip, there's going to be obviously

1 a substantial difference in the amount of water that's  
2 diverted and used on that property, probably more than  
3 25 percent savings on that particular property.

4 So we would have to compare apples to apples with  
5 what was -- how they computed their diversions in use in  
6 2013 with how they compute their diversions in use in 2015.  
7 If there's measurement devices in place, that's relatively  
8 easy, otherwise we have to use the same methodology, you know,  
9 to make it an apples-to-apples comparison.

10 CHAIR FELICIA MARCUS: You would have to have some  
11 kind of real number to base it on?

12 JENNIFER SPALETTA: Correct.

13 BOARD MEMBER TAM M. DODUC: And --

14 CHAIR FELICIA MARCUS: And I want to talk about  
15 that. Taking the lower -- that doesn't seem right to me.  
16 I'm sorry, Tom. It doesn't seem fair. I'm not saying that  
17 it's 2013/2014 -- but it doesn't -- I'm not getting it,  
18 so...

19 JENNIFER SPALETTA: Yeah. That was the first I'd  
20 heard of that. We previously had talked about doing a  
21 baseline of 2013 or 2014, certainly not using the  
22 projections from 2015 as a baseline, because many of those  
23 projections, of course, did include plans, you know, for  
24 fallowing or reductions in use already.

25 BOARD MEMBER DORENE D'ADAMO: Yeah. I would think

1 just stick with it. I really appreciate your energy and --  
2 all of you that are working on this, so stick with it and  
3 hopefully something can be worked out.

4 I have a question for staff. So Slide 25.

5 BOARD MEMBER TAM M. DODUC: Actually, if I could  
6 finish my question --

7 BOARD MEMBER DORENE D'ADAMO: Oh, sorry.

8 BOARD MEMBER TAM M. DODUC: -- before you move off  
9 the topic.

10 So I think it probably can be said -- can be said --  
11 understood without saying, but just so I have it perfectly  
12 cleared.

13 So the water savings through fallowing or reduced  
14 diversions would be water then that would not be available  
15 for transfer or other uses?

16 JENNIFER SPALETTA: The water will basically remain  
17 in the stream, okay?

18 BOARD MEMBER TAM M. DODUC: Okay.

19 JENNIFER SPALETTA: Now, I will tell you --

20 CHAIR FELICIA MARCUS: It's got to be real water or  
21 it doesn't make sense.

22 JENNIFER SPALETTA: It has to be real water,  
23 absolutely. And I wouldn't propose this program, and I know  
24 that my landowners wouldn't propose it unless it was real  
25 water. It just doesn't make sense.

1 The other thing --

2 BOARD MEMBER TAM M. DODUC: And I guess -- oh, go  
3 ahead.

4 JENNIFER SPALETTA: So I was going to say, though,  
5 but this type of program is going to teach us a lot about  
6 the effect of taking these activities in the Delta, which I  
7 think could actually be a springboard for other programs  
8 that maybe could lead to ideas about how to change stream  
9 flow or how to effectuate transfers, you know, using the  
10 Delta. And so it's an opportunity to learn for the future  
11 as well.

12 BOARD MEMBER TAM M. DODUC: And my last question is,  
13 to help me understand this in context, and so will you just  
14 say your growers, how many are we talking about, how much  
15 water are we talking about potentially?

16 JENNIFER SPALETTA: Yep. So --

17 BOARD MEMBER TAM M. DODUC: Do you have a rough  
18 estimate?

19 JENNIFER SPALETTA: So I have absolutely no idea. I  
20 will tell, you know, I personally, on a weekly basis, talk  
21 to growers who farm about 40,000 acres in the Delta, and  
22 they're all very interested in the program. There are other  
23 people who have expressed a strong interest who represent  
24 probably a like amount of acres.

25 Between the south and central Delta, there are about

1 \$300,000 acres. Do I think that all of them will sign up  
2 for this program? Probably not. It's just, frankly, too  
3 late to do that kind of outreach and accomplish that result.

4 But I do think that we'll get a critical number to  
5 sign up, and that's real -- that's real water. That's a lot  
6 of water, you know. Even if we had 10 or 10,000 acres sign  
7 up, it's still real water.

8 So I think that the program will achieve water  
9 savings if we get it moving so we can get people signed up.  
10 It's really a matter, though, of days here and getting it  
11 moving, because farmers are still making some planting  
12 decisions for the summer and they need to be able to figure  
13 out what they're doing so that we can achieve some savings.

14 Thank you all very much.

15 BOARD MEMBER DORENE D'ADAMO: Well, hang on just one  
16 second. Because the point that I was going to make is just  
17 the ability to glean additional information as a result of  
18 this, the whole issue of consumptive use in the Delta and  
19 that sort of thing.

20 And looking at what staff had suggested on Slide 25  
21 as far as going forward with curtailment inspections, at the  
22 top of the list is Nonresponsive to Curtailment  
23 Certification Form.

24 So assuming that the growers that would be  
25 participating in this would have some sort of certification

1 form on file, not that they would be ignored, but the focus  
2 would really be in other areas allowing -- allowing its  
3 staff to move forward perhaps in some of these issues that  
4 we're trying to get to the bottom of. So it's just a way to  
5 narrow down the focus.

6 KATHERINE MROWKA: As I understand, the focus would  
7 shift to obtaining the information that the fallowing had  
8 occurred, that the reductions had occurred, so that there  
9 would be a shift in focus.

10 BOARD MEMBER DORENE D'ADAMO: The monitoring.

11 JENNIFER SPALETTA: All right. Thank you.

12 THOMAS HOWARD: Chair Marcus, just for  
13 clarification. I've been telling staff that we have to make  
14 a decision on this and get it out by Friday because it's  
15 supposed to start on June 1st. And, you know, every day  
16 that we wait, as the previous speaker had indicated, you  
17 know, people are making their decisions. And so this isn't  
18 something that I think is going to age well, and we need to  
19 make a decision and --

20 CHAIR FELICIA MARCUS: Right. And then you -- so  
21 you need to put in front of us individually, since it won't  
22 be tonight, what the -- what the parameters are and let us  
23 give you feedback.

24 THOMAS HOWARD: Sure. Of course --

25 CHAIR FELICIA MARCUS: Between now and then.

1 THOMAS HOWARD: I've sent you a couple of things  
2 already, but --

3 CHAIR FELICIA MARCUS: I mean, we've had a general  
4 conversation, but we got into a set of details that we need  
5 to understand if you want our feedback, otherwise someone --  
6 someone is going to challenge it.

7 THOMAS HOWARD: Sure.

8 CHAIR FELICIA MARCUS: And then it will come back,  
9 so I just -- I think the onus is on you all collectively to  
10 lay it out, give us the details, pros and cons where the  
11 warts are, et cetera.

12 I mean, in general concept I'll say I'm intrigued by  
13 it given that we're not going to resolve everything. But I  
14 do want to hear what the blow back will be or the cons. And  
15 we've had a general conversation, but we -- the devil is in  
16 the details, so -- you know, I'll look forward to seeing it.

17 BOARD MEMBER STEVEN MOORE: That's fine. Yeah. I  
18 don't -- I don't mind discussing it a little bit, my  
19 impressions of it are, you know, there's a choice we need to  
20 make about the baseline and maybe one of the -- you know, in  
21 thinking out loud -- if we wanted to really accomplish real  
22 water savings in this context, you know, it's tempting to  
23 use 2013 because we've used that for our urban water  
24 conservation targets and -- but I realize, you know, in  
25 terms of realizing real water savings in an emergency

1 situation, what is an appropriate baseline, you know, how do  
2 we -- you know, will we make a measurable difference  
3 comparing to what was predicted a few months back and  
4 reported or comparing to 2014, you know, these are the  
5 questions in terms of what's going to get us an outcome in  
6 terms of, you know, helping fish and wildlife, making more  
7 water available to senior water right holders and those  
8 questions.

9 So, you know, I'm at a point where, you know, I  
10 really realize the time sensitive nature of this, and I'm  
11 willing to, you know, take on some risk in setting up kind  
12 of a system to encourage this voluntary approach. You know,  
13 in terms of when I say that, I mean, knowing that I don't  
14 have all the answers to those questions, but there's a  
15 timeliness to this.

16 So I think, on the one hand, 2013, there's  
17 compelling reasons to use that for consistency in a  
18 state-wide story about conservation relative to a couple  
19 years back. And then, you know, then I ask staff, you know,  
20 is that giving too much credit for things that have happened  
21 already, and it won't make a significant difference this  
22 year in terms of making critical acre feet of water  
23 available.

24 BOARD MEMBER DORENE D'ADAMO: Well, isn't -- isn't  
25 part of it based on calculations of the supply and demand

1 curves that John O'Hagan is working on? I mean, whether  
2 it's 25 percent or whatever the number is, the idea is to  
3 get roughly equivalent savings as what would have occurred  
4 with a correlative reduction for riparians.

5 THOMAS HOWARD: That is information that is used to  
6 inform the question of whether it is reasonable to offer a  
7 25 percent reduction, but it's not necessarily the sole  
8 determining factor. I can't guarantee -- because, for  
9 example, if we did a reduction, and it could very possibly  
10 be we'd send out curtailment notices in August or even the  
11 beginning of September --

12 BOARD MEMBER DORENE D'ADAMO: Uh-huh.

13 THOMAS HOWARD: -- for riparians, and it might be a  
14 much larger reduction. And so, you know, you're looking at,  
15 well, you have four months now of a reduction as opposed to,  
16 you know, maybe the two months you'd have if you sent out a  
17 riparian notice.

18 And so if you're somewhere in the area of 25 to  
19 50 percent of the supply/demand curves, then, you know, it  
20 seems as though this is a reasonable thing to offer for the  
21 purpose of ensuring that we, you know, we provide assurances  
22 to people and the assurance that we actually see some real  
23 water.

24 BOARD MEMBER DORENE D'ADAMO: And I guess what I'm  
25 saying is you could compare that number to the various

1 baselines --

2 THOMAS HOWARD: Of course.

3 BOARD MEMBER DORENE D'ADAMO: -- you're talking  
4 about.

5 THOMAS HOWARD: That's exactly what I was doing,  
6 yes.

7 BOARD MEMBER STEVEN MOORE: Yeah. I, like Board  
8 Member D'Adamo, I think this is a very healthy exercise, but  
9 there's a time sensitivity to it. And I'm comfortable  
10 moving forward not having all the answers, but knowing if  
11 you do a reasonably quick analysis of water savings, that --  
12 that it's worthwhile in building the team effort and -- and  
13 then keeping an eye on it. The monitoring will be  
14 important. I'm very favorable to moving forward with  
15 something this week.

16 CHAIR FELICIA MARCUS: Thank you. Ms. Zolezzi  
17 followed by Jennifer Buckman.

18 JEANNE ZOLEZZI: Good evening, Board Members.  
19 Jeanne Zolezzi representing Patterson Irrigation District  
20 and Banta-Carbona Irrigation District. And I just want to  
21 mention those are both pre-1914 water right holders on the  
22 San Joaquin River. We have also been talking to the Delta  
23 Water Master and your staff about a potential voluntary  
24 curtailment agreement. We'd very much like to explore that.  
25 We're waiting for numbers because we feel very strongly that

1 a voluntary curtailment is much preferred to the chaos and  
2 the litigation that would follow a mandatory curtailment.

3 And I agree with Ms. Spaletta that we'd like to have  
4 something voluntary for this year while we still pursue  
5 getting answers to those legal questions that must be  
6 answered for us to continue in this venue.

7 I just wanted to go through a few of the reasons why  
8 we don't believe that pre-'14 curtailments across the board  
9 are appropriate at this time or legal at this time, just  
10 some things for you to think about.

11 Regarding data, I think everyone has done it that's  
12 come up here. We really do want to commend your staff.  
13 They have taken the information we have provided and they  
14 have just made extraordinary efforts in trying to take those  
15 comments into consideration and come up with the best data  
16 they can come up with. It's been a herculean effort, and  
17 they've done a great job.

18 The problem is in the San Joaquin River System there  
19 are just no answers to some of the anomalies that we're  
20 finding. Even the top experts on the San Joaquin system who  
21 usually have all the answers don't have those answers this  
22 time.

23 For example, just looking at the seven-day running  
24 average from last week working with the experts on the San  
25 Joaquin River we went through, we looked at all the gauges,

1 we looked at all the reservoir releases, and we looked at  
2 actual diversions from the river that were taking place,  
3 came up with the number that we expected to see at Vernalis.

4 Well, that wasn't the number that showed up. The  
5 number at Vernalis was 200 CFSS higher than that. And  
6 nobody, including the expert on the San Joaquin River, can  
7 explain why that is the case at this point.

8 So there are things that simply cannot be answered  
9 in the San Joaquin River. And when you enforce a  
10 curtailment against a water right holder, you have the  
11 burden to demonstrate that no water is available. And when  
12 we don't have the answers as to what water is there and  
13 where it comes from, we can't make those conclusions.

14 Regarding the right to divert, again, imposing  
15 curtailments based on an assumption that a senior water  
16 right holder is being injured somewhere downstream, it's  
17 simply not authorized and not within the State Board's  
18 power, frankly. A junior water right appropriator in  
19 California has the right to continue to divert as long as  
20 there is water at their facility and a senior water right  
21 holder is not being significantly injured.

22 It's not enough to say -- it's not enough for the  
23 State Water Project contractors to get up here and say, "We  
24 are losing 30 percent of our water, curtail everyone." It  
25 just doesn't work that way. They have some burden of

1 showing where that 30 percent is going. They have no idea.  
2 Frankly, that's why we need data, that's why we need some  
3 questions answered.

4 And as Dante mentioned, curtailments are based upon  
5 site specific and time specific determinations, and they  
6 also depend upon specific priority at a specific location.  
7 We simply don't have those facts. We haven't even attempted  
8 to get those facts, and we haven't had a factual hearing --  
9 we haven't had an evidentiary hearing to glean those.

10 Just as an example, if you have a senior water right  
11 holder in the Delta who has a certain water right for a CFS  
12 diversion and it's for irrigation. They don't divert water  
13 30 days out of the month; they divert water a few days to  
14 irrigate and then a few days later in the month to irrigate.

15 When they are not irrigating, the junior water right  
16 holder has the opportunity to take that very same water  
17 legally. Your staff's information is based on a 30-day use  
18 of that water that's been reported. That's not correct.  
19 That's not the way junior and senior water rights work. If  
20 it was, it would never work. Even in the wet years we  
21 couldn't get that done. It's because we have seniors  
22 turning on and off and juniors using that this whole system  
23 we have with the over appropriations that you keep hearing  
24 about, that's how it works.

25 Another issue. When you're talking about my

1 client's pre-'14 water right holders in the San Joaquin  
2 River being curtailed to protect more senior "pre-1914 water  
3 right users in the Delta," you have a real difficulty,  
4 because those pre-'14 water right users in the Delta are  
5 simply claimants. No one has determined whether or not they  
6 have valid pre-'14 water rights. They -- they very well  
7 may. No one has determined that.

8 So to curtail upstream pre-'14s in favor of  
9 downstream more senior pre-'14s who have not established  
10 their rights, it's simply not equitable, it's not legal,  
11 and, of course, it will be challenged.

12 CHAIR FELICIA MARCUS: So I follow the logics of  
13 that. Basically, it would be an argument that we can't do  
14 curtailments because we haven't adjudicated the whole  
15 system?

16 JEANNE ZOLEZZI: No. You -- you have -- you have no  
17 idea if someone has a valid right. When you're dealing with  
18 post '14s, you have a --

19 CHAIR FELICIA MARCUS: But you say we could never  
20 curtail seniors because we haven't adjudicated it fully the  
21 way other western states have. Or, in some cases we have --  
22 in some cases perhaps we have.

23 JEANNE ZOLEZZI: If you had determined.

24 CHAIR FELICIA MARCUS: But I'm trying to understand  
25 how what you're saying doesn't mean we just can't do it at

1 all ever until we adjudicate the whole system.

2 JEANNE ZOLEZZI: That would be my legal conclusion.

3 CHAIR FELICIA MARCUS: I'm trying to understand what  
4 you're saying, that you have no authority over pre-'14s.

5 JEANNE ZOLEZZI: And that's one of the reasons is  
6 that you don't have a permit that you can look to and say,  
7 "This pre-'14 has a right to take this water at this time."

8 The courts have very clearly said very recently that  
9 you do have the authority to determine if a pre-'14 is  
10 valid. They have said that you have to do that in order to  
11 determine if they're legally taking water, but the court  
12 also said, "You can't go beyond that. You can't regulate  
13 that water right."

14 And once you determine a pre-'14's right vis-a-vis  
15 another pre-'14, you're regulating. Once you tell that  
16 pre-'14, "Okay, you have a valid right, but you have to stop  
17 taking it because other water right holders need the water,  
18 you're regulating." And I would ask you to ask the hard  
19 questions of your staff because we know that your legal  
20 counsel is telling you something different, that you do have  
21 that authority.

22 And, obviously, we will get the answer to that  
23 because, you know, if we have broad brush curtailments, we  
24 will bring that up and have the legal answer.

25 CHAIR FELICIA MARCUS: Right. I'm assuming that one

1 is on the list?

2 JEANNE ZOLEZZI: It is.

3 CHAIR FELICIA MARCUS: But I don't want to see the  
4 list, frankly.

5 JEANNE ZOLEZZI: And that's how you get to it,  
6 because how can you curtail me as a pre-'14 when I have  
7 data, I have a posted notice from 1911 that shows I have a  
8 valid right to divert, and someone else just says, "Oh, I  
9 have a pre-'14 right" with -- with no proof and no  
10 determination or fact finding by this Board that that's the  
11 case.

12 BOARD MEMBER DORENE D'ADAMO: So what you're saying  
13 is that we don't have jurisdiction over pre's, and that, in  
14 addition, that we need to wait until we get a complaint?  
15 Someone has to be injured --

16 JEANNE ZOLEZZI: Well, as to pre, absolutely. That  
17 is the law as well. You could -- if you could determine  
18 without a complaint that there's an injury, obviously you  
19 could perceive that way.

20 But again, the courts have been very specific, and  
21 the California Supreme Court has stated that a threat of  
22 harm, which is what we are hearing staff telling us, that we  
23 are curtailing in order to protect, John O'Hagan told us,  
24 "Well, there's a threat that these senior water right  
25 holders will be injured because you're taking their water."

1           The California Supreme Court has said a threat is  
2 not enough. You have to prove that the senior water right  
3 holder has actually been substantially injured or materially  
4 injured.

5           So if you're just taking water that they weren't  
6 going to divert that day, you're legally entitled to it. If  
7 you've inconvenienced them, you're entitled to it. If we  
8 have taken, you know, one acre foot from the projects,  
9 that's not a substantial injury, and they cannot show what  
10 water we're taking, if any, that we're not entitled to. So,  
11 yes, our point is that you simply don't have the site  
12 specific information that's needed to do this.

13           And again, as we've said it before, it's also the  
14 due process issue. You know, we're getting double-speak,  
15 very frankly, from your staff. We receive in the mail --  
16 the post-'14s received a letter that said, "You are  
17 immediately to cease diverting, and within seven days you  
18 will file under penalty of perjury a certification that you  
19 have stopped diverting. But it's just a notice and it's not  
20 enforceable."

21           You know, we can't have it both ways. It's either a  
22 binding notice to cease diverting or it's just a letter  
23 saying, "There might not be enough water for you, you better  
24 consider what you do or we'll come after you."

25           What you sent out is a notice. It is an order to

1 stop diverting, and you cannot do that without a due process  
2 hearing. You can't do that without an evidentiary hearing.

3 And that's why your staff is not calling it an  
4 order; it's just a notice. Because, as you well know, you  
5 can't have a binding order affecting your property rights  
6 without some kind of due process, without a hearing, right  
7 to be heard evidence, which we've had none of. We simply  
8 have staff, based upon a graph that we haven't been able to  
9 cross-examine or correctly verify saying, "Someone might be  
10 injured in the future. You have to stop diverting."

11 It simply doesn't work, which is why we are asking,  
12 "Let's see if we can work out something voluntary and still  
13 pursue these legal issues to get them answered," or let's  
14 take a different approach and wait until we have complaints  
15 and you can do that site specific determination through a  
16 hearing. And then we'll get our answers and we'll know who  
17 needs to be curtailed and who doesn't need to be, so --

18 But we hope -- we hope to get some numbers from your  
19 staff and, hopefully, we can work out some voluntary  
20 curtailment so that we don't have the chaos that follows and  
21 we can come up with some kind of orderly way to get these  
22 questions answered. I know that Mr. George has been working  
23 very hard on that to try to get some of these questions  
24 answered in an orderly way rather than the chaos result. So  
25 I do thank your staff for its efforts. Thank you.

1 CHAIR FELICIA MARCUS: Okay.

2 BOARD MEMBER DORENE D'ADAMO: I just wish my  
3 housekeeper vacuumed that well.

4 CHAIR FELICIA MARCUS: Some -- can you hear that?  
5 It's like someone is vacuuming in the hallway behind us for  
6 15 minutes. I don't know. Sorry. We are listening, it's  
7 just --

8 JENNIFER BUCKMAN: And, for some reason, I'm always  
9 last at these things. Jennifer Buckman. I'm here on behalf  
10 of the Friant Water Authority.

11 And I just wanted to clear up -- I want to -- it's  
12 late, and I don't want to repeat any of the comments and be  
13 repetitive of comments that have already been made for us by  
14 others, but I did want to clear up the comment in reference  
15 to Arvin-Edison Water Storage District, which is a Friant  
16 Division contractor and a member of the Friant Water  
17 Authority.

18 They are not transferring 150,000-acre feet of CVP  
19 water this year. The Friant Division contractors, as this  
20 Board is painfully aware, got a zero allocation this year  
21 like we got last year. They don't -- we didn't, as a whole  
22 division, we didn't get 150,000-acre feet of water either  
23 this year or last year or the two years in combination.

24 So our hydrology this year is even more challenging  
25 than it was last year because the local streams have

1 basically very, very little supply to augment.

2 So the folks in our division that have other sources  
3 of supply are in an even worse situation this year than they  
4 were last year. As a result of that, we put together a  
5 complicated package of exchanges and transfers in order to  
6 develop a water supply for the Friant Division contractors.

7 And as you all know from some of the prior workshops  
8 and such we've had on the TUCPs, within our service area, we  
9 have thousands of families who are still out of water 10,  
10 12 months later after their wells ran out. It's primarily  
11 impacting low-income families, folks who can't afford to  
12 drill the well deeper or move.

13 And in response to the comment earlier that there  
14 are no endangered farmers, well, there are in our area in  
15 Terra Bella and Lindsey and Strathmore and Orange Cove. I  
16 know plenty of endangered farmers. A lot of our guys are  
17 growers that have been on the same land for multiple  
18 generations, and right now their lives and livelihoods are  
19 on the line. We've got 15,000 small family farms. Within  
20 the Friant Division, the average farm size is less than 200  
21 acres. These aren't guys that can weather a long multi-year  
22 drought like that.

23 As I've mentioned to the Board before, within the  
24 Friant Division is a little bit unique in the fact that we  
25 are a conjunctive use system, planned that way under the

1 California Water Plan and operated that way, which means  
2 that our M&I contractors, those who have municipal and  
3 industrial needs within the Friant Division are served by a  
4 Class 1 contract, not a specific M&I contract.

5 So it's critically important for us to develop some  
6 Class 1 supply for those contractors this year because we've  
7 got six cities, including the City of Fresno, that are  
8 Friant contractors and need that water.

9 A lot of people worked very, very hard to get what  
10 is essentially a replacement of the Class 1 supply we would  
11 otherwise get, and it's not just Arvin-Edison, we have other  
12 Friant Division contractors who worked on that. Delano  
13 Earlimart and Kern and Tulare were both involved in the  
14 transactions, as were a number of our neighbors, the  
15 exchange contractors and Westlands Water District was very  
16 helpful to us in making some water and deferring -- taking  
17 some water out of San Luis so that we could avoid a low  
18 point problem and make the water available behind Millerton,  
19 we were able to back it up through a multi-party exchange.

20 It's a really complicated package of transactions  
21 that we've put together, and that's why it may be confusing  
22 to folks who just read, "Oh, there's 150,000-acre feet of  
23 water that's going to change hands at some point, but that's  
24 not this year and it's not CVP supply."

25 We're developing a minimal supply for the Friant

1 Division contractors. We're getting a total of less than  
2 30,000-acre feet for the entire division.

3 So I also want to echo the comments that a bunch of  
4 other folks have made about how the State Board staff has  
5 been really helpful this year, and we appreciate that. It's  
6 a much more iterative process this year than last, and we're  
7 very thankful for the, you know, discussions we've been able  
8 to have with Kathy and Michael and a bunch of other folks.

9 CHAIR FELICIA MARCUS: Thank you very much.

10 (Whereupon, end of transcribed portion.)

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**BBID**  
**EXHIBIT 324**

STATE WATER RESOURCES CONTROL BOARD  
BOARD MEETING/HEARING  
(Portion)

MAY 20, 2015

Coastal Hearing Room - Second Floor  
1001 I Street  
Sacramento, California 95814

scribed by: Thresha Spencer, CSR No. 11788

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BBID Exh. 324

STATE WATER RESOURCES CONTROL BOARD  
BOARD MEETING/HEARING  
(Portion)

MAY 20, 2015

Coastal Hearing Room - Second Floor  
1001 I Street  
Sacramento, California 95814

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STATE WATER RESOURCES CONTROL BOARD

BOARD MEMBERS

- Chair Felicia Marcus
- Vice-Chair Frances Spivy-Weber
- Board Member Tam M. Doduc
- Board Member Steven Moore
- Board Member Dorene D'Adamo

1 PORTION OF TRANSCRIPT OF PROCEEDINGS

2 (File 12 - all)

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4 CHAIR FELICIA MARCUS: Thank you. I know folks have  
5 worked very hard to try and actually converse and work these  
6 things through, and it's much better -- it doesn't take away  
7 from the fact that it's a horrible drought and a horrible  
8 situation (inaudible). So figuring what to do is the  
9 challenge.

10 I'm trying to figure out what the most useful thing  
11 for us to do right now would be. I found this actually  
12 quite helpful, believe it or not.

13 What?

14 (Inaudible.)

15 CHAIR FELICIA MARCUS: Oh, Tim? Oh, yeah. I didn't  
16 bring -- your card is over there.

17 Tim, last word. You'll just wrap it all up for us?

18 (Inaudible.)

19 CHAIR FELICIA MARCUS: That's fine.

20 TIM O'LAUGHLIN: Tim O'Laughlin, representing the  
21 San Joaquin Tributaries Authority. I have a question for  
22 staff, and maybe they can answer it. So on the chart that  
23 was put up on the screen, it said "San Joaquin River Basin  
24 Curtailment this Friday."

25 Do we know, is that the San Joaquin River Basin from

1 Vernalis all the way to Friant, and if -- what's the  
2 geographic boundary of it? And also is there a start date?  
3 Is it 1906 or 1908? What's -- what's the game plan?

4 KATHERINE MROWKA: Yes. Staff has done the analysis  
5 for the individual tributaries, the Stanislaus, Merced, and  
6 Tuolumne, and right now they're combining data for the basin  
7 as a whole to give us a common date at a common location. I  
8 believe it's Mossdale Bridge.

9 TIMOTHY O'LAUGHLIN: So -- but does that -- but will  
10 that include the -- if it's Mossdale Bridge, you're going to  
11 curtail on the mainstay on San Joaquin River on Friday too?

12 KATHERINE MROWKA: It's common curtailment.

13 TIMOTHY O'LAUGHLIN: All right. Thank you.

14 CHAIR FELICIA MARCUS: Say that again.

15 KATHERINE MROWKA: So, basically, it would be a  
16 watershed-based curtailment like all of our others have been  
17 this year.

18 TIMOTHY O'LAUGHLIN: Well, okay. So it's just going  
19 to be the Stanislaus, Tuolumne, and the Merced?

20 KATHERINE MROWKA: No. We've run all the data for  
21 the individual -- those are the tributaries.

22 TIMOTHY O'LAUGHLIN: I just need to know is it all  
23 three of them --

24 KATHERINE MROWKA: Plus, we're running right now the  
25 data for the major -- for, like, the combined whole

1 watershed picture, so...

2 TIMOTHY O'LAUGHLIN: So is the curtailment going to  
3 include the mainstem San Joaquin?

4 KATHERINE MROWKA: At this time.

5 TIMOTHY O'LAUGHLIN: Perfect. That's all I need.  
6 Thanks. I appreciate that.

7 I just have two real quick points. I am struck by  
8 the irony of this, and actually Terry Erlewine tee'd this up  
9 earlier, and it came in the letter that you received last  
10 year which started these discussions going forward. Which  
11 was the exporters say 35 percent of their water is being  
12 mysteriously disappearing in the system. We think it's in  
13 the Delta but we need to find out where it's -- where it's  
14 currently.

15 And you got that letter and then you folks started  
16 your process to go forward and collect information to do  
17 what you do.

18 So I find it strange that we're in this process now,  
19 and the first curtailment that's going to be issued is on  
20 the San Joaquin River above Vernalis. And I'm wondering why  
21 that is because there's no way that anyone on the mainstem  
22 of the San Joaquin River or on the three tribs could ever  
23 take stored water from the projects.

24 So I'm sitting here, and here's my question to you  
25 folks, because you're the policy people. And when you do

1 policy, in my mind, you have a goal in effect. Or what's  
2 the goal?

3 So I've been asking your staff and people, "What is  
4 the goal?" And I hear it's to protect senior rights. Well,  
5 that's really not the goal. The goal is, is to protect  
6 stored water being released by the projects into the Delta  
7 so you can back more water up into Shasta and Oroville and  
8 the American River. I have no problem with that. Totally  
9 down with that.

10 So why is a curtailment being issued on San Joaquin  
11 because we don't take their stored water and we can't  
12 possibly take their stored water? And so it's kind of  
13 ironic to us that this is occurring in the fashion that it's  
14 going to occur.

15 The other thing that's ironic is, to me, is there's  
16 this discussion, and I applaud Ms. Spaletta on moving  
17 forward or trying to get some reduction in Delta water use.

18 My clients have already been reduced somewhere  
19 between 40 and 90 percent. So if the -- if the goal is that  
20 we've taken these reductions and you get a hall pass on  
21 curtailment and enforcement, then why are we issuing  
22 curtailment notices at all of the San Joaquin River of the  
23 tribes? We've already reduced. We took those -- we took  
24 those voluntary measures already in February and March. So  
25 how are you going to do that? And one of the oxymoronic

1 things --

2 CHAIR FELICIA MARCUS: Wait. What do you mean --  
3 what do you mean by that?

4 TIMOTHY O'LAUGHLIN: Well, all the districts  
5 voluntarily reduce their water supply to their growers and  
6 have pushed water up into storage and are -- and are taking  
7 conservation measurements and, therefore, so why is that any  
8 different --

9 CHAIR FELICIA MARCUS: But that's the stored --  
10 that's the stored water.

11 TIMOTHY O'LAUGHLIN: But it doesn't matter. If  
12 they're taking -- I mean, think about it this way. If the  
13 statement is -- here's the funny thing about this.

14 If the goal is that, based on the curtailment that  
15 we were going to protect stored water in the Delta, and  
16 people in the Delta aren't taking water without -- without  
17 right, just because you reduce it 25 percent and they're  
18 taking 75 percent without right doesn't make it right.

19 So my question to you and your staff is, who are  
20 you -- what is the goal here? Because in the her -- Kathy's  
21 presentation, it was ironic. I mean, there is no water in  
22 the San Joaquin River system. There is nothing. And, like  
23 she said, you go out and do these inspections and it's dry.  
24 Like we said last year and we said this year again, people  
25 upstream of our reservoirs, we're not concerned about them

1 diverting. There is no water to divert.

2           So what -- what are -- I'm asking you. What are you  
3 trying to accomplish here? I mean, I get -- I have no  
4 problem because I've been fighting this battle for 25 years.  
5 I have no problem tee'ing up legal issues that need to be  
6 resolved in the Delta, okay? I am fully supportive of that.  
7 There's some major -- like, is stored water released to meet  
8 Delta outflow protected? I don't know. I've never seen a  
9 1707 on it, I've never seen a State Board Order on it. If  
10 that water goes into the X2 zone and it's abandoned, is it  
11 subject to appropriation?

12           I mean, there are great questions to ask, okay? But  
13 if you go about it with a curtailment, here's my fear: My  
14 fear is we're going to be in a legal procedural morass,  
15 which has nothing to do with the substantive issues.  
16 Because it's all going to go to whether you have a notice,  
17 whether you have an order, whether you've taken a final  
18 action, whether it's an administrative action, can we seek a  
19 stay? Can you seek -- can we have a TRO? Are you going to  
20 say we have to exhaust our administrative perimeters and  
21 come back here and file motions for reconsideration?

22           I mean, we're going to be playing that dance, and  
23 especially if your staff rolls this out in a sequential  
24 order where we're going to have curtailments for -- I don't  
25 know -- are you going to go all pre-'14 rights all the way

1 back to, like, 1850, or are you just going to do like 1906?

2 KATHERINE MROWKA: Staff is still doing that math  
3 for me.

4 TIMOTHY O'LAUGHLIN: Okay. So -- but let's say you  
5 do half of them now and half of them later. So now we're  
6 going to be staggering these people through these processes  
7 with various complaints, then you're going to do riparians,  
8 now you're going to do Sacramento.

9 Now, my clients have claims that they have pre-'14  
10 rights that are superior to pre-'14 rights in the Delta, and  
11 you're going to -- so I get the issue and the legal issues  
12 involved, but the process by which you're trying to -- and I  
13 keep telling your staff this -- the process by which you're  
14 trying to get to the point to put the legal issues in play  
15 isn't going to get you there.

16 CHAIR FELICIA MARCUS: And what's your suggestion?

17 TIMOTHY O'LAUGHLIN: My suggestion is that if you  
18 truly feel that you want to do -- get to these legal issues,  
19 and I've told your Water Master this and I've told your  
20 staff this, you issue CDOs and ACLs on specific properties  
21 or interests in which you think parties are taking water  
22 without right. It's pretty simple. Because the broad brush  
23 isn't going to get you there and it's not going to give you  
24 the fact patterns and it's not going to give you the issues  
25 that you want.

1 BOARD MEMBER DORENE D'ADAMO: But that just seems to  
2 be one aspect of it. So if we were to focus on -- I guess  
3 you're talking about the Delta diverters that may or may not  
4 have a right, but the issues are broader than that. And  
5 just --

6 TIMOTHY O'LAUGHLIN: Are they?

7 BOARD MEMBER DORENE D'ADAMO: Well, and -- okay. So  
8 when you say protecting -- that we're protecting -- we,  
9 staff, is wanting to protect senior water right holders.

10 TIMOTHY O'LAUGHLIN: Okay.

11 BOARD MEMBER DORENE D'ADAMO: So the Delta diverters  
12 are also in the San Joaquin watershed.

13 TIMOTHY O'LAUGHLIN: Yes, they are.

14 BOARD MEMBER DORENE D'ADAMO: And so one would think  
15 that, in anticipation of a claim that they would have, is  
16 what about folks upstream, such as your folks?

17 TIMOTHY O'LAUGHLIN: And if Mr. Herrick --  
18 Mr. Herrick is sitting right behind me. If Mr. Herrick ever  
19 has a claim that we are improperly diverting his water  
20 downstream, bring it on.

21 BOARD MEMBER DORENE D'ADAMO: Well, I just --

22 TIMOTHY O'LAUGHLIN: But that's not -- but that's  
23 not what happened here. The claim that was made was made by  
24 the projects that the restored water was being illegally  
25 diverted. It wasn't that the upstream -- Mr. Herrick didn't

1 make a claim last year that we were improperly taking his  
2 water upstream. That claim wasn't made. And if he wanted  
3 to make that claim, I think that would be a fine claim to  
4 bring to the State Board or to a court and we can go through  
5 that, but that's not what this curtailment is about.

6 The curtailment is -- the curtailment is to push  
7 more water into the Delta, okay, so that the Delta people  
8 can get their water needs met and, therefore, back off  
9 taking water that's being released by the projects. That's  
10 what's happening, okay? And it's under the guise that they  
11 have senior rights.

12 Now, Mr. Herrick and I have had numerous long  
13 discussions about who has what senior rights in the Delta,  
14 but like even your staff admits, when the forms came in,  
15 people in the Delta claim pre-'14 and riparian rights. Your  
16 Water Master sent them a letter and said "Which one is it?"  
17 Your staff analysis treats everybody like a riparian. Well,  
18 we already know under the Phelps case that everybody isn't a  
19 riparian. So that's the issue.

20 And if you go this route, the problem is going to be  
21 you're going to get stuck in this legal mumbo-jumbo world,  
22 and you're not going to get to the substantive issues. And  
23 the curtailment isn't going to give you additional water in  
24 the Delta, if that's what you're hoping for. I don't know  
25 if you're hoping for additional water in the Delta or if

1 you're hoping to cut off or reduce the amount of loss to the  
2 exporters. I don't know which one it is. I go back and  
3 forth every other day about which one it is.

4 CHAIR FELICIA MARCUS: (Inaudible.)

5 TIMOTHY O'LAUGHLIN: It isn't? So is it to protect  
6 stored water?

7 CHAIR FELICIA MARCUS: It's to implement the system.

8 BOARD MEMBER STEVEN MOORE: Yeah, you know. We look  
9 at --

10 CHAIR FELICIA MARCUS: It's fair to point out -- I  
11 mean, this is helpful to point out what we need to think --

12 BOARD MEMBER STEVEN MOORE: In terms of outcome but,  
13 you know, there is a ministerial function that, you know, we  
14 have to confront when there's -- when the demand outstrips  
15 the supply. So there's a ministerial function that we're  
16 trying to, you know, in good faith, implement.

17 TIMOTHY O'LAUGHLIN: Well, now see that's -- now I  
18 take you at your word -- and I take you at your word and I  
19 agree entirely with what you say, and I understand that  
20 regulators wants to regulate and I understand this desire --  
21 well, no, because here's the problem.

22 We presented to you last year -- we presented to you  
23 last year in the San Joaquin River. We had all the major  
24 water right holders, and we had the South Delta signed up.  
25 And we said, "You do not curtail us. You don't need to

1 curtail us. You didn't curtail us. You had no complaints.  
2 You had no allegation of water right infringements. You had  
3 nothing on the San Joaquin, except some BS little things  
4 down on the mainstem of the -- on the Friant. Those were,  
5 like, three complaints.

6 So we operate -- because, you see, actually, I  
7 disagree with you. The water rights system is a  
8 self-effectuating system. And if you have a water right,  
9 you and your neighbors get together and figure out how that  
10 water is going to move through the stream, how it's going to  
11 operate, who is going to divert, and when.

12 So -- so that's the basis. You don't see  
13 curtailment notices because you don't need them.

14 So -- and if you try to do it in the San Joaquin  
15 River system, which is this big, then you're just going to  
16 run into all these little nuances and problems.

17 So my statement is, don't issue it, and if you think  
18 somebody is illegally diverting water, issue a CDO and an  
19 ACL, and you'll be in a much better position.

20 CHAIR FELICIA MARCUS: Clearly.

21 JOHN HERRICK: If I may. This is the sort of thing  
22 that we need to discuss more than, you know, no offense but,  
23 you know, at 7:00 o'clock at night at the last minute.

24 CHAIR FELICIA MARCUS: No. Agreed.

25 JOHN HERRICK: This is very important, and I'm not

1 trying to isolate my clients so everybody else is fine. But  
2 Tim has brought up the crux of the issue. Curtailments on  
3 the Tuolumne and the Merced and the Stanislaus in a year  
4 when there's zero water, really, that's not protecting South  
5 Delta.

6 The intent of this program is to protect exported  
7 stored water. Now, we could find ways to tee that up, we  
8 could go after somebody, but that's who is being protected.  
9 It's the stored water for future use, whether that's fish or  
10 X2 or exports, that's the intent of this process.

11 Now, I don't know if that's what you think or I  
12 don't know if that's what staff thinks to themselves, but  
13 nobody's -- there's no senior right holder that's going  
14 "Phew, you curtailed everybody from Mossdale up" -- and  
15 besides, it can't be Mossdale, it has to Vernalis. Mossdale  
16 is in the title zone.

17 But -- but this is the issue. And it all boils back  
18 down to the poor South Delta, which is should they be  
19 diverting water when somebody is releasing stored water to  
20 meet obligations? Well, we think the answer is clear, but  
21 everybody else apparently doesn't. So if you want to tee  
22 that up, let's figure it out.

23 But you're embarking upon a curtailment of, I don't  
24 know how many, hundreds or thousands of diverters for no  
25 benefit when there's no complaint.

1           Now, I would say if somebody is complaining that the  
2 Delta is -- these illegal diverters, it's odd that they  
3 don't bring a complaint for that. They just write a letter  
4 that says, "You know, I think they're evil" and then --

5           CHAIR FELICIA MARCUS: But, see now you're making  
6 caricature of it.

7           JOHN HERRICK: And then the Board repeats that for  
8 two years, but be that as it may.

9           CHAIR FELICIA MARCUS: Right. Look, I see what  
10 you're saying and, you're right, this isn't the best time to  
11 have this conversation. What we've been struggling to do is  
12 figure out how to tee that conversation up. Because what  
13 happens is a caricature of people caricaturing other  
14 people's legitimate interests.

15           So we have two sets of problems, and they are real  
16 problems. One is the unsettled legal decisions. Some think  
17 they're settled, some think they aren't, the whole set of  
18 those. And then there's this issue of the data and the  
19 information we have, some of which we don't have because  
20 people haven't given it to us and some of which they have  
21 now given to us. And so there's a whole hassle of things  
22 that people are doing a Rashomon on, and we have to figure  
23 out what to do about it.

24           JOHN HERRICK: But we are not having workshops or  
25 hearings to find that.

1 CHAIR FELICIA MARCUS: Right. And what we need is  
2 help in tee-ing up those issues, which is what I was trying  
3 to get at before versus a restatement of people's positions  
4 and what somebody else's intent is and why they're bad.  
5 Which I know is a human thing to do, I just don't find it  
6 that useful.

7 BOARD MEMBER DORENE D'ADAMO: How would you suggest  
8 we tee it up on stored water?

9 JOHN HERRICK: Well, I've been asked -- we, not I.  
10 We've been asking for a couple years if you -- if you, as  
11 the Board or staff, will give us your factual  
12 thought/factual determination of how water works in the  
13 Delta and tell us why you think the law that we've quoted to  
14 you is wrong, then we could have a workshop and see where,  
15 you know, somebody is making something up or not or if it's  
16 clear or if it's not resolved or if there's issues or  
17 there's conflicting law. And then, from that, we can figure  
18 out what to do.

19 And I've suggested before, you guys will never agree  
20 to it, not because of you but because of the Attorney  
21 General's Office and your own counsel, you'll never agree  
22 to, "Here's the set of facts and the law, and let's get a  
23 declaratory relief action quickly."

24 Now, I don't know why that could ever happen, but  
25 that's an easy way to do it, especially if we've all sat

1 down and said, "Okay. That -- we do agree on that." This  
2 one everybody says each other is wrong, and this one is  
3 maybe, boom. I mean, that's the easiest and cleanest way.  
4 So that's your discussion, no offense, with the AG's office  
5 who won't listen to you and your own staff who will listen  
6 to you, so -- there are ways to do it. There are many other  
7 ways too, but those -- those are the issues.

8 BOARD MEMBER DORENE D'ADAMO: I have -- I have a  
9 question for you. Let's just assume that we have that  
10 answer on stored water and that there's the determination  
11 that there's a certain amount of stored water that the Delta  
12 diverters are picking up. Wouldn't it matter to you at that  
13 point about a curtailment process on the San Joaquin and on  
14 the Sacramento? You're at the bottom of the system.

15 JOHN HERICK: Well, stored water is released into  
16 the Delta, but the issue is whether there's natural flow  
17 absent the stored water for people to divert, whether there  
18 are regulatory and statutory obligations on people who are  
19 releasing water to the Delta, and whether there are  
20 regulations that are ordering people to maintain conditions  
21 for those diversions in the Delta. So it's a bigger group  
22 of things and, of course, however it all pans out --

23 BOARD MEMBER DORENE D'ADAMO: Right.

24 JOHN HERRICK: -- then some day it -- some day a  
25 potential curtailment might be important, but it's not now.

1     Anyway, I didn't mean to delay things, but --

2             BOARD MEMBER DORENE D'ADAMO:  No.  No.

3             JOHN HERRICK:  But this is the heart of the matter.

4     Because the exporters don't want Tuolumne River water --

5     well, I said that wrong.  I said that wrong.

6             (Laughter from the audience.)

7             JOHN HERRICK:  Thank you for your time.

8             UNIDENTIFIED VOICE:  They won't sell it.

9             CHAIR FELICIA MARCUS:  That was interesting, yeah.

10    Yeah, definitely.

11            Other questions, thoughts?

12            BOARD MEMBER TAM M. DODUC:  The three takeaway,

13    that's just I got were, according to Mr. Herrick, no one

14    listens to us, not the AG, not anyone else.

15            According to Mr. Nomellini, staff tells us what to

16    do.

17            And according to, I forget who the third person was,

18    we're actually doing better than we've perceived.

19            (Laughter from the audience.)

20            CHAIR FELICIA MARCUS:  All right.  A lot to think

21    about.  I'm trying to figure out --

22            BOARD MEMBER DORENE D'ADAMO:  I would like to better

23    understand, it's interesting, because I can go back and

24    forth on this issue, and there are so many different --

25            CHAIR FELICIA MARCUS:  (Inaudible.)

1 BOARD MEMBER DORENE D'ADAMO: Yeah. There are so  
2 many different aspects of it. I -- I do think that, as you  
3 said, that the goal is to implement the water rights system.

4 And one of the things that I am concerned about --  
5 all you have to do is pick up a newspaper and see that there  
6 are people that think that our water rights system doesn't  
7 work and maybe we ought to scrap it and try something else.

8 So we've got to collectively figure out a way --  
9 personally, I think that it can work, but there are these  
10 ongoing issues that haven't been resolved over a period of  
11 decades. So we need to get to the bottom of it and  
12 demonstrate that the water rights system does work.

13 Because for those of you that are looking at  
14 strictly a legal analysis, there's -- you should also be  
15 looking at, you know, the court of public opinion and what  
16 could occur if we don't do our jobs.

17 So I'd like to, you know, maybe, after staff gets  
18 some time to sort through the hydrology, how things are  
19 going forward from, you know, the sort of the perspective of  
20 the math, have a better understanding of if this happens,  
21 then what are the options? If we take this action, what are  
22 the various options?

23 Not just our options, but for those that would be  
24 filing suit or issuing some sort of counter-complaint. What  
25 are the different options as far as how things could play

1 out.

2 CHAIR FELICIA MARCUS: Now, one thing I find  
3 challenging is the notion that some people hold that we  
4 really can't do anything. And the practical impact of doing  
5 what some suggest is that if we did it legally the way they  
6 said we should do it, we could never get anything done in a  
7 drought. Just not -- just not possible because we'd be in  
8 court forever.

9 So it does appeal to me to tee up the issues, and I  
10 know that Mr. George and the team have been working through  
11 it. But I would like to see, sooner than later, that short  
12 list of issues. We won't resolve all 20 of them or 100 of  
13 them that are out there. I'd like to see what are the three  
14 to five greatest hits that would make progress in this  
15 arena, and then where would we make the most progress in  
16 implementing the system?

17 Because just stasis and throwing up our hands is  
18 just not an option. And, I know, again, that there are ways  
19 that we can and that we plan to, but I would like to see  
20 that strategic package for moving forward that we've talked  
21 about for a long time, even if it's just in the next couple  
22 of days, few days.

23 And I would like a clearer sense of the timing on  
24 things so I know which things we need to decide, what we  
25 have to decide before Friday somehow, and what we have to do

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1 in the next few weeks so that we make the time to be able to  
2 the -- the team. Because some of the issues we're  
3 discussing today, I know that this is eerily familiar, and  
4 people have brought it up, are the same issues we talked  
5 about last year. And this year is not last year, this year  
6 is worse than last year. And just not acting is not good,  
7 but I want to make sure that what we do is strategic and  
8 thoughtful but has forward motion.

9 Would you like the last word?

10 UNKNOWN PUBLIC SPEAKER: Thank you, Chair Marcus and  
11 Board. I need to make a correction to a comment I made  
12 and -- and I would like to -- as suggestions you consider  
13 what the gentleman said that we have a forum of experts, we  
14 need more growers to show up there. They say no one listens  
15 to them so they don't come to these meetings, but...

16 CHAIR FELICIA MARCUS: We've had a lot at other  
17 meetings, I'll tell you.

18 UNKNOWN PUBLIC SPEAKER: That's good.

19 CHAIR FELICIA MARCUS: Honestly. This was a quiet  
20 meeting compared to our last meeting.

21 UNKNOWN PUBLIC SPEAKER: Yeah. Yeah. My -- it's a  
22 lot of -- the correction is that I'm a good -- I'm a good  
23 news choir singer, and the truth is we do have a dying  
24 redwood tree that's almost 70 years old. We do have --  
25 we're paid by ton, we have less tonnage. I'm told we need

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1 to irrigate more.

2 When I went to county -- a San Joaquin County Board  
3 Meeting a year ago, a lady reported that 11 wells have gone  
4 dry. My father said we can't put -- the well go any deeper,  
5 and our house we have cloudy water and it was clear three  
6 years ago, so we're going to have to pay \$4,000 for a soft  
7 water system.

8 It -- we are feeling the result, and any talk of  
9 diversion is ridiculous. We don't -- what are they talking  
10 about diverting from -- to semi-arid? And the vocabulary.  
11 We haven't heard the word aquifer. I heard riparian.

12 We only have a well. We don't have a canal. And  
13 when people say, "Oh, storage," I know that's the Farm  
14 Bureau. But, for me, I have to say, and some others, who is  
15 controlling the spigots? I mean, I'd like to know more  
16 about the aquifer system that we're relying on and that was  
17 100 years ago, it was three feet with watermelon, now it's  
18 50 feet. And it's because it goes to Oakland from the party  
19 reservoir.

20 So people have been borrowing our water since part E  
21 1906, and later San Francisco had an earthquake. I mean,  
22 playing with water is pretty serious.

23 CHAIR FELICIA MARCUS: It's complicated.

24 UNKNOWN PUBLIC SPEAKER: So thank you for your time  
25 in doing that, and I hope we can consider more press release

1 in good faith and more forums like this and workshops where  
2 people -- because there's a lot of vocabulary. I said,  
3 "What does curtailment mean?" I says, "That's your water  
4 rights."

5 CHAIR FELICIA MARCUS: Surface water rights.

6 UNKNOWN PUBLIC SPEAKER: Oh, well, we have a well.

7 CHAIR FELICIA MARCUS: Not groundwater.

8 UNKNOWN PUBLIC SPEAKER: I didn't even know that.

9 And then we heard some other things. Substitute water.  
10 What do you mean substitute water? We don't want more  
11 cloudy water.

12 Anyway, thanks -- thanks a lot for letting me  
13 correct my earlier comment.

14 CHAIR FELICIA MARCUS: Thanks for spending the day  
15 with us.

16 So we'll be talking a lot the next few days, but can  
17 we -- I really want -- I feel remiss in not having that  
18 schedule laid out, questions tee'd up and figuring out.

19 All right. With that, more to think about than to  
20 resolve in this meeting, but this actually was very helpful  
21 to me, so thank you for the time that you've all spent. I'm  
22 sorry it's so late. It may be an unsatisfactory conclusion  
23 because we haven't wrapped anything up, but it's been  
24 helpful, so thank you.

25 With that, I will adjourn.

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(Whereupon, end of transcribed portion.)

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REPORTER'S CERTIFICATE

State of California        )  
                                  ) ss.  
County of Sacramento     )

I certify that the statements in the foregoing hearing were transcribed in the within-entitled cause by audio; that said hearing was taken at the time and place therein named; that the testimony of said witnesses was reported by me, a duly Certified Shorthand Reporter of the State of California authorized to administer oaths and affirmations; and said testimony was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for either or any of the parties to said hearing, nor in any way interested in the outcome of the cause named in said hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this 2nd day of September, 2015.

\_\_\_\_\_  
THRESHA SPENCER  
Certified Shorthand Reporter  
Certificate No. 11788

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# **EXHIBIT A**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

BYRON-BETHANY IRRIGATION DISTRICT  
and THE WEST SIDE IRRIGATION DISTRICT,

Petitioners,

Case No. H042878

v.

SUPERIOR COURT OF THE STATE OF  
CALIFORNIA FOR THE COUNTY OF SANTA  
CLARA,

Respondent,

CALIFORNIA STATE WATER RESOURCES  
CONTROL BOARD,

Real Party In Interest.

Santa Clara County Superior Court, Case No. JCCP 4838  
The Honorable Peter H. Kirwan, Judge

**STATE WATER RESOURCES CONTROL BOARD'S OPPOSITION  
TO PETITIONERS' MOTION FOR STAY OF ADMINISTRATIVE  
ENFORCEMENT ACTIONS PENDING RULING ON PETITION  
FOR WRIT OF MANDATE, PROHIBITION, OR OTHER  
APPROPRIATE RELIEF**

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## INTRODUCTION

Petitioners and appellants Byron-Bethany Irrigation District (BBID) and the Westside Irrigation District (WSID) (collectively Districts) have asked this Court to order the California State Water Resources Control Board (State Water Board) to halt a key component of the State of California's drought mitigation efforts by shutting down pending State Water Board administrative proceedings brought against the Districts for the alleged unauthorized diversion of water. The trial court below heard and denied the Districts' request. The Districts filed both a petition for writ of mandate, prohibition, or other appropriate relief and a notice of appeal over the trial court's ruling. In the present motion, The Districts ask this Court to apply its extraordinary relief authority under section 923 of the Code of Civil Procedure, not simply to vacate the trial court's ruling, but to affirmatively compel the State Water Board to halt its on-going water right enforcement proceedings.

The State Water Board respectfully submits that this Court should deny the motion because: 1) The Districts have failed to meet their burden of showing that the requested relief is necessary to avoid irreparable injury or to maintain this Court's appellate jurisdiction, and 2) the Districts have failed to raise serious legal questions that merit the extraordinary relief that they have requested.

## PROCEDURAL BACKGROUND

### **A. The Governor's Emergency Proclamations and Orders Affirm Emergency Drought Conditions.**

On January 17, 2014, Governor Brown issued a proclamation of a state of emergency that found that "conditions of extreme peril to the safety of persons and property exist in California due to water shortage and drought conditions" (State Water Board's Req. for Jud. Not. (Board RJN),

Exh. A.) As part of the effort to address this emergency, the proclamation states that “[t]he Water Board will put water right holders throughout the state on notice that they may be directed to cease or reduce water diversions based on water shortage.” (*Id.*, at ¶ 7.) On April 25, 2014, the Governor issued a proclamation of continued state emergency that declared that “[t]he Water Board will adopt and implement emergency regulations...to require curtailment of diversion when water is not available under the diverter’s priority of right.” (Board RJN, Exh. B, ¶ 17.) On April 1, 2015, the Governor issued Executive Order B-25-15 which reaffirmed the early drought condition findings and mandated that:

The Water Board shall require frequent reporting of water diversion and use by water right holders, conduct inspections to determine whether illegal diversion or wasteful and unreasonable use of water are occurring, and bring enforcement actions against illegal diverters and those engaging in the wasteful and unreasonable use of water.

(Board RJN, Exh. C, ¶ 10.)

**B. The State Water Board’s Executive Director Notifies Water Rights Holders Insufficient Water is Available to Satisfy Certain Diversions.**

On May 1, 2015, the Executive Director of the State Water Board issued a Notice of Unavailability of Water informing water rights holders that based upon most recent hydrological conditions insufficient water supply in the Sacramento River watershed was available to satisfy diversions by appropriate water right holders with a priority date later than 1914. (Petnrs’ App. in Support of Pet. for Writ of Mandate, Prohibition, or Other Relief (App.) Vol. 1, pp. 27-28.) On June 12, 2015, the Executive Director issued a Notice of Unavailability of Water informing water rights holders that insufficient water supply in the Sacramento and San Joaquin watersheds and Delta was available to satisfy diversions by appropriate water rights holders with a priority date of 1903

or later. (App., Vol. 1, pp. 30-32.)

**C. The Districts File Suit Challenging the Notices.**

On June 26, 2015 BBID filed a petition for writ of mandate challenging the June Notice of Unavailability of Water. (App., Vol. 2, pp. 518-521.) On June 29, 2015, WSID, along with Central Delta Water Agency, South Delta Water Agency, and Woods Irrigation Company, filed a petition for writ of administrative mandate challenging the May and June Notices of Unavailability of Water. (App., Vol. 1, pp. 3-5.) The BBID and WSID actions have been coordinated with three other actions, and are presently pending before Coordination Trial Judge Peter H. Kirwan of the Santa Clara County Superior Court. (App., Vol. 1, pp. 62-64.)

**D. The Executive Director Partially Rescinds the Notices.**

On July 15, 2015, the State Water Board Executive Director issued a partial rescission of its water availability notices, including the May and June notices. (App., Vol. 1, pp. 218-219.) Among other matters, the July 15, 2015 rescission states that “[t]he purpose of this notice is to rescind the ‘curtailment’ portions of the unavailability notices you received. To the extent that any of the notices described above contain language that may be construed as an order requiring you to stop diversions under your affected water right, than language is hereby rescinded.” (*Id.*, p. 218.)

**E. The Enforcement Section of the State Water Board Takes Administrative Action Against the Districts for Alleged Unauthorized Water Diversion.**

On July 16, 2015, the Enforcement Section of the State Water Board’s Division of Water Rights (Enforcement Section) issued a draft cease and desist order under section 1831 of the Water Code directed against WSID for the alleged unauthorized diversion of water. (App., Vol. 2, pp. 366-374.) On July 20, 2015, the Enforcement Section issued an administrative civil liability complaint under section 1052 of the Water Code against

BBID for the alleged unauthorized diversion of water. (App., Vol. 1, pp. 221-229.) On September 2, 2015, BBID filed a first amended petition for writ of mandate against the State Water Board that contested the Enforcement Section's initiation of the administrative enforcement proceeding against BBID. (App., Vol. 1, p. 66.) On September 8, 2015, WSID filed a second amended and supplemental petition for writ of mandate against the State Water Board that contested the Enforcement Section's initiation of the enforcement proceeding against WSID. (App., Vol. 1, pp. 267-268.)

**F. The Districts Seek and Are Granted Continuances of the Administrative Proceedings and then Ask the Courts to Stay those Proceedings.**

In response to written requests by the Districts, the State Water Board continued the administrative hearings dates on the BBID and WSID enforcement proceedings. The hearings are presently scheduled to take place on specific dates between March 21, 2016 through April 6, 2016. (Petnrs' Mot. for Stay, p. 12; Petnrs' Mot. for Jud. Not., Exh. 1, pp. 2-3.)

Notwithstanding the Districts' requests for continuance of and participation in the State Water Board administrative proceedings, the Districts filed motions with Coordination Trial Judge Kirwan to stay or enjoin the pending State Water Board proceedings. The Districts contended that the doctrine of exclusive concurrent jurisdiction barred the State Water Board from proceeding in light of their lawsuits against the State Water Board on the Board's water availability notices. After hearing oral argument on the matter, Judge Kirwan denied the Districts' motions on September 24, 2015. (App., Vol. 4, pp. 998-1012.) On October 14, 2015, the Districts filed a petition for writ of mandate, prohibition or other appropriate relief (Petition for Writ) requesting this Court to vacate Judge Kirwan's ruling and to direct Judge Kirwan to enter a new order staying or

enjoining the State Water Board's administrative proceedings. (*Byron-Bethany Irr. Dist. v. Superior Court*, Court of Appeal for the Sixth Appellate District, No. H042878.) On November 23, 2015, the Districts filed a notice of appeal from Judge Kirwan's ruling. (Petrs' Mot. for Stay at pp. 10-11.)

Having failed to have secured a stay of the State Water Board's administrative proceedings through their motions before Judge Kirwan, the Districts now move this Court under Rule 8.54 of the California Rules of Court for an order staying the State Water Board proceedings under the Court's authority to issue ancillary writs and orders pursuant to section 923 of the Code of Civil Procedure. As the following will show, this motion is without merit and should be denied.<sup>1</sup>

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<sup>1</sup> The Districts state that they are bringing this motion to stay the State Water Board proceedings under section 923 of the Code of Civil Procedure as a matter ancillary to their Petition for Writ. (Petrs' Mot. for Stay at pp. 2, 4, 14.) However, section 923 expressly states that relief under this section is in furtherance of the Court's *appellate* jurisdiction. (Code Civ. Proc., § 923; *Norton v. Municipal Court* (1935) 8 Cal.App.2d 358, 369 ["An appellate court has no jurisdiction to grant a writ of supersedeas except in aid of its appellate jurisdiction."].) The Petition for Writ is not an appeal, but an original action in the Court of Appeal. To the extent that the Districts align their motion with their Petition for Writ, and not their appeal, this Court lacks jurisdiction to consider the motion. Stay authority is also not available under the temporary stay provision of Rule 8.486 of the California Rules of Court because that provision is limited to stays of trial court judgments or orders. (Cal. Rules of Court, rule 8.486(a)(7).) If this Court chooses to interpret the motion as a petition for a writ of supersedeas that is an auxiliary writ to the Districts' appeal, then the motion is procedurally defective in that it fails to comply with the procedural requirements for a petition for writ of supersedeas. (Cal. Rules of Court, rule 8.112 (a).) For purposes of directly addressing the Districts' claims, the State Water Board will assume, solely for purpose of argument, that the motion is a request for a writ of supersedeas in "aid of appellate jurisdiction." (*People ex rel. San Francisco Bay Conservation and Development Com. v. Town of Emeryville* (1968) 69 Cal.2d 533, 538.)

## ARGUMENT

### I. THE DISTRICTS HAVE NOT MET THEIR BURDEN OF SHOWING THAT A STAY OF THE STATE WATER BOARD'S PROCEEDINGS IS NECESSARY TO AVOID IRREPARABLE INJURY OR TO MAINTAIN THIS COURT'S APPELLATE JURISDICTION.

Where an appeal is available to a party, the burden rests on the party seeking the extraordinary writ to show that in the absence of the writ the party “will suffer great and irreparable harm and injury.” (*Phelan v. Superior Court* (1950) 35 Cal.2d 363, 370.) In determining whether the Districts have met their irreparable injury burden, this Court must consider injury to both the Districts and the State Water Board to ensure that “disproportionate injury to the respondent” does not occur. (*Mills v. County of Trinity* (1979) 98 Cal.App.3d 859, 861.) In determining this issue, the reviewing court must weigh the “harm to the public” of granting or denying the writ. (*Building Code Action v. Energy Resources Conservation & Dev. Com.* (1979) 88 Cal.App.3d 913, 922 [“The public’s interest is our paramount concern”].)

In the present case, the Districts have identified only one claimed “harm” that their motion seeks to prevent: the Districts’ expense of having to participate in the scheduled State Water Board administrative proceedings now set for late March and early April of 2016. According to the Districts, “[w]ithout a stay from this Court, Petitioners will be required to go forward with the SWRCB administrative hearings and prehearing conferences in February and March, 2016, with related deadlines occurring even earlier...In short, without a stay the very harm sought to be avoided by way of the Petitioners’ Petition for Writ may well occur before this Court has ruled on the Petition for Writ.” (Petnrs’ Mot. for Stay at p. 18.) The Districts’ irreparable injury claim is groundless for the following reasons.

First, the Districts have failed to disclose to this Court that the March and April 2016 hearing dates that the Districts now seek to stay by way of extraordinary relief are the hearings dates that they requested the State Water Board adopt for the two enforcement proceedings. In a letter to the State Water Board hearing officers Tam Doduc and Frances Spivy-Weber, counsel for the Districts specifically asks that the State Water Board calendar the hearing dates for the enforcement proceedings for late March, 2016. The Districts' letter asks the hearing officers to "reserve the dates currently scheduled for the BBID ACL [administrative civil liability action] hearing in March for a joint hearing for BBID and WSID on the Water Availability Issue" and that "any remaining issues for the WSID and BBID enforcement actions would be heard immediately thereafter in the last week of March, through separate hearings for each enforcement action." (Board RJN, Exh. D, pp 1-2.) The Districts' November 23, 2015 letter requesting March 2016 hearing dates constitutes an admission that the March 2016 hearing dates would not "harm" BBID's or WSID's interests. On December 16, 2015, the State Water Board granted the Districts' request for consolidation and continuance, and calendared the hearing dates for the two enforcement proceedings for late March and early April of 2016. (Petrs' Mot. for Jud. Notice, Exh. 1, pp. 2-3.) By alleging in their present motion that the hearing schedule "harms" their interests, the Districts are incongruously telling this Court and the State Water Board that they will not take "yes" for an answer. Such unfounded "general allegations without any reference to facts" of harm are insufficient to justify extraordinary relief. (*Phelan, supra*, 35 Cal.2d at p. 370.)<sup>2</sup>

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<sup>2</sup> The Districts' motion cites to only one decision where a stay motion was granted--*People ex rel. San Francisco Bay Conservation and Development Comm. v. Town of Emeryville* (1968) 69 Cal.2d 533. In that  
(continued...)

Second, the balance of harms and the public interest weigh against the issuance of a stay of the State Water Board's enforcement proceedings. (*Mills, supra*, 98 Cal.App.3d at p. 861; *Building Codes Action, supra*, 88 Cal.App.3d at p. 922.) As the California Supreme Court has observed, the Legislature has "delegated to the Board by the Water Commission Act the authority to protect the public interest not only in the issuance of appropriate permits and licenses but also in their later administration." (*Environmental Defense Fund v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183, 198.) The First Appellate District has recently reviewed the State Water Board's legislative authority to conduct administrative water right enforcement actions and has concluded that "[t]he Legislature's intent to expand the Board's authority into territory formerly occupied by the courts is made clear from the progression of legislation in this area." (*Millview County Water Dist. v. State Water Resources Control Bd.* (2014) 229 Cal.App.4th 879, 895.) The Governor's reliance on this authority as a critical part of the state's drought management efforts in his proclamations and orders underscores the public importance of allowing the State Water Board's hearings to move forward as scheduled. A stay order would thwart these drought mitigation efforts and deny the public the ability to participate in the administrative proceedings.

Third, the granting of the Districts' stay motion would set an unfortunate precedent that would harm future drought enforcement efforts.

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(...continued)

case the issue was whether the town required a Commission permit before filling in portions of San Francisco Bay. The Commission requested a stay to prevent the town's fill activity, activity which would have rendered moot the permit question. (*Id.* at p. 536.) The Districts have not demonstrated any equivalent harm in the present case and have an opportunity for judicial review if they are dissatisfied with the results of the State Water Board proceedings.

The Districts' theory of exclusive concurrent jurisdiction would potentially offer a diverter who is taking water outside of the scope of his water right the ability to circumvent the statutory water right enforcement process. If the State Water Board staff have begun investigating a diverter's use of water, but have not yet initiated an administrative enforcement proceeding, the diverter, under the Districts' theory advanced here, could file an action in superior court challenging the State Water Board's investigation efforts and then claim under the exclusive concurrent jurisdiction theory that the superior court action trumps any further State Water Board administrative activity. Such an outcome would be contrary to the public interest given that it would obstruct the Legislature's efforts to expand the State Water Board's administrative water right enforcement powers and would directly conflict with the Board's statutory authority. (*Millview, supra*, 229 Cal.App.4th at p. 895; see Wat. Code, § 1052, subd. (d) [Water Code grants the Board the discretion to enforce water rights through either administrative or judicial actions].)

Finally, allowing the State Water Board to proceed with the pending enforcement proceedings would not divest this Court of its appellate jurisdiction. The Districts have filed notices of appeal from Judge Kirwan's ruling denying their motion for stay. (Petrs' Mot. for Stay at pp. 10-11.) This appeal will eventually be briefed, argued, and decided. If this Court's decision concurs with the Districts' contention that the superior court has exclusive concurrent jurisdiction to address the water availability issues raised in the enforcement proceedings, divesting the State Water Board of its authority to hear those issues, then the Districts would be free to use the ruling to challenge any State Water Board final enforcement decision or order on the grounds that the State Water Board lacked jurisdiction to address the water availability issues. The requested stay

order is therefore not necessary to preserve this Court's appellate jurisdiction.

**II. THE DISTRICTS' MOTION HAS NOT RAISED A SUBSTANTIAL LEGAL QUESTION SUFFICIENT TO JUSTIFY THE EXTRAORDINARY RELIEF THAT THEY HAVE REQUESTED.**

The Districts premise their motion to stay on the unprecedented legal theory that the doctrine of exclusive concurrent jurisdiction, a doctrine that California courts have only applied where two "superior courts have concurrent jurisdiction over the subject matter and all parties involved in litigation," can and must also be applied where the State Water Board and a superior court have concurrent jurisdiction regarding water allocation issues under the California Supreme Court decision in *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 449-451 (*National Audubon*). (*People ex rel., Garamendi v. American Autoplan, Inc.* (1993) 20 Cal.App.4th 760, 769.) Under this unprecedented theory, the Districts contend that their superior court actions challenging the State Water Board's water availability notices pre-date the Enforcement Section's commencement of its separate enforcement actions against the Districts, and therefore the superior court actions trump the State Water Board proceedings. (Petrs' Mot. for Stay at pp. 13-14.) The Districts' motion must fail because their exclusive concurrent jurisdiction theory does not raise substantial legal questions warranting extraordinary relief for the following reasons.<sup>3</sup>

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<sup>3</sup> A party seeking a writ of supercedeas must "show that substantial questions will be raised upon the appeal." (*Deepwell Homeowners' Protective Assn. v. City Council* (1965) 239 Cal.App.2d 63, 67; *Private Investors v. Homestake Min. Co.* (1936) 11 Cal.App.2d 488, 492.) While the writ does not decide the merits of the appeal, "an appellant seeking supersedeas relief must show that the appeal *has merit*." (Eisenberg et al., (continued...))

First, *National Audubon* did not involve a private party action challenging a State Water Board administrative proceeding. Rather, *National Audubon* involved an action by private parties (several environmental organizations) against another private party (the City of Los Angeles Department of Water and Power – “City”). The environmental plaintiffs challenged the City’s water diversions from the Mono Lake basin in superior court. (*National Audubon, supra*, 33 Cal.3d at p. 425.) The plaintiffs did not seek judicial review of any State Water Board decision or proceeding, or request any relief against the State Water Board itself. While the State Water Board was named as a real party in interest, the plaintiffs did not challenge and could not have challenged the Board’s decision to issue water rights to the City for its Mono Lake basin diversions because the Board’s issuance of such water right licenses occurred in 1974, and the statute of limitations for challenging that action had long since run. (*Id.* at p. 428, fn. 8.)

*National Audubon* stands for the unremarkable proposition that if a private party brings a water right action under the public trust doctrine against another private party, then the courts have concurrent jurisdiction with the State Water Board to consider the dispute and the private party does not first have to bring the action before the State Water Board. As *National Audubon* noted, historically, California superior courts have exercised jurisdiction to resolve water right disputes among private parties. (*Id.* at p. 449; see also *Environmental Defense Fund v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183, 200.) The only part of *National Audubon* ‘s concurrent jurisdiction discussion that is novel is its application

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(...continued)

Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 2015) ¶ 7:286, p. 7-80, italics added.)

of the long-standing concurrent jurisdiction of the Board and the courts to private party disputes involving the public trust doctrine. The Districts have not and cannot cite to any California appellate authority that applies the exclusive concurrent jurisdiction doctrine to the analysis set forth in *National Audubon* so as to wrest authority from the State Water Board to proceed with an ongoing administrative proceeding.<sup>4</sup>

Second, the Districts' attempt to expand *National Audubon's* concurrent jurisdiction holding to impose exclusive concurrent jurisdiction in situations where parties have filed superior court challenges to pending State Water Board proceedings conflicts with *National Audubon's* concurrent jurisdiction reasoning. *National Audubon* recognized that the State Water Board's "experience and expert knowledge" as to water resource matters favors applying the exhaustion of administrative remedies doctrine, even as to water disputes among private parties. (*National Audubon, supra*, 33 Cal.3d at p. 451.) However, the Supreme Court concluded that the trial court could retain jurisdiction to consider water disputes among private parties and still rely upon the State Water Board's

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<sup>4</sup> The Districts also rely upon the Third Appellate District decision in *California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187, 204 in support of their claim that the exclusive concurrent jurisdiction doctrine bars the State Water Board enforcement proceedings. However, that decision is inapplicable. *California Trout* does not even address the doctrine of exclusive concurrent jurisdiction. Moreover, the Third Appellate District asserted concurrent jurisdiction because the State Water Board had *failed* to conduct "a prompt hearing addressed to enforcement of the section 5946 [of the Fish and Game Code] license conditions based on best available data and methodology." (*Id.* at p. 208.) According to the Court of Appeal, it was the State Water Board's inaction that justified the assertion of judicial jurisdiction. (*Ibid.* ["The Water Board is not legally inflicted with terminal regulatory anemia."].) *California Trout* therefore provides no authority to enjoin the State Water Board from taking "prompt" water right enforcement action, as is the case here.

expertise by invoking the water reference provisions of the Water Code. (Wat. Code, §§ 2000 *et seq.*) These provisions authorize the trial court to refer “any or all issues involved in the suit” to the State Water Board for the preparation of a special-master-style referee report. (Wat. Code, §§ 2000, 2010-2020.) As *National Audubon* explained, “[t]hus the courts, through the exercise of sound discretion and use of their reference powers, can substantially eliminate the danger that litigation will bypass the Board’s expert knowledge.” (*National Audubon, supra*, 33 Cal.3d at p. 451.)

However, the *National Audubon*-endorsed reference option is not available to the trial court where, as here, the dispute involves a private party challenge to an ongoing State Water Board administrative proceeding. In that situation, it is the very judgment of the State Water Board that is being challenged, so the Board cannot provide the trial court with referee services under the court reference provisions of the Water Code. In such situations, *National Audubon’s* reasoning in support of concurrent jurisdiction disappears and the concurrent jurisdiction doctrine becomes inapplicable.

Third, assuming that the exhaustion doctrine does not apply and the superior court and the State Water Board have concurrent jurisdiction to consider the water rights issues raised in the Districts’ pleadings, then the doctrine of primary jurisdiction nevertheless compels this Court to defer to the pending State Water Board enforcement proceedings. As the California Supreme Court has explained, primary jurisdiction, unlike exhaustion:

applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed with the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

(*Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 390.) The primary jurisdiction doctrine “advances two related policies: it enhances court decision-making and efficiency by allowing courts to take advantage of the administrative expertise and it helps assure uniform application of regulatory laws.” (*Jonathan Neil & Assoc. Inc. v. Jones* (2004) 33 Cal.4th 917, 932.) Application of the primary jurisdiction doctrine in the present case would advance both of these policies.

The Water Code evidences the Legislature’s intent to vest regulation of water resource management issues within the primary jurisdiction of the State Water Board. For example, Section 174 of the Water Code states that “[t]he Legislature hereby finds and declares that in order to provide for the orderly and efficient administration of the water resources of the state it is necessary to establish a control board which shall exercise the adjudicatory and regulatory functions of the state in the field of water resources.” (Wat. Code, § 174.) In addition, as the California Supreme Court has noted, “[t]he scope and technical complexity of issues concerning water resource management are unequalled by virtually any other type of activity presented to the courts.” (*Environmental Defense Fund., supra*, 26 Cal.3d at p. 194.)

Underscoring the technical complexity of these issues, the Legislature requires four of the five State Water Board members to have specific expertise in water resources. (Wat. Code, §175.) The need for expert judgment and uniform application of regulatory requirements becomes particularly important as the State Water Board engages in the highly challenging and complex task of managing water use throughout the state during this historic drought period. The Districts’ stay motions therefore contravene the primary jurisdiction doctrine and should be denied.

Lastly, the doctrine of exclusive concurrent jurisdiction is a flexible doctrine and does not create any bright line rule requiring that the tribunal

in which jurisdiction first vests take the matter. As the Second, Third, and Fourth Appellate Districts have observed, “the rule of exclusive concurrent jurisdiction is a rule of policy and countervailing policies may make the rule inapplicable.” (*County of Siskiyou v. Superior Court* (2013) 217 Cal.App.4th 83, 92; *Garamendi, supra*, 20 Cal.App.4th at p. 769; *Childs v. Eltinge* (1973) 29 Cal.App.3d 843, 854.)

Contrary to the Districts’ broad-brush assertions, the implications of a court asserting concurrent jurisdiction to the exclusion of a state regulatory agency vested with statutory authority over the subject matter at issue have never been addressed by any California decision sustaining exclusive concurrent jurisdiction. The Districts’ request that this Court apply the exclusive concurrent jurisdiction doctrine to stay administrative enforcement proceedings that are pending before the State Water Board, the regulatory agency entrusted by the Legislature to administer the California water rights system, strongly implicates “countervailing policies,” including the doctrines of exhaustion of administrative remedies and primary jurisdiction. These policies counsel against divesting the State Water Board of jurisdiction. The exhaustion doctrine is a particularly potent countervailing policy given that it is derived from the state constitutional principle of separation of powers. (*County of Santa Clara v. State of California* (1986) 177 Cal.App.3d 62, 76-77.) Judicial review can and should occur only after the State Water Board has completed its administrative enforcement process.

### CONCLUSION

For the above reasons, respondent State Water Board respectfully requests that this Court deny the Districts’ motion for a stay of the State Water Board’s administrative enforcement actions pending this Court’s ruling on the petition for writ of mandate, prohibition, or other appropriate relief.

Dated: January 12, 2016

Respectfully submitted,

KAMALA D. HARRIS  
Attorney General of California  
ROBERT W. BYRNE  
Senior Assistant Attorney General  
TRACY L. WINSOR  
GAVIN MCCABE  
Supervising Deputy Attorneys General  
MATTHEW G. BULLOCK  
Deputy Attorney General



CLIFFORD T. LEE  
Deputy Attorney General  
*Attorneys for Real Party In Interest State  
Water Resources Control Board, et al.*

SA2015301338  
41447688.doc

**CERTIFICATE OF COMPLIANCE**

I certify that the attached STATE WATER RESOURCES CONTROL BOARD'S OPPOSITION TO PETITIONERS' MOTION FOR STAY OF ADMINISTRATIVE ENFORCEMENT ACTIONS PENDING RULING ON PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF uses a 13 point Times New Roman font and contains 4,598 words.

Dated: January 12, 2016

Respectfully submitted,

KAMALA D. HARRIS  
Attorney General of California  
ROBERT W. BYRNE  
Senior Assistant Attorney General  
TRACY L. WINSOR  
GAVIN MCCABE  
Supervising Deputy Attorneys General  
MATTHEW G. BULLOCK  
Deputy Attorney General



CLIFFORD T. LEE  
Deputy Attorney General  
*Attorneys for Real Party In Interest State  
Water Resources Control Board, et al.*

**DECLARATION OF SERVICE BY U.S. MAIL**

Case Name: **California Curtailment Cases**  
No.: **H042878**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On January 12, 2016, I served the attached STATE WATER RESOURCES CONTROL BOARD'S OPPOSITION TO PETITIONERS' MOTION FOR STAY OF ADMINISTRATIVE ENFORCEMENT ACTIONS PENDING RULING ON PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, California, addressed as follows:

Daniel Kelly  
Somach Simmons & Dunn  
A Professional Corporation  
500 Capitol Mall, Suite 100  
Sacramento, CA 95814

Honorable Peter H. Kirwin  
Santa Clara County Superior Court  
Department 1  
191 North First Street  
San Jose, CA 95113

Steven A. Herum  
\*Jeanne M. Zolezzi  
Karna Harrigfeld  
Herum Crabtree Suntag  
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Stockton, CA 95207

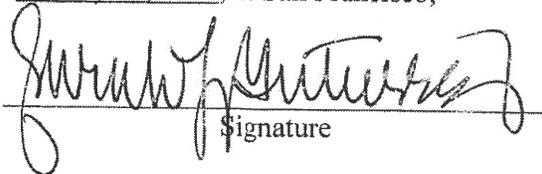
Administrative Coordinator  
Judicial Council of California  
Administrative Office of the Courts  
455 Golden Gate Avenue  
San Francisco, CA 94102

Thomas H. Keeling  
Freeman Firm  
A Professional Law Corporation  
1818 Grand Canal Boulevard, Suite 4  
Stockton, CA 95207

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 12, 2016, at San Francisco, California.

SARAH L. GUTIERREZ

Declarant

  
Signature

# **EXHIBIT B**



EDMUND G. BROWN JR.  
GOVERNOR



MATTHEW RODRIGUEZ  
SECRETARY FOR  
ENVIRONMENTAL PROTECTION

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## State Water Resources Control Board

October 30, 2015

### VIA ELECTRONIC MAIL

TO: ENCLOSED SERVICE LIST OF PARTICIPANTS

### **RULING ON MOTION FOR PROTECTIVE ORDER AND OTHER PROCEDURAL ISSUES IN THE MATTER OF THE ADMINISTRATIVE CIVIL LIABILITY COMPLAINT ISSUED AGAINST BYRON-BETHANY IRRIGATION DISTRICT.**

This letter addresses the Division of Water Rights Prosecution Team's (Prosecution Team) Motion for Protective Order and several additional procedural issues.

### **MOTION FOR PROTECTIVE ORDER**

The Prosecution Team filed a motion for protective order on October 15, 2015, in the matters of the Administrative Civil Liability Complaint against Byron-Bethany Irrigation District (BBID) and the Draft Cease and Desist Order against The West Side Irrigation District (WSID and WSID proceeding). I hereby adopt and incorporate by reference the Ruling on Motion for Protective Order in the WSID proceeding made by Frances Spivy-Weber, Hearing Officer, on October 23, 2015.

In conjunction with Vice Chair Spivy-Weber in her ruling on the motion for protective order, I am very unlikely to allow multiple depositions of the same individual and am likely to limit or prohibit discovery requests in this matter that are duplicative of and not coordinated with requests made or depositions noticed in the WSID proceeding.

### **WSID'S REQUEST TO SUBMIT AN AMENDED NOTICE OF INTENT TO APPEAR**

On September 2, 2015, WSID submitted a Notice of Intent to Appear (NOI) that indicated WSID planned to participate in the hearing by cross-examination or rebuttal only. On October 5, 2015, WSID submitted an amended NOI that indicated its plans to participate in the hearing by presenting a case-in-chief and included its list of witnesses. I will allow WSID to amend its NOI to submit a case-in-chief, but require that the testimony be submitted in writing only. Because of the limited number of days available for this hearing due to the availability of the parties and State Water Board's schedule in other matters, I must maintain the limits on oral testimony presented during the hearing. As an alternative to oral testimony, WSID may seek to submit into evidence in this proceeding relevant portions of the transcript of the hearing in the WSID proceeding.

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

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1001 I Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 100, Sacramento, Ca 95812-0100 | [www.waterboards.ca.gov](http://www.waterboards.ca.gov)

Because WSID's amended NOI and witness list is identical to the NOI and witness list that it filed in the WSID proceeding, I conclude that the amendment will not prejudice the other parties. At this point in the pre-hearing preparation, I am not likely to make a similar finding if a party seeks to amend its NOI or witness list in a manner not previously reflected in either proceeding.

## **PRE-HEARING BRIEFS**

### **Pre-hearing briefing of legal issues:**

In my October 2, 2015 letter, I invited the parties to submit concise statements of legal issues to be addressed in pre-hearing legal briefs. After reviewing the responses submitted by BBID, City and County of San Francisco, Department of Water Resources, WSID, Central Delta Water Agency, South Delta Water Agency and the Prosecution Team, I am requesting briefing of the following legal issues in the context of the facts of this case (please consider the range of disputed facts, both as construed in your favor and in favor of opposing parties):

*Whether, and in what circumstances: (1) does the State Water Resources Control Board have the authority to curtail, and (2) does Water Code section 1052 apply to diversions made under claim of a pre-1914 or riparian water right?*

Your briefing should address the extent to which these legal issues are or are not relevant to and determinative of the Administrative Civil Liability Complaint issued against Byron-Bethany Irrigation District.

Briefing of these legal issues may not exceed ten pages in length. Alternately, parties may file a joint brief of up to twenty pages in length.

Pre-hearing briefing of legal issues are due January 25, 2016.

### **Motions to Dismiss and Motions for Summary Judgment:**

BBID indicated in its letter of October 22, 2015, that it intends to submit a motion to dismiss. BBID may file a motion to dismiss or motion for summary judgment (or a combined motion). The Prosecution Team may also file a motion for summary judgment. BBID and the Prosecution Team may file a brief in response to the other party's motion. The remaining parties may submit responsive briefs in support or in opposition to the motions. The motions, including supporting memoranda of points and authorities, and briefs filed in support or opposition may not exceed ten pages in length. Alternately, parties may file a joint brief of up to twenty pages in length.

Parties should not repeat arguments made in their briefing of the legal issues described above, but may incorporate these arguments by reference into their motions, or briefs in support or opposition.

Motions to dismiss and/or motions for summary judgment are due January 25, 2016. Responsive briefs are due February 22, 2016.

**Written Opening Statements:**

I will allow the submittal of written opening statements, not to exceed ten pages in length. Alternately, parties may file a joint opening statement of up to twenty pages in length. I will not allow written rebuttal of written opening statements.

Written Opening Statements are due February 29, 2016.

**HEARING TIME LIMITS**

At this time, I intend to impose the following time limits during the hearing. I may revise these time limits based on discussion during the pre-hearing conference to be held on February 8, 2016, and declaration by the parties of any intent to combine time.

Opening Statements: Opening statements by parties presenting a case-in-chief will be limited to twenty (20) minutes. Opening statements or policy statements by all other parties will be limited to five (5) minutes.

Direct testimony: Oral summaries by the witnesses of direct testimony submitted by parties presenting a case-in-chief will be limited to twenty (20) minutes per witness and up to one (1) hour total to present all of the party's direct testimony. As previously discussed, WSID will not be allowed to present oral direct testimony as part of its case-in-chief. To further streamline the hearing, I may require all parties other than the Prosecution Team and BBID to submit their cases-in-chief solely in writing. If so, the parties will be allowed to offer relevant excerpts from the transcript of the hearing in the WSID proceeding into evidence.

Cross-Examination: Cross-examination will be limited to one (1) hour each for BBID and the Prosecution Team, and 10 minutes each for all other parties, to cross-examine each of the other parties' witnesses or panel of witnesses.

The parties may choose to combine their allowed time for opening statements, presentation of cases-in-chief, or cross-examination, with that of other parties.

**DISCOVERY REQUESTS**

To facilitate prompt response to discovery disputes that may arise, I am requesting that the parties electronically copy all subpoenas and discovery requests to the hearing team at: <mailto:wrhearing@waterboards.ca.gov>. The parties are also asked to attach copies of the particular discovery requests sought to be limited when filing a motion for protective order (including a motion for a general protective order) or motion to quash. As required by section 2016.040 of the California Code of Civil Procedure, the parties should meet and confer regarding any disputes before filing a motion. I intend to respond to motions regarding discovery as promptly as possible; parties who seek to respond to a motion should do so within five working days of service of the underlying motion.

October 30, 2015

**EX PARTE COMMUNICATIONS**

I would like to remind the parties that *ex parte* communications concerning substantive or controversial procedural issues relevant to this hearing are prohibited. Please be sure to copy the service list on any correspondence to me, the other Board Members, and the hearing team related to this matter.

Thank you for your continued cooperation. Questions regarding non-controversial procedural matters should be directed to Staff Counsel Nicole Kuenzi at (916) 322-4142 or by email to [Nicole.Kuenzi@waterboards.ca.gov](mailto:Nicole.Kuenzi@waterboards.ca.gov); or to Jane Farwell-Jensen at (916) 341-5349 or by email to [Jane.Farwell-Jensen@waterboards.ca.gov](mailto:Jane.Farwell-Jensen@waterboards.ca.gov). (Gov. Code, § 11430.20, subd. (b).)

Sincerely,

A handwritten signature in black ink, appearing to read "Tam M. Doduc". The signature is fluid and cursive, with a long horizontal stroke at the end.

Tam M. Doduc  
Hearing Officer

Enclosures: Service List

**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)**

<b>PARTIES</b>	
<p>THE FOLLOWING <b><u>MUST BE SERVED</u></b> WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (All have AGREED TO ACCEPT electronic service, pursuant to the rules specified in the hearing notice.)</p>	
<p><b>Division of Water Rights</b> Prosecution Team Andrew Tauriainen, Attorney III SWRCB Office of Enforcement 1001 I Street, 16th Floor Sacramento, CA 95814 <a href="mailto:andrew.tauriainen@waterboards.ca.gov">andrew.tauriainen@waterboards.ca.gov</a></p>	<p><b>Byron Bethany Irrigation District</b> Daniel Kelly Somach Simmons &amp; Dunn 500 Capitol Mall, Suite 1000, Sacramento, CA 95814 <a href="mailto:dkelly@somachlaw.com">dkelly@somachlaw.com</a></p>
<p><b>Patterson Irrigation District Banta-Carbona Irrigation District The West Side Irrigation District</b> Jeanne M. Zolezzi Herum\Crabtree\Suntag 5757 Pacific Ave., Suite 222 Stockton, CA 95207 <a href="mailto:izolezzi@herumcrabtree.com">izolezzi@herumcrabtree.com</a></p>	<p><b>City and County of San Francisco</b> Jonathan Knapp Office of the City Attorney 1390 Market Street, Suite 418 San Francisco, CA 94102 <a href="mailto:jonathan.knapp@sfgov.org">jonathan.knapp@sfgov.org</a></p> <p>Robert E. Donlan Ellison, Schneider &amp; Harris L.L.P. 2600 Capitol Avenue, Suite 400 Sacramento, CA 95816 (916) 447-2166 <a href="mailto:red@eslawfirm.com">red@eslawfirm.com</a></p>
<p><b>Central Delta Water Agency</b> Jennifer Spaletta Spaletta Law PC PO Box 2660 Lodi, CA 95241 <a href="mailto:jennifer@spalettalaw.com">jennifer@spalettalaw.com</a></p> <p>Dante Nomellini and Dante Nomellini, Jr. Nomellini, Grilli &amp; McDaniel <a href="mailto:ngmplcs@pacbell.net">ngmplcs@pacbell.net</a> <a href="mailto:dantejr@pacbell.net">dantejr@pacbell.net</a></p>	<p><b>California Department of Water Resources</b> Robin McGinnis, Attorney PO Box 942836 Sacramento, CA 94236-0001 <a href="mailto:robin.mcginnis@water.ca.gov">robin.mcginnis@water.ca.gov</a></p>
<p><b>Richard Morat</b> 2821 Berkshire Way Sacramento, CA 95864 <a href="mailto:rjmorat@gmail.com">rjmorat@gmail.com</a></p>	<p><b>San Joaquin Tributaries Authority</b> Valerie Kincaid O'Laughlin &amp; Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95814 <a href="mailto:vkincaid@olaughlinparis.com">vkincaid@olaughlinparis.com</a> <a href="mailto:lwood@olaughlinparis.com">lwood@olaughlinparis.com</a></p>

<p><b>South Delta Water Agency</b> John Herrick, Esq. 4255 Pacific Ave., Suite 2 Stockton, CA 95207 <a href="mailto:jherrlaw@aol.com">jherrlaw@aol.com</a></p> <p>Dean Ruiz, Esq. Harris, Perisho &amp; Ruiz, Attorneys at Law 3439 Brookside Road, Suite 210 Stockton, CA 95219 <a href="mailto:dean@hprlaw.net">dean@hprlaw.net</a></p>	<p><b>State Water Contractors</b> Stefani Morris, Attorney 1121 L Street, Suite 1050 Sacramento, CA 95814 <a href="mailto:smorris@swc.org">smorris@swc.org</a></p>
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# **EXHIBIT C**

**From:** Buckman, Michael@Waterboards Michael.Buckman@waterboards.ca.gov  
**Subject:** Clarifications-BYRON BETHANY IRRIGATION DISTRICT AND WEST SIDE IRRIGATION DISTRICT HEARINGS  
**Date:** January 14, 2016 at 3:53 PM

BM

**To:** dkelly@somachlaw.com, jzolezzi@herumcrabtree.com, jonathan.knapp@sfgov.org, red@eslawfirm.com, jennifer@spaleitalaw.com, ngrmpics@pacbell.net, dantejr@pacbell.net, rjmorat@gmail.com, vkircaid@claughlinparis.com, lwood@claughlinparis.com, Herrick, John @aol.com jherrlaw@aol.com, dean@hprlaw.net, smorris@swc.org, towater@claughlinparis.com, kharrigfield@herumcrabtree.com, jkrattiger@herumcrabtree.com, dohanlon@kmtg.com, pwilliams@westlandswater.org, Tauriainen, Andrew@Waterboards Andrew.Tauriainen@waterboards.ca.gov, Akroyd, Rebecca@KMTG rakroyd@kmtg.com, McGinnis, Robin C. @DWR Robin.McGinnis@water.ca.gov  
**Cc:** Riddle, Diane@Waterboards Diane.Riddle@waterboards.ca.gov, Kuenzi, Nicole@Waterboards Nicole.Kuenzi@waterboards.ca.gov, Mona, Ernie@Waterboards Ernie.Mona@waterboards.ca.gov, McCue, Jean@Waterboards Jean.McCue@waterboards.ca.gov, Farwell Jensen, Jane Jane.Farwell-Jensen@waterboards.ca.gov, Bourgeois, Deborah@Waterboards Deborah.Bourgeois@waterboards.ca.gov, Kauba, Amy@Waterboards Amy.Kauba@Waterboards.ca.gov

## Hearing Participants:

The Hearing Team appreciates the questions from the parties regarding the document submittal deadlines for the Byron-Bethany Irrigation District (BBID) and The West Side Irrigation District (WSID) proceedings. This letter clarifies the various document submittal deadlines and the substance of the submittals in the two proceedings.

The Board will accept the following motions and legal briefings:

### **(1) Motions to dismiss and/or motions for summary judgment.**

Motions to dismiss or motions for summary judgment may be submitted by BBID in the BBID proceeding and by WSID in the WSID proceeding. The Prosecution Team may file a motion for summary judgment in both proceedings. The motions must be received by the Board **by Noon, January 25, 2016**. The briefs may not exceed ten pages in length. The motions may include a motion for summary judgment; at the parties' discretion, the motions may address evidence submitted to the Board and need not be strictly based on the allegations in the Administrative Civil Liability Complaint or draft Cease and Desist Order.

All other parties may submit responsive briefs in support or opposition to the motions, to be received by the Board by **Noon, February 22, 2016**. Responsive briefs may not exceed ten pages in length. Alternatively, parties may file a joint responsive brief of up to twenty pages in length.

### **(2) Pre-hearing briefing of legal issues. (BBID proceeding only)**

In the ruling of October 30, 2015, Hearing Officer Doduc requested briefing of two legal issues in the BBID proceeding:

*Whether, and in what circumstances: (1) does the State Water Resources Control Board have the authority to curtail, and (2) does Water Code section 1052 apply to diversions made under claim of a pre-1914 or riparian water right?*

The briefs should address the extent to which these legal issues are or are not relevant to and determinative of the Administrative Civil Liability Complaint issued against BBID. The briefs must be received by the Board by **Noon, January 25, 2016**. The briefs may not exceed ten pages in length. Alternatively, parties may file a joint brief of up to twenty pages in length.

The parties may submit responsive briefs, to be received by **Noon, February 22, 2016**. Responsive briefs may not exceed ten pages in length. Alternatively, parties may file a joint responsive brief of up to twenty pages in length.

The submission of these additional pre-hearing briefs regarding legal issues was authorized only in the BBID proceeding and only with respect to the listed issues. The parties may raise additional legal issues relevant to the WSID or BBID proceedings in their written opening statement, or in a motion to dismiss, motion for summary judgment, or response to a motion, as applicable.

**(3) Motions in limine.**

The parties may submit motions in limine, to be received by the Board by **Noon, February 29, 2016**. All such motions must be submitted as a single document and may not exceed ten pages in length, total. Alternatively, parties may file motions jointly, not to exceed twenty pages in length.

The parties may submit responsive briefs in support or opposition to the motions, to be received by the Board by **Noon, March 4, 2016**. Responsive briefs may not exceed ten pages in length. Alternatively, parties may file a joint responsive brief of up to twenty pages in length.

**(4) Written opening statements: Phase I, Phase II – BBID, and Phase II - WSID.**

At this time, the hearing team anticipates that the parties may submit a separate written opening statement for each of the following phases of the proceedings: Phase I, Phase II-BBID, and Phase II – WSID. Written opening statements must be received by the Board by **Noon, February 29, 2016**. Each opening statement may not exceed ten pages in length. Alternatively, parties may file a joint opening statement of up to twenty pages in length. Opening statements should state the objectives of the case-in-chief, the major points that the proposed evidence is intended to establish, and the relationship between the major points and the key issues. Any policy-oriented statements by a party should also be included in the opening statement. The written opening statements may include legal arguments.

Any written response to opening statements should be included in the closing brief. The format for written opening statements may be addressed further at the pre-hearing conference on February 8, 2016.

**(5) Closing briefs.**

In addition to the briefing papers described above, the hearing officers will allow submission of closing briefs. The phases of the proceedings to be addressed in each closing brief, page limits, and deadlines for these briefs will be set at the conclusion of the hearing in each of the proceedings, respectively. The parties should address only those facts and legal arguments previously raised. At this time, the hearing officers do not expect to allow responses to closing briefs.

All briefs must be double-spaced and in 12-point Arial, or equivalent, font. Three copies of each brief must be submitted to the State Water Board, and a copy must be served electronically on

each of the other participants on the service list.

If you have additional questions regarding non-controversial procedural matters, please contact Staff Counsel Nicole Kuenzi at (916) 322-4142 or by email to [Nicole.Kuenzi@waterboards.ca.gov](mailto:Nicole.Kuenzi@waterboards.ca.gov); or Ernie Mona at (916) 341-5359 or by email to [Ernie.Mona@waterboards.ca.gov](mailto:Ernie.Mona@waterboards.ca.gov); or to Jane Farwell-Jensen at (916) 341-5349 or by email to [Jane.Farwell-Jensen@waterboards.ca.gov](mailto:Jane.Farwell-Jensen@waterboards.ca.gov). (Gov. Code, § 11430.20, subd. (b).)

Michael Buckman  
Hearings Unit Chief, Division of Water Rights  
State Water Resources Control Board  
916.341.5448

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

**DECLARATION OF LAUREN D. BERNADETT IN SUPPORT OF BYRON-BETHANY IRRIGATION DISTRICT'S NOTICE OF POSITION REGARDING THE STATE WATER RESOURCES CONTROL BOARD AUTHORITY TO ISSUE CURTAILMENTS**

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 January 25, 2016 at Sacramento, California.

  
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Yolanda De La Cruz

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<b><u>VIA ELECTRONIC MAIL</u></b> South Delta Water Agency John Herrick Law Offices of John Herrick 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 Email: <a href="mailto:Jherrlaw@aol.com">Jherrlaw@aol.com</a>	<b><u>VIA ELECTRONIC MAIL</u></b> State Water Contractors Stefani Morris 1121 L Street, Suite 1050 Sacramento, CA 95814 <a href="mailto:smorris@swc.org">smorris@swc.org</a>
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**SERVICE LIST  
WEST SIDE IRRIGATION DISTRICT  
CEASE AND DESIST ORDER HEARING**

SOMACH SIMMONS & DUNN  
A Professional Corporation

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<p>Division of Water Rights Prosecution Team Andrew Tauriainen, Attorney III SWRCB Office of Enforcement 1001 I Street, 16th Floor Sacramento, CA 95814 <a href="mailto:andrew.tauriainen@waterboards.ca.gov">andrew.tauriainen@waterboards.ca.gov</a></p>	<p>The West Side Irrigation District Jeanne M. Zolezzi Karna Harringfeld Janelle Krattiger Herum\Crabtree\Suntag 5757 Pacific Avenue, Suite 222 Stockton, CA 95207 <a href="mailto:jzolezzi@herumcrabtree.com">jzolezzi@herumcrabtree.com</a> <a href="mailto:kharringfeld@herumcrabtree.com">kharringfeld@herumcrabtree.com</a> <a href="mailto:jkrattiger@herumcrabtree.com">jkrattiger@herumcrabtree.com</a></p>
<p>State Water Contractors Stefani Morris 1121 L Street, Suite 1050 Sacramento, CA 95814 <a href="mailto:smorris@swc.org">smorris@swc.org</a></p>	<p>Westlands Water District Daniel O'Hanlon Rebecca Akroyd Kronick Moskovitz Tiedemann &amp; Girad 400 Capitol Mall, 27<sup>th</sup> Floor Sacramento, CA 95814 <a href="mailto:dohanlon@kmtg.com">dohanlon@kmtg.com</a> <a href="mailto:rakroyd@kmtg.com">rakroyd@kmtg.com</a></p> <p>Phillip Williams of Westlands Water District <a href="mailto:pwilliams@westlandswater.org">pwilliams@westlandswater.org</a></p>
<p>South Delta Water Agency John Herrick Law Offices of John Herrick 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 Email: <a href="mailto:Jherrlaw@aol.com">Jherrlaw@aol.com</a></p>	<p>Central Delta Water Agency Jennifer Spaletta Law PC P.O. Box 2660 Lodi, CA 95241 <a href="mailto:jennifer@spalettalaw.com">jennifer@spalettalaw.com</a></p> <p>Dante Nomellini and Dante Nomellini, Jr. NOMELLINI, GRILLI &amp; MCDANIEL <a href="mailto:ngmplcs@pacbell.net">ngmplcs@pacbell.net</a> <a href="mailto:dantejr@pacbell.net">dantejr@pacbell.net</a></p>
<p>City and County of San Francisco Jonathan Knapp Office of the City Attorney 1390 Market Street, Suite 418 San Francisco, CA 94102 <a href="mailto:jonathan.knapp@sfgov.org">jonathan.knapp@sfgov.org</a></p>	<p>San Joaquin Tributaries Authority Valerie C. Kincaid O'Laughlin &amp; Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95816 <a href="mailto:vkincaid@olaughlinparis.com">vkincaid@olaughlinparis.com</a></p>

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Byron-Bethany Irrigaton District Daniel Kelly Somach Simmons & Dunn 500 Capitol Mall, Suite 1000 Sacramento, CA 95814 <a href="mailto:dkelly@somachlaw.com">dkelly@somachlaw.com</a>	California Department of Water Resources Robin McGinnis, Attorney P.O. Boc 942836 Sacramento, CA 94236-0001 <a href="mailto:robin.mcginnis@water.ca.gov">robin.mcginnis@water.ca.gov</a>
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1 SOMACH SIMMONS & DUNN  
A Professional Corporation  
2 DANIEL KELLY, ESQ. (SBN 215051)  
MICHAEL E. VERGARA, ESQ. (SBN 137689)  
3 LAUREN D. BERNADETT, ESQ. (SBN 295251)  
500 Capitol Mall, Suite 1000  
4 Sacramento, California 95814-2403  
Telephone: (916) 446-7979  
5 Facsimile: (916) 446-8199

6 Attorneys for Petitioner/Plaintiff BYRON-  
BETHANY IRRIGATION DISTRICT

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8  
9 BEFORE THE  
10 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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

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

SWRCB Enforcement Action  
ENF01951 and ENF01949

DECLARATION OF LAUREN D.  
BERNADETT IN SUPPORT OF  
MOTION TO DISMISS  
ADMINISTRATIVE CIVIL  
LIABILITY PROCEEDING IN  
ENF01951 SWRCB'S METHOD  
OF DETERMINING WATER  
AVAILABILITY IS AN UNLAWFUL  
UNDERGROUND REGULATION

20 I, Lauren D. Bernadett, declare:

21 1. I am an attorney at law licensed to practice before the courts of the State of  
22 California. I am an associate with Somach Simmons & Dunn. The following matters are  
23 within my personal knowledge and, if called as a witness, I can competently testify  
24 thereto.

25 2. Attached hereto as BBID Exhibit 219 is a true and correct copy of the State  
26 Water Resources Control Board's Notice of Unavailability of Water and Need for  
27 Immediate Curtailment for those Diverting Water in the Sacramento-San Joaquin  
28 Watersheds and Delta with a Pre-1914 Appropriative Claim Commencing During or After  
DECL. OF L. BERNADETT IN SUPP OF MTN TO DISMISS ADMIN CIVIL LIABILITY PROCEEDING IN  
ENF01951 SWRCB'S METHOD OF DETERMINING WATER AVAIL. IS AN UNLAWFUL  
UNDERGROUND REG.

1 1903, dated June 12, 2015.

2 3. Attached hereto as BBID Exhibit 277 is a true and correct copy of the State  
3 Water Resources Control Board's Administrative Civil Liability Complaint in the Matter of  
4 Unauthorized Diversion by Byron-Bethany Irrigation District (including cover letter from  
5 John O'Hagan, Assistant Deputy Director of the Division of Water Rights, to Rick  
6 Gilmore and Daniel Kelly regarding Enforcement Action ENF01951), dated July 20,  
7 2015.

8 4. Attached hereto as BBID Exhibit 279 is a true and correct copy of the State  
9 Water Resources Control Board's Partial Rescission of April, May and June 2015  
10 Curtailment Notices and Clarification of State Water Board Position Re: Notices of  
11 Unavailability of Water for Those Diverting Water in the Sacramento River Watershed,  
12 San Joaquin River Watershed and Delta, and Scott River, dated July 15, 2015.

13 5. Attached hereto as BBID Exhibit 293 is a true and correct copy of the State  
14 Water Resources Control Board's 2015 Summary of Water Shortage Notices, dated  
15 December 18, 2015.

16 6. Attached hereto as Exhibit A is a true and correct copy of excerpts from the  
17 Videotaped Deposition of Thomas Howard, Volume II, November 25, 2015.

18 7. Attached hereto as Exhibit B is a true and correct copy of excerpts from the  
19 Deposition of Thomas Howard, Volume I, November 19, 2015.

20 8. Attached hereto as Exhibit C is a true and correct copy of the Governor's  
21 Office webpage with the text of "A Proclamation of a Continued State of Emergency,"  
22 issued by Governor Brown, dated April 25, 2014.

23 9. Attached hereto as Exhibit D is a true and correct copy of Executive Order  
24 B-29-15, dated April 1, 2015.

25 10. Attached hereto as Exhibit E is a true and correct copy of the State of  
26 California Office of Administrative Law Notice of Approval of Emergency Regulatory  
27 Action, In Re: State Water Resources Control Board, OAL File No. 2014-0708-02 E,  
28 dated July 16, 2014.

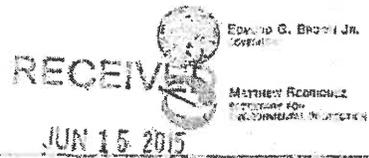
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I declare under penalty of perjury under the laws of the State of California that the facts recited above are true and correct. Executed this 25th day of January 2016 at Sacramento, California.



Lauren D. Bernadett

**BBID**  
**EXHIBIT 219**



State Water Resources Control Board

Byron-Bethany  
Irrigation District

June 12, 2015

BYRON-BETHANY IRRIGATION DISTRICT  
C/O RICK GILMORE, GENERAL MANAGER  
7995 BRUNS ROAD  
BYRON, CA 94514

In Regards to Claim of Right(s) [ID (password)]: S021256 (407769)

**NOTICE OF UNAVAILABILITY OF WATER AND NEED FOR IMMEDIATE CURTAILMENT FOR THOSE DIVERTING WATER IN THE SACRAMENTO-SAN JOAQUIN WATERSHEDS AND DELTA WITH A PRE-1914 APPROPRIATIVE CLAIM COMMENCING DURING OR AFTER 1903**

On January 23, 2015 and again on April 2, 2015, the State Water Resources Control Board (State Water Board) issued a Notice of Surface Water Shortage and Potential for Curtailment due to dry conditions throughout the State. On April 1, 2015, the Governor issued an executive order, order B-29-15, continuing the state of emergency, initially enacted on January 17, 2014, due to drinking water shortages, diminished water for agriculture production, degraded habitat for fish and wildlife, increased wildfire risk and the threat of saltwater contamination to fresh water supplies in the Sacramento-San Joaquin Delta (Delta).

On April 23, 2015 and May 1, 2015, the State Water Board issued curtailment notices to all post-1914 appropriative water rights in the Sacramento and San Joaquin River watersheds, inclusive of the Delta, due to insufficient projected water supplies. Based on updated water supply projections provided by the Department of Water Resources in early May, the State Water Board is now notifying pre-1914 claims of right, with a priority date of 1903 and later for the Sacramento-San Joaquin watersheds and the Delta, that, due to ongoing drought conditions, there is insufficient water in the system to service their claims of right.

**Curtailment of Certain Pre-1914 Claims of Right Commenced During or After 1903:**

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. With this notice, the State Water Board is notifying pre-1914 appropriative claims of right with a priority date of 1903 and later within the Sacramento-San Joaquin watersheds and Delta of the need to immediately stop diverting water with the exceptions discussed below. This condition of curtailment will continue until water conditions improve. Even if there is water physically available at your point of diversion, that water is necessary to meet more senior water right holders' needs or the water may be released previously stored water which must continue instream to serve its intended beneficial use. If precipitation occurs in the following weeks or months, you should not commence diversion before being notified by the State Water Board that water is legally available for diversion under your priority of right. Evaluations for additional curtailments of more senior rights will be made every two weeks through September.

FELICE MONTELEONE, CHIEF | TRACYA HIGGINS, EXECUTIVE DIRECTOR

1001 I Street, Sacramento, CA 95811 | 916-227-4600, TDD: 916-227-4600, Fax: 916-227-0100 | www.waterboards.ca.gov

**Compliance Certification Required:**

Holders of pre-1914 water right claims with priority dates equal to or later than 1903 are required to document receipt of this notice by completing an online Curtailment Certification Form (Form) within seven days. The Form confirms your cessation of diversion under the specific pre-1914 claim of right. Completion of the Form is mandatory to avoid unnecessary potential enforcement proceedings. You are required to complete the Form for each pre-1914 claim of right identified through this notice at:  
[http://www.waterboards.ca.gov/waterights/water\\_issues/programs/ewrims/curtailment/2015curt\\_form.php](http://www.waterboards.ca.gov/waterights/water_issues/programs/ewrims/curtailment/2015curt_form.php)

**Exceptions to Curtailment:**

If your diversion is for hydroelectric generation by direct diversion only and all water diverted is returned to the same stream system, you may continue to divert under your pre-1914 claim of right. If you continue to divert under the above circumstances, you must identify that on the Form and provide the information requested. If you have previously collected water to storage in a reservoir covered by a pre-1914 claim of right prior to this curtailment notice, you still may beneficially use that previously stored water. However, you must bypass all inflow into the reservoir at all times during the period this notice remains in effect.

**No Exception for Health and Safety:**

There is no exception to this notice for health and safety needs. However, we are aware that some water users must comply with directives issued by the Division of Drinking Water (DDW), or local health or drinking water regulation to provide continued water service to meet minimum health and safety standards. Should you continue to divert water under a claim of right subject to this notice to meet human health and safety needs, you must complete the Form identifying your health and safety needs, whether there is an applicable DDW, state or local regulation and your attempts at securing an alternate water supply. The State Water Board will carefully analyze the non-exempted continued diversions for minimum health and safety needs on a case-by-case basis.

**Potential Enforcement:**

Those who are found to be diverting water beyond what is legally available to them may be subject to administrative penalties, cease and desist orders, or prosecution in court. If the State Water Board finds following an adjudicative proceeding that a person or entity has diverted or used water unlawfully, the State Water Board may assess penalties of \$1,000 per day of violation and \$2,500 for each acre-foot diverted or used in excess of a valid water right. (See Water Code, §§ 1052, 1055.) Additionally, if the State Water Board issues a Cease and Desist Order against an unauthorized diversion, violation of any such order can result in a fine of \$10,000 per day. (See Water Code, §§ 1831, 1845.)

The State Water Board is encouraging diverters to work together to reach local voluntary agreements that not only provide solutions that help local communities with water shortages, but also prevent injury to other legal users of water and do not cause unreasonable effects on fish and wildlife. If you have any questions, please call our Curtailment Hotline at (916) 341-5342, contact us by email at: [SWRCB-Curtailment-Certification@waterboards.ca.gov](mailto:SWRCB-Curtailment-Certification@waterboards.ca.gov), or review our drought year webpage at: [http://www.waterboards.ca.gov/waterights/water\\_issues/programs/drought/index.html#notices](http://www.waterboards.ca.gov/waterights/water_issues/programs/drought/index.html#notices). The State Water Board also encourages water right holders to assist in the prevention of unlawful diversion of water and in discouraging any waste or unreasonable use of water. To assist the State Water Board, you may file a complaint at:

To Water Right Users in the  
Sacramento-San Joaquin Delta,  
Sacramento & San Joaquin River Watersheds

-3-

June 12, 2015

[http://www.dtac.ca.gov/database/CalEPA\\_Complaint/index.cfm](http://www.dtac.ca.gov/database/CalEPA_Complaint/index.cfm)

We recognize the burden the drought creates, and want to assure that others do not illegally benefit from your curtailments.

Sincerely,



Thomas Howard  
Executive Director

**BBID**  
**EXHIBIT 277**



RECEIVED

JUL 22 2015



EDMUND G. BROWN JR.  
GOVERNOR



MATTHEW RODRIGUEZ  
SECRETARY FOR  
ENVIRONMENTAL PROTECTION

State Water Resources Control Board

Byron-Bethany  
Irrigation District

JUL 20 2015

Byron-Bethany Irrigation District  
Attn: Rick Gilmore, General Manager  
7995 Bruns Road  
Byron, CA 94514

CERTIFIED MAIL NO. 7003 1680 0000 2965 9480

Daniel Kelley  
General Counsel, Byron-Bethany Irrigation District  
Somach Simmons & Dunn  
500 Capital Mall, Suite 1000  
Sacramento, CA 95814

CERTIFIED MAIL NO. 7003 1680 0000 2965 9473

Dear Messrs. Gilmore and Kelley:

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

Enclosed is an Administrative Civil Liability (ACL) Complaint relating to your diversions from the intake channel to the Banks Pumping Plant (formerly Italian Slough) after June 12, 2015. This letter serves as notice to Byron-Bethany Irrigation District (BBID) that the State Water Resources Control Board (State Water Board), Division of Water Rights (Division), intends to impose the proposed Administrative Civil Liability.

**You have 20 days from receipt of this notice to act or face additional enforcement without further notice. Therefore, this matter requires your immediate attention.**

**VIOLATION DESCRIPTION**

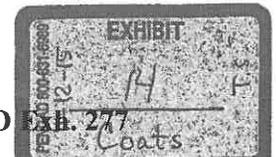
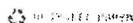
BBID is alleged to have diverted a total of approximately two thousand sixty-seven (2,067) acre-feet over the course of thirteen days, from June 13 through June 25, 2015, during which water was unavailable to serve BBID's water right. The violation is further described in the enclosed ACL Complaint.

**ADMINISTRATIVE CIVIL LIABILITY**

California Water Code, section 1052, prohibits the unauthorized diversion of water. Water Code section 1052 authorizes the State Water Board to administratively impose civil liability for unauthorized diversions of water during periods of drought emergency in an amount not to exceed \$1,000 per day of violation plus \$2,500 per acre-foot diverted without authorization.

FELIX MARQUEZ, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

1001 J Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 160, Sacramento, Ca 95812-0160 | www.waterboards.ca.gov



BBID

I am hereby issuing the enclosed ACL Complaint proposing that a liability of \$1,553,250 be imposed for your diversion of water during periods when water supplies were insufficient to fulfill your claimed right. The ACL Complaint provides for a potentially reduced penalty upon showing that water pumped during the time considered under this action was used for health and safety needs, or for critical power generation. **If you fail to respond to the ACL Complaint in one of the manners below within 20 days of receiving this notice, then the State Water Board will issue an ACL Order and seek recovery of this proposed liability amount as authorized by California Water Code section 1055.4.**

If you disagree with the facts or allegations set forth in the ACL Complaint, you may request a hearing before the State Water Board. **Your request for a hearing must be in writing, signed by you or on your behalf, and mailed or hand-delivered to ensure receipt by the State Water Board within 20 days from the date you receive this notice.** You may mail your written hearing request to: State Water Resources Control Board, Division of Water Rights, Attn: Enforcement Section, P.O. Box 2000, Sacramento, CA 95812-2000.

You may hand-deliver your written hearing request to: State Water Resources Control Board, Division of Water Rights, Records Unit, 1001 I Street, 2nd Floor, Sacramento, CA 95814.

If you request a hearing, a hearing will be scheduled before the State Water Board or a designated hearing officer. Prior to the hearing, you will be required to submit any written testimony and other evidence you would like the State Water Board to consider. You will be notified of the hearing date and the submittal deadlines as soon as they are scheduled.

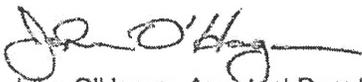
If you fail to come into compliance or request a hearing within 20 days of the date you receive this notice, the State Water Board will adopt the ACL.

#### SUMMARY OF OPTIONS

1. Submit a written request for hearing within 20 days of receiving the enclosed ACL Complaint; or
2. Do nothing, and receive a final ACL Order.

If you have any questions regarding the ACL Complaint, or if you have information that you want to provide in response to this complaint, or information that you believe the State Water Board staff should otherwise consider, please contact Kathy Mrowka, Manager, Enforcement Section at (916) 341-5363 or [Kathy.Mrowka@waterboards.ca.gov](mailto:Kathy.Mrowka@waterboards.ca.gov); or Andrew Tauriainen, Attorney III, Office of Enforcement, at (916) 341-5445 or [Andrew.Tauriainen@waterboards.ca.gov](mailto:Andrew.Tauriainen@waterboards.ca.gov), or send the information directly to them via email.

Sincerely,



John O'Hagan, Assistant Deputy Director  
Division of Water Rights

Enclosures: 1) Administrative Civil Liability Complaint

STATE OF CALIFORNIA  
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY  
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT

---

In the Matter of Unauthorized Diversion by

**BYRON-BETHANY IRRIGATION DISTRICT**

---

SOURCE: Intake Channel to the Banks Pumping Plant (formerly Italian Slough)

COUNTY: Contra Costa

---

**YOU ARE HEREBY GIVEN NOTICE THAT:**

1. Byron-Bethany Irrigation District (BBID or District) is alleged to have diverted and used water in violation of California Water Code section 1052, subdivision (a), which provides that the diversion or use of water subject to Division 2 of the Water Code other than as authorized in Division 2 is a trespass.
2. Water Code section 1052, subdivision (c), provides that any person or entity committing a trespass during a period for which the Governor has issued a proclamation of a state of drought emergency may be liable in an amount not to exceed the sum of one thousand dollars (\$1,000) for each day the trespass occurs plus two thousand five hundred dollars (\$2,500) for each acre-foot of water diverted or used in excess of that diverter's rights. Water Code section 1052, subdivision (d)(2), provides that civil liability may be imposed administratively by the State Water Resources Control Board (State Water Board or Board) pursuant to Water Code section 1055.
3. Water Code section 1055, subdivision (a), provides that the Executive Director of the State Water Board may issue a complaint to any person or entity on whom Administrative Civil Liability (ACL) may be imposed. On June 5, 2012, the Executive Director delegated this authority to the Deputy Director for Water Rights. State Water Board Resolution 2012-0029 authorizes the Deputy Director for Water Rights to issue an order imposing an ACL when a complaint has been issued and no hearing has been requested within 20 days of receipt of the complaint. The Deputy Director for Water Rights has redelegated this authority to the Assistant Deputy Director for Water Rights pursuant to State Water Board Resolution 2012-0029.

**ALLEGATIONS**

4. On June 30, 2010, BBID submitted an Initial Statement of Water Diversion and Use (Statement), which the State Water Board, Division of Water Rights (Division) designated as Statement 021256 (S021256). Under S021256, BBID claims a pre-1914 appropriative water right to the Intake Channel to the Banks Pumping Plant, formerly Italian Slough, in Contra Costa County. The Statement also indicates that BBID diverted approximately 26,179 acre-feet (af) in 2009 for municipal and industrial and agricultural use within its boundaries.
5. On July 1, 2013, BBID submitted Supplemental Statements for S021256, for the years 2010, 2011 and 2012. BBID's Supplemental Statements each indicate that the District first put water to use in 1917, and that the purpose of use for the District's diversions is irrigation of 12,500 acres. The 2010 Supplement Statement indicates that BBID diverted 26,269 af and applied

- approximately 22,302 af to beneficial use. The 2011 Supplemental Statement indicates that BBID diverted 22,344 af and applied 19,779 af to beneficial use. The 2012 Supplemental Statement indicates that BBID diverted 32,167 af and applied 23,345 af to beneficial use.
6. BBID does not hold or claim any other appropriative or riparian water rights on record with the State Water Board, although S021256 indicates that BBID holds Contract No. 14-06-200-765-LTR1 with the United States Bureau of Reclamation (Reclamation). In 2014 and 2015, Reclamation's agricultural contractors in the Delta were allocated zero percent of their contract quantity (available at <http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=49115> [last accessed June 30, 2015]). BBID confirmed in a public statement dated June 12, 2015, that it had received zero water supply from Reclamation in both 2014 and 2015 (available at <http://bbid.org/wp-content/uploads/2015/06/BBID-Curtailment-Response-FINAL.1.pdf> [last accessed June 30, 2015].)
  7. On January 17, 2014, Governor Edmund G. Brown Jr. issued Proclamation No. 1-17-2014, declaring a State of Emergency to exist in California due to severe drought conditions.
  8. Also on January 17, 2014, the State Water Board issued a "Notice of Surface Water Shortage and Potential Curtailment of Water Right Diversions" (2014 Shortage Notice). The 2014 Shortage Notice alerts water right holders in critically dry watersheds that water may become unavailable to satisfy beneficial uses at junior priorities.
  9. On April 25, 2014, Governor Brown issued a Proclamation of a Continued State of Emergency due to drought conditions, to strengthen the state's ability to manage water and habitat effectively in drought conditions.
  10. On May 27, 2014, the State Water Board issued a "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the Sacramento and San Joaquin River Watershed with a post-1914 Appropriative Right" (2014 Unavailability Notice), which notifies all holders of post-1914 appropriative water rights within the Sacramento and San Joaquin River watersheds of the lack of availability of water to serve their post-1914 water rights, with some minor exceptions for non-consumptive diversions. The 2014 Unavailability Notice did not apply to pre-1914 appropriative rights such as that claimed by BBID. The State Water Board notified the most senior right holders in stages as water became available to serve their rights, and by November 19, 2014, had notified all right holders of availability for all diversions in the Sacramento and San Joaquin River watersheds.
  11. On January 23, 2015, the State Water Board issued a "Notice of Surface Water Shortage and Potential for Curtailment of Water Right Diversions for 2015" (2015 Shortage Notice). The 2015 Shortage Notice alerted water right holders in critically dry watersheds that water may become unavailable to satisfy beneficial uses at junior priorities.
  12. On February 4, 2015, the State Water Board issued Order WR 2015-0002-DWR, requiring pre-1914 and riparian water right claimants representing the top 90 percent of such claimants by volume in the Sacramento and San Joaquin River watersheds and the Delta to submit information relating to their claimed water right, the monthly amounts of water diverted and the basis of right claimed for diversions in 2014, and monthly diversion information and anticipated monthly diversion information for each month starting with February, 2015, to be submitted by the 5<sup>th</sup> of each succeeding month until the drought ends.
  13. BBID is subject to Order WR 2015-0002-DWR, and in response submitted information indicating that its predecessor, the Byron-Bethany Irrigation Company, recorded notice of an appropriation of water on or around May 13, 1914. Thus, BBID claims that its pre-1914 water right has a

priority date of May 18, 1914.<sup>1</sup>

14. BBID also submitted water diversion and use information for 2014, projected monthly diversions for 2015, and actual monthly diversions through May, 2015. BBID reports that it diverted 30,204 af in 2014 and projected diversions of 25,462 af in 2015. BBID's reported actual monthly diversion amounts for January through May, 2015, are generally similar to reported diversions for the same months in prior years where such information is available. BBID's reported projected diversions are similar to the reported actual diversions for the same months in prior years where such information is available. From August 1 to October 31, 2014, BBID reports it pumped 1,573 af of water under transfer that was approved by State Water Board Order dated August 27, 2014.
15. On April 1, 2015, Governor Brown issued Executive Order B-29-15 (Executive Order) to strengthen the state's ability to manage water and habitat effectively in drought conditions and called on all Californians to redouble their efforts to conserve water. The Executive Order finds that the continuous severe drought conditions present urgent challenges across the state including water shortages for municipal water use and for agricultural production, increased wildfire activity, degraded habitat for fish and wildlife, threat of saltwater contamination, and additional water scarcity if drought conditions continue. The Executive Order confirms that the orders and provisions in the Governor's previous drought proclamations and orders, the January 17, 2014, Proclamation, April 25, 2015, Proclamation, and Executive Orders B-26-14 and B-28-14, remain in full force and effect. On April 2, 2015, the State Water Board issued another notice warning that notices of unavailability of water were likely to be issued soon.
16. On April 23, 2015, the State Water Board issued a "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the San Joaquin River Watershed with a Post-1914 Appropriative Right" (April 23 Unavailability Notice), which notifies all holders of post-1914 appropriative water rights within the San Joaquin River watershed of the lack of availability of water to serve their post-1914 water rights, with some minor exceptions for non-consumptive diversions. The State Water Board issued a similar notice for post-1914 appropriative water rights within the Sacramento River watershed on May 1, 2015 (May 1 Unavailability Notice). The April 23 and May 1 Unavailability Notices do not apply to pre-1914 appropriative rights such as that claimed by BBID.
17. On June 12, 2015, the State Water Board issued a "Notice of Unavailability of Water and Need for Immediate Curtailment for Those Diverting Water in the Sacramento-San Joaquin Watersheds and Delta with a Pre-1914 Appropriative Claim Commencing During or After 1903" (June 12 Unavailability Notice), which notifies all holders of pre-1914 appropriative water rights with a priority date of 1903 and later within the Sacramento and San Joaquin River watersheds of the lack of availability of water to serve their rights, with some minor exceptions for non-consumptive uses.
18. Drought management of water rights is necessary to ensure that water to which senior water right holders are entitled is actually available to them, which requires that some water remain in most streams to satisfy senior demands at the furthest downstream point of diversion of these senior water rights. The June 12 Unavailability Notice reflects the State Water Board's determination that the existing water available in the Sacramento-San Joaquin watersheds and the Delta is insufficient to meet the demands of diverters with claims of pre-1914 appropriative rights with a priority date of 1903 and later. Continued diversion when there is no water available under the priority of the right constitutes unauthorized water diversion and use. Unauthorized diversion is subject to enforcement. (Wat. Code § 1052.)

<sup>1</sup> The term "pre-1914" appropriative water right means those appropriative rights commenced prior to December 19, 1914, the effective date of the Water Commission Act. Therefore, it is possible to have a "pre-1914" appropriative water right with a priority date in 1914.

19. The State Water Board determines the availability of water for water rights of varying priorities in any watershed by comparing the current and projected available water supply with the total water right diversion demand.
20. To determine water availability, the Board relies upon the full natural flows of watersheds calculated by the Department of Water Resources (DWR) for certain watersheds in its Bulletin 120 and in subsequent monthly updates. "Full natural flow," or "unimpaired runoff," represents the natural water production of a river basin, unaltered by upstream diversions, storage, storage releases, or by export or import of water to or from other watersheds. The full natural flow amount is different than the measured stream flows at the given measurement points because the measured flows may be higher or lower due to upstream operations. Forecasted flow data is uncertain, so DWR provides the data in the form of "levels of exceedance" or simply "exceedance" to show the statistical probability that the forecasted supply will occur. The exceedance is simply the percent of the time that the actual flow is expected to exceed the projected flow. The 90 percent exceedance hydrology assumes inflows from rainfall and snowmelt at levels that are likely to be met or exceeded by actual flows with a 90 percent probability, or in other words, there is a ten percent or less chance of actual conditions turning out to be this dry or drier. In April and early May, the State Water Board uses the 90% and 99% exceedance amounts for its analyses due to low flow conditions. DWR's daily natural flow calculations are also used in the analysis.
21. To determine water demand, the State Water Board relies on information supplied by water right holders on annual or triennial reports of water diversion and use required to be true and accurate to the best of the knowledge of the diverters. The Board also incorporates 2014 diversion data submitted pursuant to Order WR 2015-0002. All reported monthly water diversion data is compiled by watershed, type of right and priority dates. The Board performs quality control checks and removes obvious errors, excess reporting, removes demand for direct diversion for power, and makes additional changes based on stakeholders' input. The corrected demand data includes the 2014 reported data for 90% of the watershed demand plus, for the remaining diverters, an averaged diversion amount for 2010 through 2013. These monthly diversion demands are grouped into water right types (riparian, pre-1914 and post-1914 rights).
22. The State Water Board consistently adjusts the water availability and demand analyses based on new information obtained from stakeholders, or adjustments to projected flows from the DWR. State Water Board staff reviews this information and provides revisions to its data set and graphs that are all shown on the Watershed Analysis website ([http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/analysis/](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/analysis/)).
23. The State Water Board's Watershed Analysis website provides updated graphical summations and spreadsheets containing supporting analysis of the availability and demand analyses. The graphical summations show priorities with monthly demands for the total riparian demand at bottom, the pre-1914 demands added to riparian and depicted above the riparian demand. The monthly amounts are averaged into cubic feet per second for graphical purposes. See, for example, the combined Sacramento/San Joaquin River Basin Senior Supply/Demand Analysis ([http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/analysis/docs/sacsjocmbined.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/analysis/docs/sacsjocmbined.pdf)). The Curtailment Analysis website also provides graphical summations of the San Joaquin River Basin Senior Supply/Demand Analysis with Proportional Delta Demand ([http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/analysis/docs/sjprorate.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/analysis/docs/sjprorate.pdf)) and the Sacramento River Basin Senior Supply/Demand Analysis with Proportional Delta Demand ([http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/analysis/docs/secprorate.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/analysis/docs/secprorate.pdf)).
24. This analysis shows that by June 12, 2015, available supply was insufficient to meet the demands of appropriative rights with priority dates of 1903 and later throughout the Sacramento and San Joaquin River watersheds and the Delta.

25. The June 12 Unavailability Notice applies to S021253 because BBID claims a priority date of May 18, 1914. BBID received an electronic copy of the June 12 Unavailability Notice on June 12, 2015, via the Board's "Drought Updates" Lyris email list system, because Rick Gilmore, BBID's General Manager is a subscriber to that system (via email address [r.gilmore@bbid.org](mailto:r.gilmore@bbid.org)). Moreover, BBID issued a public statement on June 12, 2015, in response to the June 12 Unavailability Notice (available at <http://bbid.org/wp-content/uploads/2015/06/BBID-Curtailment-Response-FINAL1.pdf> [last accessed June 25, 2015].) BBID received a paper copy of the June 12 Unavailability Notice no later than June 15, 2015.
26. BBID's diversions are recorded by DWR and posted to the California Data Exchange Center (CDEC) (<http://cdec.water.ca.gov/cul-progs/queryDaily?BBID> also available at <http://www.water.ca.gov/swp/operationscontrol/docs/delta/DeltaHydrology.pdf>). CDEC reports that BBID has diverted water each day since the June 12 Unavailability Notice:

Date	Avg Diversion Rate (cfs)	Amount Diverted (af)	Date	Avg Diversion Rate (cfs)	Amount Diverted (af)
06/13/2015	91	180	06/20/2015	96	190
06/14/2015	122	242	06/21/2015	99	196
06/15/2015	79	156	06/22/2015	62	123
06/16/2015	83	164	06/23/2015	61	121
06/17/2015	78	154	06/24/2015	57	132
06/18/2015	91	180	06/25/2015	36	71
06/19/2015	80	158	06/26/2015	0	0

27. The daily diversion rates through June 24 are comparable to the District's average daily diversion rates reported for June 2014 (4,842 af/30 days/1.9835=81.4 cfs), and those BBID reported as anticipated for June 2015. This daily rate is in excess of the basic minimum health and safety needs of Mountain House Community Service District. This indicates that BBID has continued its normal diversions following the June 12 Unavailability Notice.
28. BBID diverted a total of approximately two thousand sixty-seven (2,067) acre-feet over the course of thirteen days following the June 12 Unavailability Notice, specifically from June 13 through June 25, 2015.
29. On July 15, 2015, the State Water Board issued a Clarification to the Unavailability Notices indicating that, to the extent that any of the notices described above contain language that may be construed as an order requiring you to curtail diversions under your affected water right, that language has been rescinded. Similarly, any language requiring affected water right holders to submit curtailment certification forms has been rescinded.
30. Diversion or use of water by an appropriative water right holder when there is insufficient water supply available for that water right is an unauthorized diversion or use of water subject to Division 2 of the Water Code. Water Code section 1052, subdivision (a) provides that unauthorized diversion or use of water is a trespass.
31. This enforcement action is based on lack of available water supply under the priority of the right. The Unavailability Notices were issued for the purpose of advising the public and water diverters of the lack of available water under the priority of the rights identified in each notice; the notices are not the basis for this enforcement action.

#### PROPOSED CIVIL LIABILITY

32. Water Code section 1052 provides that the maximum civil liability that can be imposed by the State Water Board in this matter for the unauthorized diversion and use of the water during a

- drought period is \$1,000 for each day of trespass plus \$2,500 for each acre-foot of water diverted or used in excess of that diverter's water rights.
33. Evidence demonstrates that BBID's unauthorized diversions began on June 13, 2015, and continued until June 25, 2015, for a total of thirteen (13) days. Over that period, BBID diverted approximately two thousand sixty-seven (2,067) acre-feet of water in excess of that available to serve its claimed water right.
  34. Therefore, the maximum civil liability for the alleged violations is \$5,180,500 [13 days at \$1,000 per day plus 2,067 acre-feet at \$2,500 per acre-foot].
  35. In determining the amount of civil liability, California Water Code section 1055.3 requires that the State Water Board consider all relevant circumstances, including, but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, and any corrective action taken by the violator.
  36. In this case, BBID has made unauthorized diversions of water from the Intake Channel to the Banks Pumping Plant (formerly Italian Slough) during the most extreme drought in decades, when there was insufficient water supply available for BBID's claimed water right. BBID was aware that the State Water Board had determined that there was insufficient water supply available for BBID's claimed water right. These unauthorized diversions have reduced or threatened to reduce the amount of water available for downstream water right holders during an extreme drought emergency. Moreover, BBID's diversions likely reduced the water available for instream resources and riparian habitat within the Delta during an extreme drought emergency.
  37. BBID received an economic advantage over other legitimate water diverters in the area by foregoing the costs of buying replacement water during the violation period. During 2015, irrigation districts north of the Delta have paid at least \$250 per acre-foot of replacement water. Thus, by illegally diverting 2,067 acre-feet of water from June 13 through June 25, BBID avoided purchased water costs of at least \$516,750.
  38. The Division estimates that its staff cost to investigate the unauthorized diversion issues and develop the enforcement documents to be \$3,000.
  39. BBID is known to be serving water to Mountain House Community Service District and to power generation facilities that may be deemed critical energy suppliers. BBID and Mountain House Community Service District took corrective actions to secure water available via contract and transfer. Although these supplies were not provided during the violation period identified above, they are recognized as progressive correction actions to prevent unauthorized diversions. Also taken into consideration is the fact that BBID has stopped its diversions from June 26.
  40. Having taken into consideration the factors described above, the Assistant Deputy Director for Water Rights recommends an ACL for the unauthorized diversion of water in the amount of \$1,553,250. The recommended penalty is based on the circumstances known to this time, BBID's continued diversions despite lack of availability of water to serve its right during extreme ongoing drought conditions, and to provide a strong disincentive for continued unauthorized diversions by BBID and any similarly-situated parties. The Prosecution Team will consider adjustment of the recommended penalty if BBID provides evidence of the amounts of water pumped that were for health and safety needs or critical power generation.
  41. Should the matter go to hearing, the State Water Board may consider a different liability based on the evidence received, including additional staff costs incurred, up to the maximum amount provided by law. It is estimated that if this matter goes to hearing, additional staff costs incurred for the prosecution staff would be approximately \$10,000.

**RIGHT TO HEARING**

42. BBID may request a hearing on this matter before the State Water Board. Any such request for hearing must be in writing and received or postmarked within 20 days of the date this notice is received. (California Water Code, § 1055, subd. (b).)
43. If BBID requests a hearing, BBID will have an opportunity to be heard and to contest the allegations in this Complaint and the imposition of an ACL by the State Water Board. If a hearing is requested, separate notice setting the time and place for the hearing will be mailed not less than 10 days before the hearing date.
44. If BBID requests a hearing, the State Water Board will consider at the hearing whether to impose the civil liability, and, if so, whether to adjust the proposed liability within the amount authorized by statute. Based on the evidence received at the hearing, the State Water Board may take any appropriate action in accordance with sections 100, 275, and 1050 et seq. of the California Water Code and its responsibilities under the public trust doctrine. Any State Water Board order imposing an ACL shall become final and effective upon issuance.
45. If BBID does not wish to request a hearing, please remit a cashier's check or money order within 20 days of the date of this Complaint for the amount of the ACL set forth above to:  
  
State Water Resources Control Board  
Division of Water Rights  
Enforcement Section  
P.O. Box 2000  
Sacramento, CA 95812-2000
46. If BBID does not request a hearing and does not remit the ACL amount, the State Water Board may seek recovery of the ACL amount as authorized by Water Code section 1055.4.

STATE WATER RESOURCES CONTROL BOARD

  
John O'Hagan, Assistant Deputy Director  
Division of Water Rights

Dated: JUL 20 2015

**BBID**  
**EXHIBIT 279**

23



Water Boards

State Water Resources Control Board

RECEIVED

JUL 18 2015

Byron-Bethany  
Irrigation District



July 15, 2015

BYRON-BETHANY IRRIGATION DISTRICT  
C/O RICK GILMORE, GENERAL MANAGER  
7995 BRUNS ROAD  
BYRON, CA 94514

**PARTIAL RESCISSION OF APRIL, MAY AND JUNE 2015 CURTAILMENT NOTICES AND CLARIFICATION OF STATE WATER BOARD POSITION RE: NOTICES OF UNAVAILABILITY OF WATER FOR THOSE DIVERTING WATER IN THE SACRAMENTO RIVER WATERSHED, SAN JOAQUIN RIVER WATERSHED AND DELTA, AND SCOTT RIVER**

The State Water Resources Control Board (State Water Board) issued two letters earlier this year (January 23, 2015 and April 2, 2015) advising persons of the drought and the resulting lack of surface water availability. These letters were issued to facilitate planning for diversions during critical water supply shortages.

In addition to the planning letters, the State Water Board staff has issued notices to specific water diverters alerting categories of users that information available to the State Water Board staff indicates there is insufficient water available to divert under the priority of their water rights. These notices were issued as follows:

**Sacramento River and Delta**

- o May 1, 2015: All post-1914 rights (concurrent with term 91 curtailment); and
- o June 12, 2015: All appropriative water rights with a priority date between 1903 and 1914.

**San Joaquin River**

- o April 23, 2015: All post-1914 appropriative rights; and
- o June 12, 2015: All appropriative water rights with a priority date between 1903 and 1914.

**Additional San Joaquin River Sub-watersheds**

- o June 26, 2015: Appropriative rights in the Upper San Joaquin watershed with a priority date senior to 1903;
- o June 26, 2015: Appropriative rights in the Merced watershed with a priority date between 1858 and 1902; and
- o June 26, 2015: Four appropriative rights in the Tuolumne River watershed.

**Scott River**

- o April 23, 2015: All Decreed Surplus Class Rights, Post-1914 rights, and Priority class 2 water rights in Schedule D4.

You received one of the above notices because information available to the State Water Board, of which you may not be aware, indicates there is insufficient water to divert under the priority of your right. The notice was provided to ensure that diverters: (a) are aware of the severity of the situation; (b) have reliable information regarding the amount of water available for their diversion; and (c) have information on whether water that may appear to be available instead is only available to serve senior rights (expressed in the notices as priority of rights).

The purpose of this notice is to rescind the "curtailment" portions of the unavailability notices you received. To the extent that any of the notices described above contain language that may be construed as an order requiring you to stop diversions under your affected water right, that language is hereby rescinded. Similarly, any language that may be construed as requiring affected water right holders to submit curtailment certification forms is hereby rescinded.



July 15, 2015

Please note that information available to the State Water Board continues to indicate that there is insufficient water available for the categories of junior water users identified in the State Water Board's prior correspondence, identified above. If you believe you received this notice in error, or have information that you want to provide in response to this notice, or have information you believe the State Water Board staff should otherwise consider, you may submit that information via email to: [SWRCB-Drought-Availability@waterboards.ca.gov](mailto:SWRCB-Drought-Availability@waterboards.ca.gov)

Diversion is always subject to water availability limitations, and diversions under your affected water right may be subject to enforcement should the State Water Board find such diversions are or were unauthorized. The State Water Board is continuing its drought-year inspections to determine whether diverters are using water to which they are not entitled.

Diversion when there is no available water under the priority of your right is an unauthorized diversion and use and is subject to enforcement by the State Water Board. Those who are found to be diverting water beyond what is legally available to them may be subject to administrative penalties, cease and desist orders, or prosecution in court. If the State Water Board finds following an adjudicative proceeding that a person or entity has diverted or used water unlawfully, the State Water Board may assess penalties of up to \$1,000 per day of violation and \$2,500 for each acre-foot diverted or used in excess of a valid water right. (See Water Code, §§ 1052, 1055.) Additionally, if the State Water Board issues a Cease and Desist Order against an unauthorized diversion, violation of any such order can result in penalties of up to \$10,000 per day. (See Water Code, §§ 1831, 1845.) Any State Water Board enforcement action will be based upon the availability of water and be consistent with the reasonable and beneficial use requirement contained in article X, section 2 of the California Constitution. This notice does not establish or impose any new compliance responsibilities. Non-compliance with this notice shall not constitute a basis for the State Water Board's initiation of any enforcement action.

Consistent with the partial rescission of the prior notices, you are not required to complete and file the Curtailment Certification Form (Form) attached to the prior notices. The prior notices stated that there are no exceptions to curtailment, but provided opportunity for persons to inform the State Water Board, through the Form, whether they were under directives issued by the Division of Drinking Water or local health or drinking water regulation to provide continued water service to meet minimum health and safety standards. Although you are not required to complete the Form, you can voluntarily advise the State Water Board of directives regarding your domestic water system operation to facilitate the State Water Board's response to the drought conditions.

The State Water Board also encourages water right holders to assist in the prevention of unlawful diversion of water and in discouraging any waste or unreasonable use of water. To assist the State Water Board, you may file a complaint at: [http://www.dtsc.ca.gov/database/CalEPA\\_Complaint/index.cfm](http://www.dtsc.ca.gov/database/CalEPA_Complaint/index.cfm).

We recognize the burden and loss that California's historic drought is causing, and want to assure that others do not illegally benefit from your compliance with the Water Code.

Sincerely,



Thomas Howard  
Executive Director

**BBID**  
**EXHIBIT 293**



State Water Resources Control Board

## 2015 SUMMARY OF WATER SHORTAGE NOTICES

Updated December 18, 2015

- **Sacramento River and Delta – Water Shortage Notice Sent to 5,992 rights**
  - May 1, 2015: All Post-1914 rights.
  - June 12, 2015: All appropriative water rights with a priority date between 1903 and 1914.
  - September 18, 2015: 238 of the water rights with a priority date between 1903 and 1914 in the Sacramento and Feather River watersheds and the Delta received a notice that there was currently water available to meet their reported demand. Water shortage notifications stayed in effect for the remainder of these water rights in the Yuba, American, and San Joaquin watersheds.
  - October 27, 2015: Water right holders with a priority date between 1903 and 1914 in the American River and Yuba River watersheds received a notice that there was currently water available to meet their reported demand, to remain in effect until further notice.
  - November 2, 2015: All pre-1927 appropriative water right holders received a notice that there was currently water available to meet their reported demand, to remain in effect until further notice.
  - November 2, 2015: A temporary opportunity to divert was issued to all Post-1914 water rights. This notice remains in effect until further notice.
  - Permitted and licensed water rights with Term 91 were curtailed on April 30, 2015. The Term 91 curtailment was lifted on December 10, 2015.
  
- **San Joaquin River – Water Shortage Notice Sent to 3,026 rights**
  - April 23, 2015: All Post-1914 appropriative rights.
  - June 12, 2015: All appropriative water rights with a priority date between 1903 and 1914.
  - Additional sub-watershed water shortage notices sent to:
    - June 26, 2015: Appropriative rights in the Upper San Joaquin watershed<sup>1</sup> with a priority date senior to 1903.
    - June 26, 2015: Appropriative rights in the Merced watershed with a priority date between 1858 and 1902.
    - June 26, 2015: Four appropriative rights in the Tuolumne River watershed.
  - October 27, 2015: Pre-1914 water right holders who received water shortage notices in June 2015 were notified that there was water available to meet their reported demand, and will remain in effect until further notice.
  - November 2, 2015: A temporary opportunity to divert was issued to all Post-1914 water rights. This notice remains in effect until further notice.
  - Permitted and licensed water rights with Term 91 were curtailed on April 30, 2015. The Term 91 curtailment was lifted on December 10, 2015.

<sup>1</sup> The Upper San Joaquin watershed includes the area upstream of Friant Dam down to the confluence with the Merced River.

- **Scott River – Water Shortage Notice Sent to 204 rights**
  - April 23, 2015: All Decreed Surplus Class Rights, Post-1914 rights, and Priority class 2 water rights in Schedule D4.
  - December 10, 2015: A temporary opportunity to divert was issued to all Decreed Surplus Class Rights, Post-1914 rights, and Priority class 2 water rights in Schedule D4 water rights. This notice remains in effect until further notice.
- **Deer Creek (tributary of the Sacramento River) – Curtailment Order Sent to 49 rights**
  - Water rights affected: Post-1914 rights (with limited exceptions) and other right holders required to provide specified fishery flows
  - Curtailment periods: Curtailment started on October 23, 2015. Rights were previously curtailed from April 17, 2015 to June 3, 2015.
- **Antelope Creek (tributary of the Sacramento River) – Curtailment Order Sent to 58 rights**
  - Water rights affected: Post-1914 rights (with limited exceptions) and other right holders required to provide specified fishery flows
  - Curtailment periods: Curtailment started November 1, 2015. Rights were previously curtailed from April 3, 2015 through May 29, 2015.

**Total Number of Water Rights Affected by Lack of Supply: 9,329**

# **EXHIBIT A**

BEFORE THE  
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

IN RE THE MATTERS OF:

SWRCB Enforcement Action  
ENF01951; ENF01949

WEST SIDE IRRIGATION  
DISTRICT CEASE AND DESIST  
ORDER HEARING,

and

BYRON-BETHANY IRRIGATION  
DISTRICT ADMINISTRATIVE  
CIVIL LIABILITY HEARING.

CERTIFIED  
COPY

VIDEOTAPED DEPOSITION OF THOMAS HOWARD

VOLUME II

November 25, 2015

Reported by: THRESHA SPENCER, CSR No. 11788

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kathryndavis & associates  
deposition reporting

1 was doing was protecting stored water. If I were doing  
2 that, I would have requested that the party that my staff  
3 use a Term 91 type of stored water release tracking in order  
4 to decide whether or not there should be curtailments in the  
5 system.

6 But we didn't use that method. We looked at the  
7 amount of fresh water that was moving through the system,  
8 and then, you know, tried to track what demands were being  
9 placed on that fresh water.

10 So, I don't know, perhaps you could reframe the  
11 question since you're assuming that we were -- it sounds  
12 like the assumption was we were tracking stored water in the  
13 system, which we weren't.

14 Q Let me just ask a simpler question.

15 Was one of the purposes of the curtailments to  
16 protect stored water?

17 A No.

18 Q It wasn't?

19 A It was a consequence; it wasn't the purpose. The  
20 purpose was to implement the state's water right priority  
21 system, as we understood it.

22 Q But this is the first time in history that the State  
23 Board has curtailed a pre-1914 water right in the Delta,  
24 correct?

25 A I don't know the answer to that. I know we've

1 would have to ask Barbara who that task was assigned to.

2 Q Did you or anyone on your staff keep track of which  
3 regulatory condition was controlling the release of stored  
4 water by the projects during the summer of 2015?

5 A I believe that that was a subject of discussion --  
6 that sort of thing was a subject of discussion at the RTDOT  
7 meetings.

8 Q What's the RTDOT?

9 A Real Time Drought Operations Team.

10 Q Did you attend those meetings?

11 A No.

12 Q Who did for your staff?

13 A Les Grober and Diane Riddle.

14 Q Are they on the hearing team staff?

15 A I don't know which team they're on.

16 MS. SPALETTA: Okay. Let's take a five-minute  
17 break.

18 THE VIDEOGRAPHER: We're now going off the record at  
19 8:49 a.m.

20 (A recess was taken.)

21 THE VIDEOGRAPHER: We're now going back on the  
22 record at 9:01 a.m.

23 Q BY MS. SPALETTA: All right. We're back from a  
24 short break.

25 Mr. Howard, right before we took a break, you told

DEPOSITION OF THOMAS HOWARD, VOLUME II

1 release additional stored water to meet those water quality  
2 control requirements?

3 A My concern was that it was our -- that we had an  
4 obligation to ensure that the state's water right priority  
5 system was honored, and so we attempted to do that. We were  
6 well aware that if the state's water right priority system  
7 was not honored, that there would be consequences associated  
8 with project stored water and potentially with public trust  
9 resources as well.

10 Q Were the curtailments that were issued to prevent  
11 water right holders from diverting stored project water or  
12 were they issued so that the projects wouldn't have to  
13 release additional stored water to meet water quality  
14 control requirements?

15 MR. HILDRETH: Asked and answered.

16 THE WITNESS: We didn't -- I wasn't tracking stored  
17 water, so, you know, I'm not sure I can answer your  
18 question.

19 Q BY MR. KELLY: Do you think that -- that any of the  
20 water right holders in the Delta this year diverted stored  
21 project water?

22 MR. HILDRETH: Calls for speculation. Lack of  
23 foundation.

24 THE WITNESS: Could you repeat the question?

25 Q BY MR. KELLY: Do you think that any of the water

DEPOSITION OF THOMAS HOWARD

REPORTER'S CERTIFICATE

1  
2 State of California )  
3 County of Sacramento ) ss.

4 I certify that the witness in the foregoing  
5 deposition,

6 THOMAS HOWARD,

7 was by me duly sworn to testify in the within-entitled  
8 cause; that said deposition was taken at the time and place  
9 therein named; that the testimony of said witness was  
10 reported by me, a duly Certified Shorthand Reporter  
11 of the State of California authorized to administer oaths  
12 and affirmations, and said testimony was thereafter  
13 transcribed into typewriting.

14 I further certify that I am not of counsel or  
15 attorney for either or any of the parties to said  
16 deposition, nor in any way interested in the outcome of the  
17 cause named in said deposition.

18 IN WITNESS WHEREOF, I have hereunto set my hand this  
19 day of December 2, 2015.

20  
21   
22 THRESHA SPENCER  
23 Certified Shorthand Reporter  
24 Certificate No. 11788  
25

# **EXHIBIT B**

BEFORE THE  
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

IN RE THE MATTERS OF:

SWRCB Enforcement Action  
ENF01951; ENF01949

WEST SIDE IRRIGATION  
DISTRICT CEASE AND DESIST  
ORDER HEARING,

and

BYRON-BETHANY IRRIGATION  
DISTRICT ADMINISTRATIVE  
CIVIL LIABILITY HEARING.

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CERTIFIED  
COPY

DEPOSITION OF THOMAS HOWARD

VOLUME I

November 19, 2015

Reported by: THRESHA SPENCER, CSR No. 11788

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kathryndavis & associates

DEPOSITION OF THOMAS HOWARD

1 assigned, based on unimpaired flow percentages at any  
2 particular time, that that was how the Delta demand was  
3 allocated based upon those percentages.

4 Q And who made the ultimate decision on which methods  
5 would be used to determine Delta demand and Delta supplies?

6 A Well, like I say, it was done two different ways, so  
7 I can't say that there was a final decision because we did  
8 the work two different ways. But then we applied those to  
9 the water availability -- my staff applied those to  
10 determine water availability in both instances to see if  
11 there was a difference and what that difference was.

12 Q And so, ultimately, curtailments were issued this  
13 year, correct?

14 A Right.

15 Q And when curtailments were issued, who made the  
16 decision on which of those two methods to use to issue  
17 curtailments, if you know?

18 A I did.

19 Q And what did you base your decision on?

20 MR. HILDRETH: Now you're getting into delivery of  
21 process. I don't think he's going to answer that. You can  
22 ask him who he talked to, who he got information from, but  
23 he's not going to reveal his thought process.

24 Q BY MR. KELLY: So you've instructed the witness not  
25 to answer?

DEPOSITION OF THOMAS HOWARD

1    been water of sufficient quality in the South Delta to  
2    divert for the entire month of June, wouldn't that  
3    demonstrate that there was sufficient water for them and  
4    they shouldn't have been curtailed on June the 12th?

5           MR. HILDRETH: Calls for speculation. It is an  
6    incomplete hypothetical.

7           THE WITNESS: Not under the methodology that we  
8    used.

9    Q       BY MR. KELLY: So it's just the methodology, is that  
10   what you're saying?

11   A       We selected a methodology to employ, and we  
12   exercised it.

13   Q       Do you know whether any curtailments were issued in  
14   order to protect water stored in reservoirs?

15   A       Would you repeat the question?

16   Q       Yeah. And I'll be more specific. Do you know  
17   whether curtailments were issued this year in order to  
18   protect water stored in the State Water Project and Central  
19   Valley Project?

20   A       I would say that we issued curtailment notices  
21   because we determined there was not water available for the  
22   water right holder. Considering the fact that the State  
23   Water Project and the Central Valley Project are guarantors  
24   of the system, the consequence of that is that there would  
25   be reduced need to release storage, but that was not the

DEPOSITION OF THOMAS HOWARD

REPORTER'S CERTIFICATE

1  
2 State of California )  
3 County of Sacramento ) ss.

4 I certify that the witness in the foregoing  
5 deposition,

6 THOMAS HOWARD,

7 was by me duly sworn to testify in the within-entitled  
8 cause; that said deposition was taken at the time and place  
9 therein named; that the testimony of said witness was  
10 reported by me, a duly Certified Shorthand Reporter  
11 of the State of California authorized to administer oaths  
12 and affirmations, and said testimony was thereafter  
13 transcribed into typewriting.

14 I further certify that I am not of counsel or  
15 attorney for either or any of the parties to said  
16 deposition, nor in any way interested in the outcome of the  
17 cause named in said deposition.

18 IN WITNESS WHEREOF, I have hereunto set my hand this  
19 day of November 23, 2015.

20  
21   
22 THRESHA SPENCER  
23 Certified Shorthand Reporter  
24 Certificate No. 11788  
25

# **EXHIBIT C**



**GOVERNOR BROWN ISSUES EXECUTIVE ORDER TO REDOUBLE STATE DROUGHT ACTIONS**

4-25-2014

LOS ANGELES - With California's driest months ahead, Governor Edmund G. Brown Jr. today issued an executive order to strengthen the state's ability to manage water and habitat effectively in drought conditions and called on all Californians to redouble their efforts to conserve water.

"The driest months are still to come in California and extreme drought conditions will get worse," said Governor Brown. "This order cuts red tape to help get water to farmers more quickly, ensure communities have safe drinking water, protect vulnerable species and prepare for an extreme fire season. I call on every city, every community, every Californian to conserve water in every way possible."

In January, the Governor declared a drought state of emergency. Since then, state water officials say that reservoirs, rainfall totals and the snowpack remain critically low. Current electronic readings show the snowpack's statewide water content at just 16 percent of average.

In the order, Governor Brown directs the Department of Water Resources and the State Water Resources Control Board to expedite approvals of voluntary water transfers to assist farmers. He also directs the California Department of Fish and Wildlife to accelerate monitoring of drought impacts on winter-run Chinook salmon in the Sacramento River and its tributaries, and to execute habitat restoration projects that will help fish weather the on-going drought.

To respond to the increased threat of wildfire season, the order streamlines contracting rules for the Governor's Office of Emergency Services and CALFIRE for equipment purchases and enables landowners to quickly clear brush and dead, dying or diseased trees that increase fire danger.

The order also calls on Californians and California businesses to take specific actions to avoid wasting water, including limiting lawn watering and car washing; recommends that schools, parks and golf courses limit the use of potable water for irrigation; and asks that hotels and restaurants give customers options to conserve water by only serving water upon request and other measures. The order also prevents homeowner associations from fining residents that limit their lawn watering and take other conservation measures.

The order provides a limited waiver of the California Environmental Quality Act for several actions that will limit harm from the drought. This waiver will enable these urgently needed actions to take place quickly and will remain in place through the end of 2014.

Last December, the Governor formed a Drought Task Force to closely manage precious water supplies, to expand water conservation wherever possible and to quickly respond to emerging drought impacts throughout the state. In May 2013, Governor Brown issued an Executive Order to direct state water officials to expedite the review and processing of voluntary transfers of water.

Governor Brown has called on all Californians to reduce their water use by 20 percent - visit [SaveOurH2O.org](http://SaveOurH2O.org) to find out how everyone can do their part, and visit [Drought.CA.Gov](http://Drought.CA.Gov) to learn more about how California is dealing with the effects of the drought.

The text of the executive order is below:

**A PROCLAMATION OF A CONTINUED STATE OF EMERGENCY**

**WHEREAS** on January 17, 2014, I proclaimed a State of Emergency to exist in the State of California due to severe drought conditions; and

**WHEREAS** state government has taken expedited actions as directed in that Proclamation to minimize harm from the drought; and

**WHEREAS** California's water supplies continue to be severely depleted despite a limited amount of rain and snowfall since January, with very limited snowpack in the Sierra Nevada mountains, decreased water levels in California's reservoirs, and reduced flows in the state's rivers; and

**WHEREAS** drought conditions have persisted for the last three years and the duration of this drought is unknown; and

**WHEREAS** the severe drought conditions continue to present urgent challenges: water shortages in communities across the state, greatly increased wildfire activity, diminished water for agricultural production, degraded habitat for many fish and wildlife species, threat of saltwater contamination of large fresh water supplies conveyed through the Sacramento-San Joaquin Bay Delta, and additional water scarcity if drought conditions continue into 2015; and

**WHEREAS** additional expedited actions are needed to reduce the harmful impacts from the drought as the state heads into several months of typically dry conditions; and

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**Governor Brown Announces Appointments**  
06-12-2015



**Governor Brown Issues Statement on Federal Drought Aid** 06-12-2015



**Governor Brown Announces Appointments**  
06-09-2015



**Governor Brown to Attend Metropolitan Water District Board Meeting, Participate in Drought Forum Tomorrow in L.A.** 06-08-2015



**Governor Brown Announces Appointments**  
06-08-2015



**Governor Brown to Speak at Climate Summit of the Americas in July** 06-05-2015



**Governor Brown to Speak at Climate Summit of the Americas in July** 06-05-2015



**Governor Brown Announces Appointments**  
06-05-2015



**Governor Brown Signs Legislation** 06-05-2015



**Governor Brown to Meet with South Bay Water Leaders on Drought Tomorrow in San Jose** 06-04-2015

**WHEREAS** the magnitude of the severe drought conditions continues to present threats beyond the control of the services, personnel, equipment, and facilities of any single local government and require the combined forces of a mutual aid region or regions to combat; and

**WHEREAS** under the provisions of section 8558(b) of the Government Code, I find that conditions of extreme peril to the safety of persons and property continue to exist in California due to water shortage and drought conditions with which local authority is unable to cope; and

**WHEREAS** under the provisions of section 8571 of the Government Code, I find that strict compliance with the various statutes and regulations specified in this proclamation would prevent, hinder, or delay the mitigation of the effects of the drought.

**NOW, THEREFORE, I, EDMUND G. BROWN JR.**, Governor of the State of California, in accordance with the authority vested in me by the Constitution and statutes of the State of California, including the Emergency Services Act and in particular Government Code section 8567, do hereby issue this Executive Order, effective immediately, to mitigate the effects of the drought conditions upon the people and property within the State of California.

**IT IS HEREBY ORDERED THAT:**

1. The orders and provisions contained in Proclamation No. 1-17-2014, dated January 17, 2014, remain in full force and effect except as modified herein.
2. The Department of Water Resources and the State Water Resources Control Board (Water Board) will immediately and expeditiously process requests to move water to areas of need, including requests involving voluntary water transfers, forbearance agreements, water exchanges, or other means. If necessary, the Department will request that the Water Board consider changes to water right permits to enable such voluntary movements of water.
3. Recognizing the tremendous importance of conserving water during this drought, all California residents should refrain from wasting water:
  - a. Avoid using water to clean sidewalks, driveways, parking lots and other hardscapes.
  - b. Turn off fountains and other decorative water features unless recycled or grey water is available.
  - c. Limit vehicle washing at home by patronizing local carwashes that use recycled water.
  - d. Limit outdoor watering of lawns and landscaping to no more than two times a week.

Recreational facilities, such as city parks and golf courses, and large institutional complexes, such as schools, business parks and campuses, should immediately implement water reduction plans to reduce the use of potable water for outdoor irrigation.

Commercial establishments such as hotel and restaurants should take steps to reduce water usage and increase public awareness of the drought through measures such as offering drinking water only upon request and providing customers with options to avoid daily washing of towels or sheets.

Professional sports facilities, such as basketball arenas, football, soccer, and baseball stadiums, and hockey rinks should reduce water usage and increase public awareness of the drought by reducing the use of potable water for outdoor irrigation and encouraging conservation by spectators.

The Water Board shall direct urban water suppliers that are not already implementing drought response plans to limit outdoor irrigation and other wasteful water practices such as those identified in this Executive Order. The Water Board will request by June 15 an update from urban water agencies on their actions to reduce water usage and the effectiveness of these efforts. The Water Board is directed to adopt emergency regulations as it deems necessary, pursuant to Water Code section 1058.5, to implement this directive.

Californians can learn more about conserving water from the Save Our Water campaign ([SaveOurH2O.org](http://SaveOurH2O.org)).

4. Homeowners Associations (commonly known as HOAs) have reportedly fined or threatened to fine homeowners who comply with water conservation measures adopted by a public agency or private water company. To prevent this practice, pursuant to Government Code section 8567, I order that any provision of the governing document, architectural or landscaping guidelines, or policies of a common interest development will be void and unenforceable to the extent it has the effect of prohibiting compliance with the water-saving measures contained in this directive, or any conservation measure adopted by a public agency or private water company, any provision of Division 4, Part 5 (commencing with section 4000) of the Civil Code notwithstanding.
5. All state agencies that distribute funding for projects that impact water resources, including groundwater resources, will require recipients of future financial assistance to have appropriate conservation and efficiency programs in place.
6. The Department of Fish and Wildlife will immediately implement monitoring of winter-run Chinook salmon in the Sacramento River and its tributaries, as well as several runs of salmon and species of smelt in the Delta as described in the April 8, 2014 Drought Operations Plan.
7. The Department of Fish and Wildlife will implement projects that respond to drought conditions through habitat restoration and through water infrastructure projects on property owned or managed by the Department of Fish and Wildlife or the Department of Water Resources for the benefit of fish and wildlife impacted by the drought.
8. The Department of Fish and Wildlife will work with other state and federal agencies and with landowners in priority watersheds to protect threatened and endangered species and species of special concern and maximize the beneficial uses of scarce water supplies, including employment of voluntary agreements to secure instream flows, relocation of members of those species, or through other measures.
9. The Department of Water Resources will expedite the consideration and, where appropriate, the implementation, of pump-back delivery of water through the State Water Project on behalf of water districts.
10. The Water Board will adopt statewide general waste discharge requirements to facilitate the use of

treated wastewater that meets standards set by the Department of Public Health, in order to reduce demand on potable water supplies.

11. The Department of Water Resources will conduct intensive outreach and provide technical assistance to local agencies in order to increase groundwater monitoring in areas where the drought has significant impacts, and develop updated contour maps where new data becomes available in order to more accurately capture changing groundwater levels. The Department will provide a public update by November 30 that identifies groundwater basins with water shortages, details remaining gaps in groundwater monitoring, and updates its monitoring of land subsidence and agricultural land following.

12. The California Department of Public Health, the Office of Emergency Services, and the Office of Planning and Research will assist local agencies that the Department of Public Health has identified as vulnerable to acute drinking water shortages in implementing solutions to those water shortages.

13. The Department of Water Resources and the Water Board, in coordination with other state agencies, will provide appropriate assistance to public agencies or private water companies in establishing temporary water supply connections to mitigate effects of the drought.

14. For the protection of health, safety, and the environment, CAL FIRE, the Office of Emergency Services, the Department of Water Resources, and the Department of Public Health, where appropriate, may enter into contracts and arrangements for the procurement of materials, goods, and services necessary to quickly mitigate the effects of the drought.

15. Pursuant to the drought legislation I signed into law on March 1, 2014, by July 1, 2014, the California Department of Food and Agriculture, in consultation with the Department of Water Resources and Water Board, will establish and implement a program to provide financial incentives to agricultural operations to invest in water irrigation treatment and distribution systems that reduce water and energy use, augment supply, and increase water and energy efficiency in agricultural applications.

16. To assist landowners meet their responsibilities for removing dead, dying and diseased trees and to help landowners clear other trees and plants close to structures that increase fire danger, certain noticing requirements are suspended for these activities. Specifically, the requirement that any person who conducts timber operations pursuant to the exemptions in Title 14, California Code of Regulations sections 1038 (b) and (c) submit notices to CAL FIRE under the provisions of Title 14, California Code of Regulations, section 1038.2 is hereby suspended. Timber operations pursuant to sections 1038(b) and (c) may immediately commence operations upon submission of the required notice to CAL FIRE and without a copy of the Director's notice of acceptance at the operating site. All other provisions of these regulations will remain in effect.

17. The Water Board will adopt and implement emergency regulations pursuant to Water Code section 1058.5, as it deems necessary to prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water, to promote water recycling or water conservation, and to require curtailment of diversions when water is not available under the diverter's priority of right.

18. In order to ensure that equipment and services necessary for drought response can be procured quickly, the provisions of the Government Code and the Public Contract Code applicable to state contracts, including, but not limited to, advertising and competitive bidding requirements, are hereby suspended for directives 7 and 14. Approval by the Department of Finance is required prior to the execution of any contract entered into pursuant to these directives.

19. For several actions called for in this proclamation, environmental review required by the California Environmental Quality Act is suspended to allow these actions to take place as quickly as possible. Specifically, for actions taken by state agencies pursuant to directives 2, 3, 6-10, 13, 15, and 17, for all actions taken pursuant to directive 12 when the Office of Planning and Research concurs that local action is required, and for all necessary permits needed to implement these respective actions, Division 13 (commencing with section 21000) of the Public Resources Code and regulations adopted pursuant to that Division are hereby suspended. The entities implementing these directives will maintain on their websites a list of the activities or approvals for which these provisions are suspended. This suspension and that provided in paragraph 9 of the January 17, 2014 Proclamation will expire on December 31, 2014, except that actions started prior to that date shall not be subject to Division 13 for the time required to complete them.

20. For several actions called for in this proclamation, certain regulatory requirements of the Water Code are suspended to allow these actions to take place as quickly as possible. Specifically, for actions taken pursuant to directive 2, section 13247 of the Water Code is suspended. The 30-day comment period provided in section 1726(f) of the Water Code is also suspended for actions taken pursuant to directive 2, but the Water Board will provide for a 15-day comment period. For actions taken by state agencies pursuant to directives 6 and 7, Chapter 3 of Part 3 (commencing with section 85225) of the Water Code is suspended. The entities implementing these directives will maintain on their websites a list of the activities or approvals for which these provisions are suspended.

**I FURTHER DIRECT** that as soon as hereafter possible, this Proclamation shall be filed in the Office of the Secretary of State and that widespread publicity and notice be given to this Proclamation.

**IN WITNESS WHEREOF** I have hereunto set my hand and caused the Great Seal of the State of California to be affixed this 25th day of April, 2014

EDMUND G. BROWN JR.  
Governor of California

ATTEST:

DEBRA BOWEN  
Secretary of State

###

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# **EXHIBIT D**

**Executive Department**  
State of California

**EXECUTIVE ORDER B-29-15**

**WHEREAS** on January 17, 2014, I proclaimed a State of Emergency to exist throughout the State of California due to severe drought conditions; and

**WHEREAS** on April 25, 2014, I proclaimed a Continued State of Emergency to exist throughout the State of California due to the ongoing drought; and

**WHEREAS** California's water supplies continue to be severely depleted despite a limited amount of rain and snowfall this winter, with record low snowpack in the Sierra Nevada mountains, decreased water levels in most of California's reservoirs, reduced flows in the state's rivers and shrinking supplies in underground water basins; and

**WHEREAS** the severe drought conditions continue to present urgent challenges including: drinking water shortages in communities across the state, diminished water for agricultural production, degraded habitat for many fish and wildlife species, increased wildfire risk, and the threat of saltwater contamination to fresh water supplies in the Sacramento-San Joaquin Bay Delta; and

**WHEREAS** a distinct possibility exists that the current drought will stretch into a fifth straight year in 2016 and beyond; and

**WHEREAS** new expedited actions are needed to reduce the harmful impacts from water shortages and other impacts of the drought; and

**WHEREAS** the magnitude of the severe drought conditions continues to present threats beyond the control of the services, personnel, equipment, and facilities of any single local government and require the combined forces of a mutual aid region or regions to combat; and

**WHEREAS** under the provisions of section 8558(b) of the Government Code, I find that conditions of extreme peril to the safety of persons and property continue to exist in California due to water shortage and drought conditions with which local authority is unable to cope; and

**WHEREAS** under the provisions of section 8571 of the California Government Code, I find that strict compliance with various statutes and regulations specified in this order would prevent, hinder, or delay the mitigation of the effects of the drought.

**NOW, THEREFORE, I, EDMUND G. BROWN JR.,** Governor of the State of California, in accordance with the authority vested in me by the Constitution and statutes of the State of California, in particular Government Code sections 8567 and 8571 of the California Government Code, do hereby issue this Executive Order, effective immediately.

**IT IS HEREBY ORDERED THAT:**

1. The orders and provisions contained in my January 17, 2014 Proclamation, my April 25, 2014 Proclamation, and Executive Orders B-26-14 and B-28-14 remain in full force and effect except as modified herein.

**SAVE WATER**

2. The State Water Resources Control Board (Water Board) shall impose restrictions to achieve a statewide 25% reduction in potable urban water usage through February 28, 2016. These restrictions will require water suppliers to California's cities and towns to reduce usage as compared to the amount used in 2013. These restrictions should consider the relative per capita water usage of each water suppliers' service area, and require that those areas with high per capita use achieve proportionally greater reductions than those with low use. The California Public Utilities Commission is requested to take similar action with respect to investor-owned utilities providing water services.
3. The Department of Water Resources (the Department) shall lead a statewide initiative, in partnership with local agencies, to collectively replace 50 million square feet of lawns and ornamental turf with drought tolerant landscapes. The Department shall provide funding to allow for lawn replacement programs in underserved communities, which will complement local programs already underway across the state.
4. The California Energy Commission, jointly with the Department and the Water Board, shall implement a time-limited statewide appliance rebate program to provide monetary incentives for the replacement of inefficient household devices.
5. The Water Board shall impose restrictions to require that commercial, industrial, and institutional properties, such as campuses, golf courses, and cemeteries, immediately implement water efficiency measures to reduce potable water usage in an amount consistent with the reduction targets mandated by Directive 2 of this Executive Order.
6. The Water Board shall prohibit irrigation with potable water of ornamental turf on public street medians.
7. The Water Board shall prohibit irrigation with potable water outside of newly constructed homes and buildings that is not delivered by drip or microspray systems.

8. The Water Board shall direct urban water suppliers to develop rate structures and other pricing mechanisms, including but not limited to surcharges, fees, and penalties, to maximize water conservation consistent with statewide water restrictions. The Water Board is directed to adopt emergency regulations, as it deems necessary, pursuant to Water Code section 1058.5 to implement this directive. The Water Board is further directed to work with state agencies and water suppliers to identify mechanisms that would encourage and facilitate the adoption of rate structures and other pricing mechanisms that promote water conservation. The California Public Utilities Commission is requested to take similar action with respect to investor-owned utilities providing water services.

#### **INCREASE ENFORCEMENT AGAINST WATER WASTE**

9. The Water Board shall require urban water suppliers to provide monthly information on water usage, conservation, and enforcement on a permanent basis.
10. The Water Board shall require frequent reporting of water diversion and use by water right holders, conduct inspections to determine whether illegal diversions or wasteful and unreasonable use of water are occurring, and bring enforcement actions against illegal diverters and those engaging in the wasteful and unreasonable use of water. Pursuant to Government Code sections 8570 and 8627, the Water Board is granted authority to inspect property or diversion facilities to ascertain compliance with water rights laws and regulations where there is cause to believe such laws and regulations have been violated. When access is not granted by a property owner, the Water Board may obtain an inspection warrant pursuant to the procedures set forth in Title 13 (commencing with section 1822.50) of Part 3 of the Code of Civil Procedure for the purposes of conducting an inspection pursuant to this directive.
11. The Department shall update the State Model Water Efficient Landscape Ordinance through expedited regulation. This updated Ordinance shall increase water efficiency standards for new and existing landscapes through more efficient irrigation systems, greywater usage, onsite storm water capture, and by limiting the portion of landscapes that can be covered in turf. It will also require reporting on the implementation and enforcement of local ordinances, with required reports due by December 31, 2015. The Department shall provide information on local compliance to the Water Board, which shall consider adopting regulations or taking appropriate enforcement actions to promote compliance. The Department shall provide technical assistance and give priority in grant funding to public agencies for actions necessary to comply with local ordinances.
12. Agricultural water suppliers that supply water to more than 25,000 acres shall include in their required 2015 Agricultural Water Management Plans a detailed drought management plan that describes the actions and measures the supplier will take to manage water demand during drought. The Department shall require those plans to include quantification of water supplies and demands for 2013, 2014, and 2015 to the extent data is available. The Department will provide technical assistance to water suppliers in preparing the plans.

13. Agricultural water suppliers that supply water to 10,000 to 25,000 acres of irrigated lands shall develop Agricultural Water Management Plans and submit the plans to the Department by July 1, 2016. These plans shall include a detailed drought management plan and quantification of water supplies and demands in 2013, 2014, and 2015, to the extent that data is available. The Department shall give priority in grant funding to agricultural water suppliers that supply water to 10,000 to 25,000 acres of land for development and implementation of Agricultural Water Management Plans.
14. The Department shall report to Water Board on the status of the Agricultural Water Management Plan submittals within one month of receipt of those reports.
15. Local water agencies in high and medium priority groundwater basins shall immediately implement all requirements of the California Statewide Groundwater Elevation Monitoring Program pursuant to Water Code section 10933. The Department shall refer noncompliant local water agencies within high and medium priority groundwater basins to the Water Board by December 31, 2015, which shall consider adopting regulations or taking appropriate enforcement to promote compliance.
16. The California Energy Commission shall adopt emergency regulations establishing standards that improve the efficiency of water appliances, including toilets, urinals, and faucets available for sale and installation in new and existing buildings.

#### **INVEST IN NEW TECHNOLOGIES**

17. The California Energy Commission, jointly with the Department and the Water Board, shall implement a Water Energy Technology (WET) program to deploy innovative water management technologies for businesses, residents, industries, and agriculture. This program will achieve water and energy savings and greenhouse gas reductions by accelerating use of cutting-edge technologies such as renewable energy-powered desalination, integrated on-site reuse systems, water-use monitoring software, irrigation system timing and precision technology, and on-farm precision technology.

#### **STREAMLINE GOVERNMENT RESPONSE**

18. The Office of Emergency Services and the Department of Housing and Community Development shall work jointly with counties to provide temporary assistance for persons moving from housing units due to a lack of potable water who are served by a private well or water utility with less than 15 connections, and where all reasonable attempts to find a potable water source have been exhausted.
19. State permitting agencies shall prioritize review and approval of water infrastructure projects and programs that increase local water supplies, including water recycling facilities, reservoir improvement projects, surface water treatment plants, desalination plants, stormwater capture, and greywater systems. Agencies shall report to the Governor's Office on applications that have been pending for longer than 90 days.

20. The Department shall take actions required to plan and, if necessary, implement Emergency Drought Salinity Barriers in coordination and consultation with the Water Board and the Department of Fish and Wildlife at locations within the Sacramento - San Joaquin delta estuary. These barriers will be designed to conserve water for use later in the year to meet state and federal Endangered Species Act requirements, preserve to the extent possible water quality in the Delta, and retain water supply for essential human health and safety uses in 2015 and in the future.
21. The Water Board and the Department of Fish and Wildlife shall immediately consider any necessary regulatory approvals for the purpose of installation of the Emergency Drought Salinity Barriers.
22. The Department shall immediately consider voluntary crop idling water transfer and water exchange proposals of one year or less in duration that are initiated by local public agencies and approved in 2015 by the Department subject to the criteria set forth in Water Code section 1810.
23. The Water Board will prioritize new and amended safe drinking water permits that enhance water supply and reliability for community water systems facing water shortages or that expand service connections to include existing residences facing water shortages. As the Department of Public Health's drinking water program was transferred to the Water Board, any reference to the Department of Public Health in any prior Proclamation or Executive Order listed in Paragraph 1 is deemed to refer to the Water Board.
24. The California Department of Forestry and Fire Protection shall launch a public information campaign to educate the public on actions they can take to help to prevent wildfires including the proper treatment of dead and dying trees. Pursuant to Government Code section 8645, \$1.2 million from the State Responsibility Area Fire Prevention Fund (Fund 3063) shall be allocated to the California Department of Forestry and Fire Protection to carry out this directive.
25. The Energy Commission shall expedite the processing of all applications or petitions for amendments to power plant certifications issued by the Energy Commission for the purpose of securing alternate water supply necessary for continued power plant operation. Title 20, section 1769 of the California Code of Regulations is hereby waived for any such petition, and the Energy Commission is authorized to create and implement an alternative process to consider such petitions. This process may delegate amendment approval authority, as appropriate, to the Energy Commission Executive Director. The Energy Commission shall give timely notice to all relevant local, regional, and state agencies of any petition subject to this directive, and shall post on its website any such petition.

26. For purposes of carrying out directives 2–9, 11, 16–17, 20–23, and 25, Division 13 (commencing with section 21000) of the Public Resources Code and regulations adopted pursuant to that Division are hereby suspended. This suspension applies to any actions taken by state agencies, and for actions taken by local agencies where the state agency with primary responsibility for implementing the directive concurs that local action is required, as well as for any necessary permits or approvals required to complete these actions. This suspension, and those specified in paragraph 9 of the January 17, 2014 Proclamation, paragraph 19 of the April 25, 2014 proclamation, and paragraph 4 of Executive Order B-26-14, shall remain in effect until May 31, 2016. Drought relief actions taken pursuant to these paragraphs that are started prior to May 31, 2016, but not completed, shall not be subject to Division 13 (commencing with section 21000) of the Public Resources Code for the time required to complete them.
27. For purposes of carrying out directives 20 and 21, section 13247 and Chapter 3 of Part 3 (commencing with section 85225) of the Water Code are suspended.
28. For actions called for in this proclamation in directive 20, the Department shall exercise any authority vested in the Central Valley Flood Protection Board, as codified in Water Code section 8521, et seq., that is necessary to enable these urgent actions to be taken more quickly than otherwise possible. The Director of the Department of Water Resources is specifically authorized, on behalf of the State of California, to request that the Secretary of the Army, on the recommendation of the Chief of Engineers of the Army Corps of Engineers, grant any permission required pursuant to section 14 of the Rivers and Harbors Act of 1899 and codified in section 48 of title 33 of the United States Code.
29. The Department is directed to enter into agreements with landowners for the purposes of planning and installation of the Emergency Drought Barriers in 2015 to the extent necessary to accommodate access to barrier locations, land-side and water-side construction, and materials staging in proximity to barrier locations. Where the Department is unable to reach an agreement with landowners, the Department may exercise the full authority of Government Code section 8572.
30. For purposes of this Executive Order, chapter 3.5 (commencing with section 11340) of part 1 of division 3 of the Government Code and chapter 5 (commencing with section 25400) of division 15 of the Public Resources Code are suspended for the development and adoption of regulations or guidelines needed to carry out the provisions in this Order. Any entity issuing regulations or guidelines pursuant to this directive shall conduct a public meeting on the regulations and guidelines prior to adopting them.

31. In order to ensure that equipment and services necessary for drought response can be procured quickly, the provisions of the Government Code and the Public Contract Code applicable to state contracts, including, but not limited to, advertising and competitive bidding requirements, are hereby suspended for directives 17, 20, and 24. Approval by the Department of Finance is required prior to the execution of any contract entered into pursuant to these directives.

This Executive Order is not intended to, and does not, create any rights or benefits, substantive or procedural, enforceable at law or in equity, against the State of California, its agencies, departments, entities, officers, employees, or any other person.

I **FURTHER DIRECT** that as soon as hereafter possible, this Order be filed in the Office of the Secretary of State and that widespread publicity and notice be given to this Order.

**IN WITNESS WHEREOF** I have hereunto set my hand and caused the Great Seal of the State of California to be affixed this 1<sup>st</sup> day of April 2015.

\_\_\_\_\_  
EDMUND G. BROWN JR.  
Governor of California

**ATTEST:**

\_\_\_\_\_  
ALEX PADILLA  
Secretary of State

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

**DECLARATION OF LAUREN D. BERNADETT IN SUPPORT OF MOTION TO DISMISS ADMINISTRATIVE CIVIL LIABILITY PROCEEDING IN ENF01951 SWRCB'S METHOD OF DETERMINING WATER AVAILABILITY IS AN UNLAWFUL UNDERGROUND REGULATION**

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 January 25, 2016 at Sacramento, California.

\_\_\_\_\_  
Yolanda De La Cruz

**SERVICE LIST OF PARTICIPANTS  
BYRON-BETHANY IRRIGATION DISTRICT  
ADMINISTRATIVE CIVIL LIABILITY HEARING  
(Revised 9/2/15; Revised: 9/11/15)**

SOMACH SIMMONS & DUNN  
A Professional Corporation

<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>Division of Water Rights Prosecution Team Andrew Tauriainen, Attorney III SWRCB Office of Enforcement 1001 I Street, 16th Floor Sacramento, CA 95814 <a href="mailto:andrew.tauriainen@waterboards.ca.gov">andrew.tauriainen@waterboards.ca.gov</a></p>	<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>Byron-Bethany Irrigation District Daniel Kelly Somach Simmons &amp; Dunn 500 Capitol Mall, Suite 1000 Sacramento, CA 95814 <a href="mailto:dkelly@somachlaw.com">dkelly@somachlaw.com</a></p>
<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>Patterson Irrigation District Banta-Carbona Irrigation District The West Side Irrigation District Jeanne M. Zolezzi Herum\Crabtree\Suntag 5757 Pacific Avenue, Suite 222 Stockton, CA 95207 <a href="mailto:jzolezzi@herumcrabtree.com">jzolezzi@herumcrabtree.com</a></p>	<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>City and County of San Francisco Jonathan Knapp Office of the City Attorney 1390 Market Street, Suite 418 San Francisco, CA 94102 <a href="mailto:jonathan.knapp@sfgov.org">jonathan.knapp@sfgov.org</a></p>
<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>Central Delta Water Agency Jennifer Spaletta Law PC P.O. Box 2660 Lodi, CA 95241 <a href="mailto:jennifer@spalettalaw.com">jennifer@spalettalaw.com</a></p> <p>Dante John Nomellini Daniel A. McDaniel Dante John Nomellini, Jr. NOMELLINI, GRILLI &amp; MCDANIEL 235 East Weber Avenue Stockton, CA 95202 <a href="mailto:ngmplcs@pacbell.net">ngmplcs@pacbell.net</a> <a href="mailto:dantejr@pacbell.net">dantejr@pacbell.net</a></p>	<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>California Department of Water Resources Robin McGinnis, Attorney P.O. Box 942836 Sacramento, CA 94236-0001 <a href="mailto:robin.mcginnis@water.ca.gov">robin.mcginnis@water.ca.gov</a></p>
<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>Richard Morat 2821 Berkshire Way Sacramento, CA 95864 <a href="mailto:rmorat@gmail.com">rmorat@gmail.com</a></p>	<p><b><u>VIA ELECTRONIC MAIL</u></b></p> <p>San Joaquin Tributaries Authority Tim O'Laughlin Valerie C. Kincaid O'Laughlin &amp; Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95816 <a href="mailto:towater@olaughlinparis.com">towater@olaughlinparis.com</a> <a href="mailto:vkincaid@olaughlinparis.com">vkincaid@olaughlinparis.com</a></p>

DECL. OF L. BERNADETT IN SUPP OF MTN TO DISMISS ADMIN CIVIL LIABILITY PROCEEDING IN ENFO1951 SWRCB'S METHOD OF DETERMINING WATER AVAIL. IS AN UNLAWFUL UNDERGROUN REG.

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<u>VIA ELECTRONIC MAIL</u>	<u>VIA ELECTRONIC MAIL</u>
South Delta Water Agency John Herrick Law Offices of John Herrick 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 Email: Jherrlaw@aol.com	State Water Contractors Stefani Morris 1121 L Street, Suite 1050 Sacramento, CA 95814 <a href="mailto:smorris@swc.org">smorris@swc.org</a>

**SERVICE LIST  
WEST SIDE IRRIGATION DISTRICT  
CEASE AND DESIST ORDER HEARING**

**SOMACH SIMMONS & DUNN**  
A Professional Corporation

<p>Division of Water Rights Prosecution Team Andrew Tauriainen, Attorney III SWRCB Office of Enforcement 1001 I Street, 16th Floor Sacramento, CA 95814 <a href="mailto:andrew.tauriainen@waterboards.ca.gov">andrew.tauriainen@waterboards.ca.gov</a></p>	<p>The West Side Irrigation District Jeanne M. Zolezzi Karna Harringfeld Janelle Krattiger Herum\Crabtree\Suntag 5757 Pacific Avenue, Suite 222 Stockton, CA 95207 <a href="mailto:jzolezzi@herumcrabtree.com">jzolezzi@herumcrabtree.com</a> <a href="mailto:kharringfeld@herumcrabtree.com">kharringfeld@herumcrabtree.com</a> <a href="mailto:jkrattiger@herumcrabtree.com">jkrattiger@herumcrabtree.com</a></p>
<p>State Water Contractors Stefani Morris 1121 L Street, Suite 1050 Sacramento, CA 95814 <a href="mailto:smorris@swc.org">smorris@swc.org</a></p>	<p>Westlands Water District Daniel O'Hanlon Rebecca Akroyd Kronick Moskovitz Tiedemann &amp; Girad 400 Capitol Mall, 27<sup>th</sup> Floor Sacramento, CA 95814 <a href="mailto:dohanlon@kmtg.com">dohanlon@kmtg.com</a> <a href="mailto:rakroyd@kmtg.com">rakroyd@kmtg.com</a></p> <p>Phillip Williams of Westlands Water District <a href="mailto:pwilliams@westlandswater.org">pwilliams@westlandswater.org</a></p>
<p>South Delta Water Agency John Herrick Law Offices of John Herrick 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 Email: <a href="mailto:Jherrrlaw@aol.com">Jherrrlaw@aol.com</a></p>	<p>Central Delta Water Agency Jennifer Spaletta Law PC P.O. Box 2660 Lodi, CA 95241 <a href="mailto:jennifer@spalettalaw.com">jennifer@spalettalaw.com</a></p> <p>Dante Nomellini and Dante Nomellini, Jr. NOMELLINI, GRILLI &amp; MCDANIEL <a href="mailto:ngmplcs@pacbell.net">ngmplcs@pacbell.net</a> <a href="mailto:dantejr@pacbell.net">dantejr@pacbell.net</a></p>
<p>City and County of San Francisco Jonathan Knapp Office of the City Attorney 1390 Market Street, Suite 418 San Francisco, CA 94102 <a href="mailto:jonathan.knapp@sfgov.org">jonathan.knapp@sfgov.org</a></p>	<p>San Joaquin Tributaries Authority Valerie C. Kincaid O'Laughlin &amp; Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95816 <a href="mailto:vkincaid@olaughlinparis.com">vkincaid@olaughlinparis.com</a></p>
<p>Byron-Bethany Irrigaton District Daniel Kelly Somach Simmons &amp; Dunn 500 Capitol Mall, Suite 1000 Sacramento, CA 95814 <a href="mailto:dkelly@somachlaw.com">dkelly@somachlaw.com</a></p>	<p>California Department of Water Resources Robin McGinnis, Attorney P.O. Box 942836 Sacramento, CA 94236-0001 <a href="mailto:robin.mcginnis@water.ca.gov">robin.mcginnis@water.ca.gov</a></p>

# **EXHIBIT E**

**State of California  
Office of Administrative Law**

In re:  
State Water Resources Control Board

Regulatory Action:

Title 23, California Code of Regulations

Adopt sections: 876, 878.3

Amend sections: 878.1, 879

Repeal sections:

NOTICE OF APPROVAL OF EMERGENCY  
REGULATORY ACTION

Government Code Sections 11346.1 and  
11349.6

OAL File No. 2014-0708-02 E

The State Water Resources Control Board (Board) submitted this emergency action to adopt two sections and amend two sections under an article in title 23 of the California Code of Regulations that pertains to curtailment of water diversions based on insufficient flow to meet all needs. The state's current system for curtailing water diversions and enforcing those curtailments will not provide for timely and effective implementation of the state's system of senior water rights during the current drought when numerous water diversions require curtailment and enforcement in a short period of time. The proposed regulations will set drought emergency curtailment method and reporting requirements necessary to ensure the orderly curtailment of water rights to protect senior water rights. The proposed regulations also clarify the information the Board will rely on in issuing initial curtailments, make the curtailment a system of enforceable orders, thereby increasing its effectiveness, and clarify the procedures for contesting and making exceptions to curtailment orders.

OAL approves this emergency regulatory action pursuant to sections 11346.1 and 11349.6 of the Government Code.

This emergency regulatory action is effective on 7/16/2014 and will expire on 4/14/2015. The Certificate of Compliance for this action is due no later than 4/13/2015.

Date: 7/16/2014



Richard L. Smith  
Senior Attorney

For: DEBRA M. CORNEZ  
Director

Original: Thomas Howard  
Copy: David Rose

# EMERGENCY

Instructions on reverse

For use by Secretary of State only

STD 400 (REV 01-2013)

OAL FILE NUMBERS	NOTICE FILE NUMBER <b>Z</b>	REGULATORY ACTION NUMBER	EMERGENCY NUMBER <b>2014-070P-02E</b>
For use by Office of Administrative Law (OAL) only		2014 JUL -3 PM 4:31 OFFICE OF ADMINISTRATIVE LAW	
AGENCY WITH RULEMAKING AUTHORITY State Water Resources Control Board		AGENCY FILE NUMBER (if any) <b>2017-0031</b>	

ENDORSED FILED  
 2014 JUL 16 PM 1:09  


**A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)**

1. SUBJECT OF NOTICE Curtailment of Diversions Due to Insufficient Flow for Senior Water Rights	TITLE(S) 23	FIRST SECTION AFFECTED 875	2. REQUESTED PUBLICATION DATE
3. NOTICE TYPE <input checked="" type="checkbox"/> Notice re Proposed Regulatory Action <input type="checkbox"/> Other	4. AGENCY CONTACT PERSON David Rose	TELEPHONE NUMBER (916) 341-5196	FAX NUMBER (Optional) (916) 341-5400
OAL USE ONLY <input type="checkbox"/> Approved as Submitted <input type="checkbox"/> Approved as Modified <input type="checkbox"/> Disapproved/Withdrawn	ACTION ON PROPOSED NOTICE	NOTICE REGISTER NUMBER	PUBLICATION DATE

**B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)**

1a. SUBJECT OF REGULATION(S) Statewide Drought Related Curtailment of Water Diversions to Protect Senior Water Rights	1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)
--	--

2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (including title 23, if topics related)
SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)
ADOPT 875, 878.3
AMEND 878.1, 879
REPEAL
TITLE(S) 23

3. TYPE OF FILING
<input type="checkbox"/> Regular Rulemaking (Gov. Code § 11346) <input type="checkbox"/> Resubmittal of disapproved or withdrawn non-emergency filing (Gov. Code §§ 11349.3, 11349.4) <input checked="" type="checkbox"/> Emergency (Gov. Code, § 11346.1(b)) <input type="checkbox"/> Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§ 11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute. <input type="checkbox"/> Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, § 11346.1) <input type="checkbox"/> Emergency Readopt (Gov. Code, § 11346.1(h)) <input type="checkbox"/> File & Print <input type="checkbox"/> Other (Specify) _____ <input type="checkbox"/> Changes Without Regulatory Effect (Cal. Code Regs. title 1, § 100) <input type="checkbox"/> Print Only

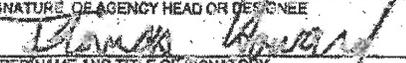
4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, § 44 and Gov. Code § 11347.1)

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(c); Cal. Code Regs. title 1, § 100)
<input type="checkbox"/> Effective January 1, April 1, July 1, or October 1 (Gov. Code § 11343.4(a)) <input checked="" type="checkbox"/> Effective on filing with Secretary of State <input type="checkbox"/> § 100 Changes Without Regulatory Effect <input type="checkbox"/> Effective other (Specify) _____

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY
<input checked="" type="checkbox"/> Department of Finance (Form STD. 399) (SAM 56660) <input type="checkbox"/> Fair Political Practices Commission <input type="checkbox"/> State Fire Marshal <input type="checkbox"/> Other (Specify) _____

7. CONTACT PERSON David Rose	TELEPHONE NUMBER (916) 341-5196	FAX NUMBER (Optional) (916) 341-5400	E-MAIL ADDRESS (Optional) david.rose@waterboards.ca.gov
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8. I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.

SIGNATURE OF AGENCY HEAD OR DESIGNEE 	DATE 7/3/14
TYPED NAME AND TITLE OF SIGNATORY Thomas Howard, Executive Director, State Water Resources Control Board	

For use by Office of Administrative Law (OAL) only

ENDORSED APPROVED

JUL 16 2014

Office of Administrative Law

## NOTICE PUBLICATION/REGULATIONS SUBMISSION

STD. 400 (REV. 01-2013) (REVERSE)

## INSTRUCTIONS FOR PUBLICATION OF NOTICE AND SUBMISSION OF REGULATIONS

Use the form STD. 400 for submitting notices for publication and regulations for Office of Administrative Law (OAL) review.

**ALL FILINGS**

Enter the name of the agency with the rulemaking authority and agency's file number, if any.

**NOTICES**

Complete Part A when submitting a notice to OAL for publication in the California Regulatory Notice Register. Submit two (2) copies of the STD. 400 with four (4) copies of the notice and, if a notice of proposed regulatory action, one copy each of the complete text of the regulations and the statement of reasons. Upon receipt of the notice, OAL will place a number in the box marked "Notice File Number." If the notice is approved, OAL will return the STD. 400 with a copy of the notice and will check "Approved as Submitted" or "Approved as Modified." If the notice is disapproved or withdrawn, that will also be indicated in the space marked "Action on Proposed Notice." Please submit a new form STD. 400 when resubmitting the notice.

**REGULATIONS**

When submitting regulations to OAL for review, fill out STD. 400, Part B. Use the form that was previously submitted with the notice of proposed regulatory action which contains the "Notice File Number" assigned, or, if a new STD. 400 is used, please include the previously assigned number in the box marked "Notice File Number." In filling out Part B, be sure to complete the certification including the date signed, the title and typed name of the signatory. The following must be submitted when filing regulations: seven (7) copies of the regulations with a copy of the STD. 400 attached to the front of each (one copy must bear an original signature on the certification) and the complete rulemaking file with index and sworn statement. (See Gov. Code § 11347.3 for rulemaking file contents.)

**RESUBMITTAL OF DISAPPROVED OR WITHDRAWN REGULATIONS**

When resubmitting previously disapproved or withdrawn regulations to OAL for review, use a new STD. 400 and fill out Part B, including the signed certification. Enter the OAL file number(s) of all previously disapproved or withdrawn filings in the box marked "All Previous Related OAL Regulatory Action Number(s)" (box 1b. of Part B). Submit seven (7) copies of the regulation to OAL with a copy of the STD. 400 attached to the front of each (one copy must bear an original signature on the certification). Be sure to include an index, sworn statement, and (if returned to the agency) the complete rulemaking file. (See Gov. Code §§ 11349.4 and 11347.3 for more specific requirements.)

**EMERGENCY REGULATIONS**

Fill out only Part B, including the signed certification, and submit seven (7) copies of the regulations with a copy of the STD. 400 attached to the front of each (one copy must bear an original signature on the certification). (See Gov. Code § 11346.1 for other requirements.)

**NOTICE FOLLOWING EMERGENCY ACTION**

When submitting a notice of proposed regulatory action after an emergency filing, use a new STD. 400 and complete Part A and insert the OAL file number(s) for the original emergency filing(s) in the box marked "All Previous Related OAL Regulatory Action Number(s)" (box 1b. of Part B). OAL will return the STD. 400 with the notice upon approval or disapproval. If the notice is disapproved, please fill out a new form when resubmitting for publication.

**CERTIFICATE OF COMPLIANCE**

When filing the certificate of compliance for emergency regulations, fill out Part B, including the signed certification, on the form that was previously submitted with the notice. If a new STD. 400 is used, fill in Part B including the signed certification, and enter the previously assigned notice file number in the box marked "Notice File Number" at the top of the form. The materials indicated in these instructions for "REGULATIONS" must also be submitted.

**EMERGENCY REGULATIONS - READOPTION**

When submitting previously approved emergency regulations for re-adoption, use a new STD. 400 and fill out Part B, including the signed certification, and insert the OAL file number(s) related to the original emergency filing in the box marked "All Previous Related OAL Regulatory Action Number(s)" (box 1b. of Part B).

**CHANGES WITHOUT REGULATORY EFFECT**

When submitting changes without regulatory effect pursuant to California Code of Regulations, Title 1, section 100, complete Part B, including marking the appropriate box in both B.3. and B.5.

**ABBREVIATIONS**

Cal. Code Regs. - California Code of Regulations  
Gov. Code - Government Code  
SAM - State Administrative Manual

For questions regarding this form or the procedure for filing notices or submitting regulations to OAL for review, please contact the Office of Administrative Law Reference Attorney at (916) 323-6815.

In Title 23, Division 3, Chapter 2, Article 24, add Sections 875 and 878.3, and amend Sections 878.1 and 879 to read:

§ 875. Curtailments Due to Lack of Water Availability

(a) California is in a state of extreme drought, and the Governor has issued a proclamation of a state of emergency based on these drought conditions.

Under such drought circumstances, Water Code section 1058.5 provides for the State Water Resources Control Board to adopt emergency regulations to provide for curtailments in order of water right priority when water is not available under the diverter's priority of right.

(b) After the effective date of this regulation, when flows are sufficient to support some but not all diversions, the Deputy Director for the Division of Water Rights, or her designee, may issue curtailment orders to post-1914 appropriative water right holders in order of water right priority, requiring the curtailment of water diversion and use except as provided in sections 878 and 878.3.

(c) In determining whether water is available under a diverter's priority of right and to issue or suspend curtailment orders, the Deputy Director for the Division of Water Rights, or her designee, may rely upon:

- (1) Relevant available information regarding date of priority, including claims of first use in statements of water diversion and use and other information contained in the Division of Water Rights files. Absent evidence to the contrary, riparian water rights are presumed senior to appropriative water rights with regard to natural flow for purposes of curtailments pursuant to this section.
- (2) Water right demand projections based on recent reports of water use for permits and licenses, 2010 or later, statements of water diversion and use, or reports submitted by watermasters.
- (3) Water availability projections based on:
  - i. Protected full natural flow data supplied by the Department of Water Resources, where available;
  - ii. Projections from the National Weather Service's River Forecasts website, where available;
  - iii. Stream gage data, where available; or
  - iv. Other data that the Deputy Director for the Division of Water Rights determines is appropriate, given data availability and reliability and staff resources.
- (4) To the extent that it is available and staff resources permit, the Deputy Director for the Division of Water Rights may also consider additional pertinent and reliable information when determining water right priorities, water availability and demand projections, and whether curtailment orders should be suspended.

Any order issued pursuant to this section shall be accompanied by the Deputy Director's determination of: (i) the quantity of water supply available by priority or type of right; (ii) the total water right demand, including the known quantity and basis of right; and (iii) the State Water Board's assumptions pertaining to the diverter's right. When issuing curtailment orders to senior water right holders, the Deputy Director shall include information regarding the quantity of water that should be made available by the prior curtailment of more junior water rights.

(d) Curtailment orders will initially be mailed to each water right holder or the agent of record on file with the State Water Resources Control Board, Division of Water Rights. The Deputy Director shall provide notice by e-mail or the State Water Board's drought webpage at least five (5) working days prior to issuance of curtailment orders. The water right holder or agent of record is responsible for immediately providing notice of the orders to all diverters and/or water users exercising the water right.

(e) Within seven (7) days of the effective date of this regulation, the State Water Resources Control Board will establish an email distribution list that water right holders should join to receive drought notices and updates regarding curtailments. Notice provided by email or by posting on the State Water Resources Control Board's drought web page shall be sufficient for all purposes related to drought notices and updates regarding curtailments.

(f) All curtailment orders issued under this article shall be subject to reconsideration under article 2 (commencing with section 1122) of chapter 4 of part 1 of division 2 of the California Water Code.

Authority: Sections 1058 and 1058.5, Water Code.

Reference: Sections 174, 1050, 1051, 1051.5, 1052, 1058.5, 1122, 1123 and 1825, Water Code.

#### **§ 878.1 Minimum Health and Safety Needs**

(a) This section shall not apply to curtailments issued under section 875 of this article.

(ab) A diversion that would otherwise be subject to curtailment may be authorized if:

(1) The diversion is necessary for minimum health and safety needs; and therefore

(2) The diversion is necessary to further the constitutional policy that the water resources of the state be put to beneficial use to the full extent they are capable, and that waste and unreasonable use be prevented, notwithstanding the effect of the diversions on more senior water rights or instream beneficial uses.

(ac) Given the essential nature of water in sustaining human life, use even under a more senior right for any other purpose when domestic and municipal supplies required for minimum health and safety needs cannot be met is a waste and unreasonable use under the California

Constitution, Article X, § 2.

(1) Diversions for domestic and municipal use under any valid basis of right, of less than 50 gallons per person, per day; and not exceeding 10 acre-feet per year of storage or 4,500 gallons per day of direct diversion, may continue after issuance of a curtailment order without further approval from the Deputy Director, subject to the conditions set forth in this section. Any diverter wishing to continue diversion under this subdivision must submit to the Deputy Director certification, under penalty of perjury, of compliance with the requirements of subdivisions (b)(1)(A)-(G), below. The Deputy Director may request additional information or set additional requirements on continued diversion.

(A) Not more than 50 gallons per person per day will be diverted under all bases of right;

(B) The diversion is necessary to achieve the minimum amount of water necessary for health and safety, up to 50 gallons per person per day; after all other alternate sources of potable water have been used. To the extent other potable water is available, those sources will be used first and the total used will not exceed 50 gallons per person, per day;

(C) The diverter or all end users are operating under the strictest existing conservation regime for that place of use, if such a plan exists for the area or service provider; or shall be operating under such regime within 30 days. If additional approvals are required before implementation of the conservation regime, the diverter must certify that all possible steps will be taken immediately to ensure prompt approval;

(D) No potable water will be used for outdoor landscaping while this approval is in effect. Water service providers must implement this provision as rapidly as possible, up to a limit of 15 days. If additional approvals are required before implementation of the conservation regime, the diverter must certify that all possible steps will be taken to ensure prompt approval;

(E) If the diverter has the authority to set rates, that such rates are set to encourage conservation, or that changing the rates to encourage conservation shall be considered at the next opportunity, but no later than 30 days from certification. If additional approvals are required before implementation of such a rate structure, the diverter must certify that all possible steps will be taken to ensure prompt approval. If the diverter does not implement rates to encourage conservation, it must submit to the Deputy Director with the next required reporting an explanation of why such rate setting is inappropriate despite the current drought;

(F) If the diverter is a public water supplier under Water Code section 350

et seq., that it has declared a water shortage emergency condition and adopted regulations and restrictions on the delivery of water or has noticed a meeting for adoption within the next 10 days, and shall adopt conservation and water delivery restrictions and regulations within the next 30 days. To the extent regulations and restrictions require additional approval, the diverter must certify that all possible steps will be taken to ensure prompt approval.

(G) The diverter has either pursued steps to acquire other sources of water, but has not yet been completely successful, as described in an attached report, or the diverter will pursue the steps in an attached plan to identify and secure additional water.

(2) To the extent that a diversion for domestic or municipal use requires more than 50 gallons per person, per day to meet minimum health and safety needs, or for up to 50 gallons per person, per day exceeding 10 acre-feet of storage or a total of 4,500 gallons per day, the continuing diversion of water after issuance of a curtailment notice for the diversion requires submission of a petition and approval by the Deputy Director. The Deputy Director may condition the approval on implementation of additional conservation measures and reporting requirements. Any petition to continue diversion to meet minimum health and safety needs of more than 50 gallons per person, per day, or for up to 50 gallons per person, per day exceeding 10 acre-feet of storage or a total of 4,500 gallons per day, must:

- (A) Describe the specific circumstances that make the requested diversion amount necessary to meet minimum health and safety needs, if a larger amount is sought.
- (B) Certify compliance and provide documentation of the actions described in subdivision (bc)(1)(C) – (bc)(1)(G).
- (C) Describe any other additional steps the diverter will take to reduce diversions and consumption.
- (D) Provide the timeframe in which the diverter expects to reduce usage to no more than 50 gallons per person, per day, or why minimum health and safety needs will continue to require more water.

(ed) All other diversions for minimum health and safety needs, except for an imminent threat to life, require approval from the Deputy Director. The Deputy Director may approve a petition under this subdivision or subdivision (bc)(2) upon a finding that the diversion is in furtherance of the constitutional policy that the water resources of the state be put to beneficial use to the full extent they are capable, and that waste and unreasonable use be prevented, notwithstanding the effect of the diversion on senior water rights or instream beneficial uses, and may condition approval as appropriate to ensure that the diversion and use are reasonable and in the public interest.

(de) "Minimum health and safety needs," as used in this article, means the amount of water necessary for prevention of adverse impacts to human health and safety, for which there is no reasonable alternate supply. "Minimum health and safety needs" include:

- (1) Domestic and municipal supplies as described in subdivision (bc).
- (2) Water supplies necessary for energy sources that are critical to basic grid reliability, as identified by the California Independent System Operator, California Public Utilities Commission, California Energy Commission, or a similar energy grid reliability authority, and as authorized by the Deputy Director.
- (3) Water supplies identified by the California Department of Forestry and Fire Protection, or another appropriate authority, as regionally necessary for fire preparedness, and as approved by the Deputy Director.
- (4) Water supplies identified by the California Air Resources Board, a local air quality management district, or other appropriate public agency with air quality expertise, as regionally necessary to address critical air quality impacts in order to protect public health, and as authorized by the Deputy Director.
- (5) Water supplies necessary to address immediate public health or safety threats, as determined by a public agency with health or safety expertise, subject to approval of the Deputy Director. Such a petition should include a description of the public health need, a description of why the need is immediate, an estimate of the amount of water needed, and a certification that the supply will be used only for the stated need. If necessary to resolve immediate public health or safety threats, the diversion may continue while the petition is being prepared and is pending. The Deputy Director may require additional information to support the initial petition, as well as information on how long the diversion is expected to continue, and a description of other steps taken or planned to obtain alternative supplies.
- (6) Other water needs not identified, which a state, local, tribal or federal health, environmental or safety agency has determined are critical to public health and safety, or to the basic infrastructure of the state, subject to Deputy Director approval. Petitioners wishing to continue diversions for these uses must identify the health and safety need, include approval from the appropriate public entity; describe why the amount requested is critical for the need and cannot be met through alternate supplies, state how long the diversion is expected to continue, certify that the supply will be used only for the stated need, and describe steps taken and planned to obtain alternative supplies.

(ef) Notice of certification, petitions and decisions under this section and section 878 will be posted as soon as practicable on the State Board's drought webpage. The Deputy Director may issue a decision under this article prior to providing notice. Any interested person may file an objection to the certification, petition or decision. The objection shall indicate the

manner of service upon the certifier or petitioner. The State Board will consider any objection, and may hold a hearing thereon, after notice to all interested persons.

Authority: Sections 1058 and 1058.5, Water Code.

Reference: Cal. Const., Art. X § 2; Sections 100, 100.5, 104, 105, 105.3, 275 and 1058.5, Water Code; *Environmental Defense Fund v. East Bay Muni. Util. Dist.* (1980) 26 Cal.3d 183.

§ 875.3 Alternative Water Sharing Agreements

Water users may propose regional alternatives to curtailment that achieve the purposes of the curtailment process described under section 875. Petitions to implement alternative water sharing agreements to coordinate diversions or otherwise share water in place of State Water Resources Control Board-issued curtailment orders under this article may be submitted to the Executive Director at any time. Petitioners must demonstrate to the satisfaction of the Executive Director that any agreement under this section will not injure legal users of water not signatory to the agreement and that the agreement does not impose an unreasonable impact on fish and wildlife. The Executive Director may approve a petition, subject to conditions appropriate to ensure that the standard of approval are met, including reporting requirements. Diversions covered by an approved agreement pursuant to this section are subject to this article and violations of such approved agreement shall be subject to enforcement as a violation of this article or as an unauthorized diversion or use.

Notice of petitions and decisions under this section will be posted as soon as practicable on the State Water Resources Control Board's drought webpage. The Executive Director may issue a decision under this article prior to providing notice. Any interested person may file an objection to the petition or decision. The objection shall indicate the manner of service upon the parties that petitioned for approval of the regional alternative. The State Water Resources Control Board will consider any objection, and may hold a hearing thereon, after notice to all interested persons.

Authority: Sections 1058 and 1058.5, Water Code.

Reference: Sections 109, 1011, 1011.5 and 1051.5, Water Code; *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224.

§ 379. Reporting

- (a) All water users or water right holders issued a curtailment order under this article are required within five days to submit under penalty of perjury a certification of the following actions taken in response to the curtailment order, certifying, as applicable, that:
- (1) Diversion under the water right identified has been curtailed;
  - (2) Continued use is under other water rights not subject to curtailment, specifically identifying those other rights, including the basis of right and quantity of diversion;
  - (3) Diversions continue only to the extent that they are direct diversions for hydropower;

- (4) A petition has been filed as authorized under section 878.1, that the diversion will be authorized if the petition is approved; that the subject water right authorizes the diversion in the absence of a curtailment order, and that diversion and use will comply with the conditions for approval of the petition, except that approval by other authorities may still be pending;
  - (5) A certification has been filed as authorized under section 878, subdivision (b) or section 878.1, subdivision (bc)(1), that the subject water right authorizes the diversion in the absence of a curtailment order; or
  - (6) The only continued water use is for instream purposes.
- (b) All water users or water right holders whose continued diversion out of order of water right seniority are authorized under section 878.1 are required to submit, under penalty of perjury, monthly reports during the effective period of the curtailment order. In addition to any reporting required as a condition of certification or of approving a petition, such reports should describe:
- (1) how the diverter complies with any conditions of continued diversion, including the conditions of certification under section 878.1, subdivision (bc)(1);
  - (2) any failures to comply with conditions, including the conditions of certification under section 878.1, subdivision (bc)(1), and steps taken to prevent further violations;
  - (3) conservation and efficiency efforts planned, in the process of implementation, and implemented, as well as any information on the effectiveness of implementation;
  - (4) efforts to obtain alternate water sources;
  - (5) if the diversion is authorized under section 878.1, subdivision (bc):
    - (i) progress towards implementing the measures described in section 878.1, subdivision (bc)(1)(C)-(F), to the extent that implementation was incomplete at the time of certification or petition under section 878.1, subdivision (bc) or the most recent report under this subdivision;
    - (ii) progress under any plan described in section 878.1, subdivision (bc)(1)(G) or (bc)(2)(C); and
  - (6) if the diversion is authorized under section 878.1, subdivision (de)(3):
    - (i) the rate of diversion if it is still ongoing;
    - (ii) whether the water has been used for any other purpose;
    - (iii) the date diversion ceased, if applicable.
- (c) Upon receipt of a complaint alleging interference with a water right by a riparian or pre-1914 appropriative water right holder or upon receipt of information that indicates unlawful diversions of stored water by riparians or pre-1914 appropriative water right holders, the Deputy Director may issue an order under this article requiring such water right holders to provide additional information regarding the property patent date, the date of initial appropriation, and diversions made or anticipated during the current drought year. Any water right holder receiving an order under this subdivision shall provide the requested information within five (5) days.

Authority: Sections 1058 and 1058.5, Water Code.

Reference: Sections 100, 186, 187, 275, 348, 1051 and 1058.5, Water Code.

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

**DECLARATION OF LAUREN D. BERNADETT IN SUPPORT OF MOTION TO DISMISS ADMINISTRATIVE CIVIL LIABILITY PROCEEDING IN ENF01951 SWRCB'S METHOD OF DETERMINING WATER AVAILABILITY IS AN UNLAWFUL UNDERGROUND REGULATION**

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 January 25, 2016 at Sacramento, California.

  
\_\_\_\_\_  
Yolanda De La Cruz

**SERVICE LIST OF PARTICIPANTS  
BYRON-BETHANY IRRIGATION DISTRICT  
ADMINISTRATIVE CIVIL LIABILITY HEARING  
(Revised 9/2/15; Revised: 9/11/15)**

**SOMACH SIMMONS & DUNN**  
A Professional Corporation

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DECL. OF L. BERNADETT IN SUPP OF MTN TO DISMISS ADMIN CIVIL LIABILITY PROCEEDING IN ENFO1951 SWRCB'S METHOD OF DETERMINING WATER AVAIL. IS AN UNLAWFUL UNDERGROUND REG.

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**SERVICE LIST  
WEST SIDE IRRIGATION DISTRICT  
CEASE AND DESIST ORDER HEARING**

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