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

12 In the Matter of the Administrative Civil) **Prosecution Team's Pre-Hearing Brief**
13 Liability Complaint Issued Against Byron-) **of Legal Issues**
14 Bethany Irrigation District)

15 **I. Introduction**

16 Hearing Officer Doduc requested briefing on the merits and relevancy of:

17 *Whether, and in what circumstances: (1) does the State Water Resources*
18 *Control Board have the authority to curtail, and (2) does Water Code section*
19 *1052 apply to diversions made under claim of a pre-1914 or riparian water*
20 *right?*

21 The Division of Water Rights (Division) Prosecution Team respectfully offers that
22 the first question as stated is not relevant to the Administrative Civil Liability (ACL)
23 Complaint proceedings against Byron-Bethany Irrigation District (BBID). The relevant first
24 question is instead whether the Division may commence administrative enforcement
25 against a water right holder who diverts after State Water Resources Control Board (State
26 Water Board) staff determines that no water is available to serve that water right priority.
27 The answer is yes. The second question is relevant here, and the answer is also yes.

28 **II. Background**

The ACL Complaint frames these proceedings, alleging, among other things, that:
(1) The analysis described in the State Water Board staff's June 12, 2015, Notice of
Unavailability of Water (WR-36) shows that, by June 12, supply was insufficient to meet

1 the demands of appropriative rights with priority dates of 1903 and later throughout the
2 Sacramento and San Joaquin River watersheds and the Delta (Exhibit WR-4, ¶ 24); (2)
3 The June 12 Notice informed all holders of pre-1914 water rights with a priority date of
4 1903 and later within those watersheds of those determinations (*id.*, ¶¶ 17, 18, 24); (3)
5 BBID claims a pre-1914 right affected by the June 12 Notice, and does not appear to have
6 any other basis of right for the post-June 12 diversions (*id.*, ¶¶ 4-6); (4) BBID continued
7 diverting for nearly two weeks after receiving the June 12 Notice (*id.*, ¶ 25, 28¹) (5)
8 Diversion or use of water by a water right holder when there is insufficient water supply
9 available for that water right is an unauthorized diversion or use of water subject to
10 enforcement as a trespass under California Water Code section 1052 (*id.*, ¶ 30).

12 The Complaint proposes an administrative civil liability based on \$1,000 per day of
13 trespass plus \$2,500 for each acre-foot diverted in excess of BBID's rights, plus
14 consideration of relevant circumstances pursuant to Water Code section 1055.3. (WR-4,
15 ¶¶ 32-40.) The Assistant Deputy Director for Water Rights issued the ACL Complaint
16 pursuant to Water Code section 1055.² BBID requested a hearing. (WR-6.)

18 **III. Question One: The Division May Commence Administrative Enforcement**
19 **Against a Water Right Holder Who Diverts After State Water Board Staff**
20 **Determines that No Water is Available to Serve that Water Right Priority**

21 **A. The ACL Complaint Does Not Allege Violation of the June 12 Notice**

22 BBID and others filed several lawsuits challenging, among other things, the legality
23 and enforceability of the June 12 Notice as a curtailment order. The lawsuits have been

24 ¹ The ACL Complaint alleges that BBID diverted 2,067 acre-feet over 13 days following the June 12 Notice, but
25 evidence obtained after the Complaint indicates that BBID diverted approximately 1,887 acre-feet over 12 days
26 following the Notice. (WR-15 [Testimony of P. Wells].) There is no evidence indicating that BBID has some other
basis of right to allow those diversions. (*Id.*)

27 ² The Executive Director delegated the authority to issue complaints under Section 1055 to the Deputy Director for
28 Water Rights [then the Chief of the Division of Water Rights] on May 17, 1999. The Deputy Director for Water Rights
redelegated this authority to the Assistant Deputy Director on August 27, 2008. These delegations remain in effect.

1 coordinated and remain pending before the Santa Clara County Superior Court as the
2 California Water Curtailment Cases (JCCP 4838, Case #1-15-CV-285182). BBID has
3 attempted to bring its challenge of the June 12 Notice into these proceedings, but the
4 legality or enforceability of the June 12 Notice are not at issue here.

5 The ACL Complaint does not allege that the June 12 Notice is an enforceable
6 order, or that BBID violated the June 12 Notice in any way. Instead, the Complaint “is
7 based on lack of available water supply under the priority of right.” (WR-4, ¶ 31.) The June
8 12 Notice and similar notices “were issued for the purpose of advising the public and
9 water diverters of the lack of available water under the priority of the rights identified in
10 each notice; the notices are not the basis for this enforcement action.” (*Id.*) The issue of
11 when BBID received the June 12 Notice may be relevant to any penalty calculation, but the
12 Complaint makes clear that the Executive Director’s July 15, 2015, Partial Rescission and
13 Clarification to the Unavailability Notices (WR-40) rescinds any portion of the June 12
14 Notice and similar notices that could be construed as an order of curtailment. (*Id.*, ¶ 29.)

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17 Thus, the question of whether, and in what circumstances, is the State Water
18 Board authorized to curtail, (e.g., issue enforceable curtailment orders), is not relevant to
19 the ACL Complaint proceedings. That question may be relevant in the coordinated
20 litigation, but under routine separation of functions the Prosecution Team is not involved in
21 that litigation and does not speak for the Board regarding those proceedings. Similarly,
22 the attorneys representing the Board in the coordinated litigation are separated from these
23 proceedings, and they do not speak for the Prosecution Team.

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25 As relevant to the ACL Complaint proceedings, the Hearing Officer’s first question
26 may be properly restated as whether the Division may commence administrative
27 enforcement against a water right holder who diverts after State Water Board staff
28 determines that no water is available to serve that water right priority.

1 **B. The State Water Board and Staff have Broad Authority to Investigate**
2 **Water Supply and Demand, Particularly During the Drought Emergency**

3 The State Water Board

4 has been granted broad authority to control and condition water use,
5 insuring utilization consistent with public interest. [internal quotation omitted]
6 Its enabling statute describes the Board's function as "to provide for the
7 orderly and efficient administration of the water resources of the state" and
8 grants it the power to "exercise the adjudicatory and regulatory functions of
9 the state in the field of water resources." (§ 174.) In that role, the Board is
10 granted "any powers ... that may be necessary or convenient for the
11 exercise of its duties authorized by law" (§ 186, subd. (a)) [...] Among its
12 other functions, "the ... board shall take all appropriate proceedings or
13 actions before executive, legislative, or judicial agencies to prevent waste,
14 unreasonable use, unreasonable method of use, or unreasonable method of
15 diversion of water in this state." (§ 275.) The Board's authority to prevent
16 unreasonable or wasteful use of water extends to all users, regardless of
17 the basis under which the users' water rights are held. [internal citation
18 omitted]

19 (*Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463, 1481-1482.)

20 The State Water Board may "investigate all streams, stream system, portions of
21 stream systems, lakes, or other bodies of water" and "ascertain whether or not water
22 heretofore filed upon or attempted to be appropriated is appropriated under the laws of
23 this State." (Wat. Code §1051, subd. (a),(c); see also § 183 ["the board may ... conduct
24 any investigations in any part of the state necessary to carry out the powers vested in
25 it."].) "The Legislature has granted the Water Board power to investigate water use and to
26 ascertain whether water is being diverted other than as authorized by the code." (*Young v.*
27 *State Water Resources Control Board* (2013) 219 Cal.App.4th 397, 405 [citing Wat. Code
28 § 1052].) This necessarily means that the Board may investigate and determine whether
available water supplies meet the demands placed on those supplies, and whether
diverters are taking more than is available to serve their water right.

The Board's authority has been reaffirmed and strengthened in response to the
drought. Governor Brown's January 17, 2014, Drought State of Emergency declaration

1 (WR-23) remains in effect. Governor Brown’s Executive Order B-29-15 directs that the
2 State Water Board shall, among other things, conduct inspections to determine whether
3 illegal diversions are occurring, and to bring enforcement actions against illegal diverters.
4 (Executive Order B-29-15, ¶10.) The Board has adopted several drought emergency
5 regulations under Water Code section 1058.5, including California Code of Regulations,
6 title 23, section 879(c), which authorizes the Deputy Director to issue enforceable
7 information-gathering orders to investigate, among other things, unlawful diversions.³
8 Section 879(c) has been readopted twice, most recently in December, 2015.
9

10 This authority is more than sufficient to allow the Board to investigate whether
11 water supplies will meet the demands of diverters at various water right priority
12 classifications, particularly during the worst drought in recent memory. The Board has
13 delegated to the Executive Director “the authority to conduct and supervise the activities
14 of the State Water Board.” (State Water Board Resolution No. 2012-0061.) Staff, in turn,
15 conducts these activities. (See Wat. Code § 7.)
16

17 **C. The Drought Water Supply and Demand Determinations are Within the**
18 **Authority Granted to the State Water Board and Staff**

19 The June 12 Notice was the third Notice of Unavailability that State Water Board
20 staff issued in response to the extreme and worsening drought conditions in 2015, after
21 similar notices on April 23 and May 1, 2015. (WR-33, WR-34.) The June 12 Notice
22 described the lack of water available for claimed pre-1914 appropriative rights dating to
23 1903 and later in the Sacramento and San Joaquin River watersheds, and in the Delta.
24 (WR-36.) The Notice describes how staff reviewed reservoir storage and inflow
25 projections, along with forecasts for future precipitation events, and determined that the
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27 ³ BBID and others received an Informational Order in February, 2015, and the responses have been incorporated into
28 the Division’s drought supply and demand analyses. (WR-9, WR-11.)

1 existing water supply in particular watersheds is insufficient to meet the demands of all
2 water rights holders in those watersheds.

3 In fact, the Notice understates the massive undertaking by staff to analyze
4 available water supplies and demand to determine whether water would be available for
5 various water right classes during 2015. A full description is beyond the scope of this brief,
6 but staff went to great lengths beginning in January 2014 to develop a drought water
7 supply and demand analytical methodology and to gather the best available data
8 regarding available and forecasted water supplies and water demand. (See WR-7, WR-9,
9 WR-11 [Testimonies of K. Mrowka, B. Coats, and J. Yeazell] and accompanying exhibits.)
10 This supply and demand analysis and the resulting notices to the affected community are
11 squarely within the authorities described in the previous section.
12

13 **D. The Board and Staff Must Uphold the Rule of Priority**

14 California's water rights system recognizes that riparian right holders are generally
15 satisfied before any appropriative right holders and, "as between appropriators, the rule of
16 priority is 'first in time, first in right.'" (*US v. SWRCB* (1986) 182 Cal.App.3d 82, 101-102;
17 see also *El Dorado Irrigation Dist. v. SWRCB* (2006) 142 Cal.App.4th 937, 961 [same].)
18 Earlier appropriators are senior to later appropriators, whether pre-1914 or post-1914. All
19 users, even riparian claimants, must curtail their use in the face of insufficient supplies in
20 accordance with the rule of priority. (*Light, supra*, 226 Cal.App.4th at 1488-1489.)
21

22 Of course, the rule of priority applies only to the use of natural or
23 abandoned flows in a watercourse. No riparian or appropriator has a right to
24 use water that was previously stored or imported by another upstream and
25 then released into the watercourse for use downstream.
(*El Dorado Irrig. Dist. v. SWRCB*, 142 Cal.App.4th at 962.)

26 All water users are subject to the prohibition against waste and unreasonable use
27 set forth in Section 2 of Article X of the California Constitution. (*Light*, 226 Cal.App.4th at
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1 1482, 1488.) However, “[e]very effort ... must be made to respect and enforce the rule of
2 priority. A solution to a dispute over water rights *must* preserve water right priorities to the
3 extent those priorities do not lead to unreasonable use.” (*Id.*, at 1489 [quoting *El Dorado*
4 *Irrig. Dist.*, 142 Cal.App.4th at 966] [emphasis in original].)

5 The purpose of the Division’s drought water availability determination analyses
6 described in the June 12 Notice, and similar notices, was to protect the rule of priority.
7 “Drought management ... requires that some water remain in most streams to satisfy
8 senior demands at the furthest downstream point of diversion of the senior water rights.”
9 (WR-7, p. 2 [Testimony of K. Mrowka].) “In accordance with the State’s water right priority
10 system, the State Water Board staff notifies diverters of a water shortage when sufficient
11 natural flows in a watershed are not available for a water user’s needs, based on their
12 priority of right.” (WR-9, p. 3 [Testimony of B. Coats].) To that end, the June 12 Notice
13 describes how Board staff determined that there was not enough water available to meet
14 the needs of all water right holders in the relevant watersheds, and that
15

16
17 Even if there is water physically available at your point of diversion, that
18 water is necessary to meet more senior water right holders’ needs or the
19 water may be released previously stored water which must continue
20 instream to serve its intended beneficial use.

21 (WR-36.) The April 23 and May 1 Notices contain similar language:

22 Even if there is water physically available at your point of diversion, that
23 water is necessary to meet senior water right holders’ needs or is water
24 released from storage that you are not entitled to divert.

25 (WR-33, WR-34.)

26 **E. Staff May Initiate Enforcement Action Based on Diversion During** 27 **Periods of Unavailability**

28 “[T]he state should take vigorous action [T]o enforce the terms and conditions of
permits, licenses, certifications, and registrations to appropriate water, to enforce state
board orders and decisions, *and to prevent the unauthorized diversion of water.*” (Wat.

1 Code §1825 [emphasis added].) As described above, the Board and staff may investigate
2 water supplies and demand to determine availability. Diversion when water is not
3 available to serve a claimed water right priority is an unauthorized diversion. (See
4 discussion of *Young* and *Millview* in the next section.) Unauthorized diversion of water is a
5 trespass and, during drought emergencies, is subject to liabilities of up to \$1,000 per day
6 plus \$2,500 per acre-foot diverted or used in excess of a diverter's right. (Wat. Code
7 §1052, subd. (a),(c).) Water Code section 1055 and the delegations thereunder authorize
8 staff to issue administrative complaints against parties subject to civil liability under
9 section 1052. Section 1055 also provides requirements for service and hearing.
10

11 **IV. Question Two: Water Code Section 1052 Applies to Diversions Made Under** 12 **Claim of a Pre-1914 or Riparian Water Right**

13 Recent appellate court decisions make clear that the State Water Board has
14 enforcement authority against pre-1914 and riparian water right claimants. In *Young v.*
15 *State Water Resources Control Board* (2013) 219 Cal.App.4th 397, customers of a
16 diverter appealed a State Water Board cease and desist order (CDO) issued under Water
17 Code section 1831(d)(1), arguing that the Board lacked jurisdiction over the diverter's
18 claimed riparian and pre-1914 rights. The court, relying on the plain meaning of Section
19 1831, held that the Board does have authority to determine if pre-1914 and riparian
20 claimants are unlawfully diverting water.
21

22 The Legislature expressly vests authority in the Water Board to determine if
23 any person is unlawfully diverting water; to determine whether the diversion
24 and use of water is unauthorized, it is necessary to determine whether the
25 diversion and use that the diverter claims is authorized by riparian or pre-
26 1914 appropriative rights. The Customers' argument that the Water Board
27 lacks jurisdiction to adjudicate claims of riparian or pre-1914 appropriative
28 rights is flawed because it begs the question central to the appeal, namely,
*whether a given diversion claimed to be authorized is in fact authorized by a
valid riparian or pre-1914 appropriative right. If it is not, the diversion is
unauthorized and subject to enforcement pursuant to Water Code sections
1052 and 1831, subdivision (d)(1).*

1 (Young, 219 Cal.App.4th, at 406.) The Board is also authorized to regulate water claimed
2 under a riparian right, but which is being diverted in excess of a valid riparian right. (*Id.*)

3 *Millview County Water District v. State Water Resources Control Board* (2014) 229
4 Cal.App.4th 879, involved a challenge to a CDO by a diverter claiming a pre-1914 right.

5 Relying on *Young*, the court held that

6 Section 1831 allows the Board to issue an order preventing the unauthorized
7 diversion of water [under Section 1052]. *Unauthorized diversion includes not*
8 *merely the diversion of water under a claimed but invalid pre-1914 right, but*
9 *also diversion beyond the proper scope of a valid pre-1914 right, whether*
10 *because the diversion exceeds the maximum perfected amount of water*
11 *under the right or because an intervening forfeiture has reduced the proper*
12 *scope. The Board therefore possesses the jurisdiction to determine all of*
13 *these issues.*

14 (*Millview*, 229 Cal.App.4th at 895 [emphasis added].)

15 *Young* and *Millview* both involved challenges to CDOs issued under Water Code
16 section 1831(d)(1), which authorizes CDOs to persons violating or threatening to violate
17 “the prohibition set forth in Section 1052 against the unauthorized diversion or use of
18 water subject to this division.” If, as these courts have held, the Board has authority to
19 issue a CDO for unauthorized diversion against a pre-1914 or riparian water right
20 claimant, then it must follow that the Board has authority to issue an ACL complaint for
21 unauthorized diversion under Section 1052. *Young* and *Millview* thus stand for the
22 proposition that the Board and staff may make any preliminary factual determinations
23 necessary to decide whether a party has engaged in the unauthorized diversion of water,
24 and may take enforcement action under either section 1831 [CDO] or section 1052 [ACL]
25 against parties claiming pre-1914 or riparian rights who are diverting in excess of the
26 water available for those rights. An alternative conclusion would be entirely inconsistent
27 with the *Young* and *Millview* holdings, and with the Board’s broad grant of authority to
28 manage the state’s water resources.

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V. Conclusion

For the foregoing reasons, the Prosecution Team respectfully offers that the answers to the Hearing Officer’s questions are: (1) the Division may commence administrative enforcement against a water right holder who diverts after State Water Board staff determines that no water is available to serve that water right priority; and (2) Water Code section 1052 applies to diversions made under claim of a pre-1914 or riparian water right.

Respectfully Submitted,



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