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BETHANY IRRIGATION DISTRICT
8

9 BEFORE THE
10 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD
11

12 ENFORCEMENT ACTION ENFO1949
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

BYRON-BETHANY IRRIGATION
DISTRICT'S COMBINED OPENING
STATEMENT

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
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1 BBID hereby submits its Combined Opening Statement for ENF01951 and
2 ENF01949.

3 **I. INTRODUCTION, BACKGORUND, AND OVERVIEW**

4 The Byron-Bethany Irrigation District (BBID) has not violated Water Code
5 section 1052 (Section 1052). Notwithstanding the legal infirmities raised in the various
6 prehearing motions, the facts simply do not support the Prosecution Team's case against
7 BBID or The West Side Irrigation District (WSID). The evidence the Prosecution Team
8 attempts to present to the Hearing Team is not from the decision-makers at the State
9 Water Resources Control Board (SWRCB). The Hearing Team will not hear from Tom
10 Howard, the SWRCB's Executive Director who is ultimately responsible for making
11 decisions on availability. The Hearing Team will not hear from John O'Hagan, who
12 directed the water availability analysis, and who works with Tom Howard in deciding
13 when curtailments will issue. Instead, the Prosecution Team attempts to introduce
14 evidence through lower-level staff who took direction from John O'Hagan; staff with no
15 expertise in water availability analyses, and until the current drought, have not conducted
16 such analysis. The Hearing Team may hear, over objection, the testimony of Katherine
17 Mrowka, who supervises the Prosecution Team witnesses, but who had no involvement
18 in the water availability analysis conducted in 2015. Any fair-minded finder of fact would
19 question why the individuals who actually made decisions material to this matter are not
20 providing testimony during this hearing.

21 Furthermore, the Hearing Team will not hear from any Prosecution Team witness
22 that the water availability analysis relied on by the Prosecution Team was the result of a
23 public process that in July 2014 the SWRCB assured the public would take place.
24 Instead, the evidence will show that SWRCB staff relied upon a watershed-wide analysis
25 in making water availability determinations and issuing curtailment notices. The evidence
26 will show that, not only did the SWRCB never conduct an analysis of water availability at
27 BBID's or WSID's point of diversion in the Delta, but also that the SWRCB never
28 considered the water that was actually present in the Delta channels as being a source

1 available to BBID or WSID. This water is a source of water that both BBID and WSID
2 have drawn from since the inception of BBID's pre-1914 appropriative water right and
3 WSID's post-1914 water right. In this regard, one of the most surprising things to hear
4 from SWRCB staff is that they were completely unaware (or that they were simply
5 unwilling to recognize and acknowledge) that there was water present in the Delta
6 channels once flows upstream slowed.

7 Instead, the evidence will show that SWRCB staff determined that water was
8 unavailable for BBID and WSID when full natural flow dropped at the full natural flow
9 stations – hundreds of miles upstream from BBID's and WSID's points of diversion.
10 Thus, there was no consideration of the time it takes for water to travel from the full
11 natural flow stations to BBID's and WSID's points of diversion. The Prosecution Team's
12 case-in-chief also fails to identify any senior water right holders downstream of BBID and
13 WSID who required water sufficient to cause BBID and WSID to cease diversions. BBID
14 is unaware of any downstream senior water right holders who were deprived of their
15 water rights as a result of BBID's diversion of water; the Administrative Civil Liability
16 Complaint fails to identify any injured senior water right holders; and the Prosecution
17 Team's case-in-chief fails to identify any senior water right holders who were deprived of
18 their water rights as a result of BBID's and WSID's diversions.

19 Notwithstanding the lack of evidence demonstrating the unavailability of water at
20 BBID's point of diversion, BBID and WSID have submitted evidence that water was
21 available after the SWRCB issued the June 12, 2015 Curtailment Notice. BBID and
22 WSID's expert, Dr. Susan Paulsen, conducted an analysis using publicly available
23 information to demonstrate why water was, and would be, available to BBID and WSID.
24 Dr. Paulsen did so by using the Delta Simulation Model II (DSM2), which was developed
25 by the Department of Water Resources (DWR) to, among other things, simulate riverine
26 systems, and can be used as a flexible estuary model. DSM2, while not used by the
27 SWRCB in 2014 and 2015 in conducting its water availability analysis, is relevant and
28 useful in determining water availability in the Delta. This fact is undisputed – as

1 supported by the rebuttal testimony filed by various parties in this proceeding. DSM2 is
2 relevant and useful, in part, because it is the only method of determining water availability
3 presented at this hearing that explains the historical availability and use of water in the
4 Delta. The evidence will show that, when looking at past dry periods and dry years, like
5 1931 (which was a pre-project dry year), the SWRCB's current method for determining
6 water availability cannot explain why BBID and others were able to divert water from the
7 Delta even when inflow into the Delta was zero (or negative flow). The evidence will
8 show that DSM2 developed for BBID and WSID were able to divert – and why BBID and
9 WSID had sufficient water of sufficient quality to divert throughout June of 2015. In fact,
10 the DSM2 model run created by the State Water Contractors and submitted as part of its
11 complaint against in-Delta diverters, demonstrates that even if the State and federal
12 water projects did not exist in 2015, BBID had water of sufficient quality to divert through
13 June of 2015 (i.e., the entire period of unauthorized use alleged in the ACL Complaint).
14 This is undisputed.

15 While the parties may disagree on the appropriate inputs into DSM2, it is
16 universally accepted that using DSM2 will provide a more accurate picture of water
17 availability in the Delta – and it is undisputed that DSM2 is the only current method that
18 explains historic availability of water of sufficient quality in the Delta. As explained in
19 more detail by the Central and South Delta Water Agencies in their Opening Statements,
20 questions related to the use of DSM2 in determining water availability should be the
21 subject of a more comprehensive proceeding – the type of proceeding the SWRCB
22 promised water users it would convene following the curtailments of post-1914 water
23 rights in 2014 – a proceeding that never convened.

24 **II. THESE ENFORCEMENT PROCEEDINGS ARE THE RESULT OF A FLAWED**
25 **PROCESS**

26 Notwithstanding the absence of a prima facie case against BBID and WSID, the
27 process leading up to the evidentiary portion of these proceeding was tortured and
28 fraught with problems. These problems were a spillover from 2014, and extend from the

1 SWRCB's inadequate substantive analysis of water availability.

2 In 2014, the Legislature provided the SWRCB with authority to require curtailments
3 of diversions when water was not available under a diverter's priority of right. (Water
4 Code section 1058.5.) Under that authority, on July 2, 2014, the SWRCB adopted
5 Resolution No. 2014-0031 creating emergency regulations for the curtailment of water
6 rights to protect senior water rights. That regulation took effect on July 16, 2014, and
7 expired on April 14, 2015. Moreover, that regulation applied only to post-1914 water
8 rights. Resolution 2014-0031 states, in material part, the following:

9 Given complexities surrounding the relative priority of individual pre-1914
10 appropriative water rights and riparian water rights, the emergency
11 regulation does not apply curtailment orders to these categories of water
12 rights. However, in light of the complexities regarding the relative priority of
13 riparian and pre-1914 appropriative rights, upon receipt of a complaint
14 alleging interference with a water right by a riparian or pre-1914 water right
15 holder, or information indicating unlawful diversion of stored water by
16 riparians or pre-1914 water right holders, the Deputy Director may issue an
17 order to these diverters requiring the diverter to provide certain information
18 necessary for determining issues of relative priority. Staff are encouraged
19 to investigate whether curtailment notices and potential enforcement under
20 the Board's existing processes should be pursued for these diverters based
21 on the information received[.]

22 Resolution No 2014-0031 further provides:

23 To assure that the State Water Board is prepared for another dry year, it will
24 engage with stakeholders in various watersheds over the next six months to
25 refine data and gather input on how to most effectively implement and
26 enforce the water rights priority system in future dry years. The primary
27 objective is to improve the State Water Board's and the water users'
28 confidence in the technical tools and analysis that will be used for making
determinations on water availability relative to water rights priority. The
Executive Director and staff will provide a report with recommendations to
the Board by January 31, 2015. As part of this process, State Water Board
staff and stakeholders will consider: 1) the State Water Board's January
1978 "Dry Year Program" and its recommendations for enforcing the water
rights priority system; 2) the 2014 curtailment and complaint process; 3) the
quality of the data in the water rights database for post-1914 and pre-1914
appropriative water rights and riparian water rights (including as compared
to the reported demand data in the 1978 Dry Year Program Report,
Statewide planning models and other available information); and 4)
opportunities to expand and improve data and database capabilities to
assist with the implementation of the water rights priority system in future
dry years[.]

29 As the San Joaquin Tributaries Authority correctly states in its February 22, 2016
30 Motion In Support of Byron-Bethany Irrigation District's And West Side Irrigation District's

1 Motions to Dismiss (SJTA Brief), the SWRCB, at its July 1, 2014 Board meeting, where it
2 began consideration of the aforementioned curtailment regulation, pledged support for a
3 process where affected parties would have an opportunity to understand and challenge
4 the curtailment methodology with some Board members openly acknowledging the need
5 for a hearing on hydrology and an open and public process undertaken by the Board
6 itself, and not delegated to staff, to ensure the SWRCB had a “level of trust” moving
7 forward. However, the processes envisioned through Resolution 2014-0031 never
8 occurred.

9 Instead, contrary to public pronouncements, the evidence will show that in 2015
10 the SWRCB commenced enforcement (after the prior curtailment regulation expired by
11 operation of law) by implementing a water availability analysis that was not subject to the
12 public process described in Resolution 2014-0031. Moreover, and unlike 2014, the
13 SWRCB staff utilized that methodology to curtail pre-1914 appropriative water rights. In
14 2014 the prior regulation and analysis was used solely for the purpose of implementing
15 curtailments of post-1914 water rights. Thus, there are serious legal issues associated
16 with the method used by the SWRCB and its staff in making water availability
17 determinations in 2015. These issues are raised in legal briefs submitted by several of
18 the parties to these proceedings.

19 The evidence will show that, employing some variation of this water availability
20 “methodology”, on June 12, 2015, the SWRCB issued notices (Curtailment Notice) of
21 what it apparently believed were “curtailments” of certain pre-1914 appropriative water
22 rights. The Curtailment Notice stated the SWRCB’s determination “of the [recipient’s]
23 need to immediately stop diverting water.” The Curtailment Notice also mandated the
24 recipient complete a compliance certification stating that the water right holder ceased all
25 diversions, and it subjected the recipient who failed to comply with the Curtailment Notice
26 to “enforcement proceedings.” Several public agencies, including BBID, challenged the
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28

1 Curtailment Notice, and the SWRCB's water availability analysis, as unlawful.¹ In
2 response to an initial request for a restraining order against the SWRCB to prohibit
3 enforcement of the Curtailment Notice, the SWRCB filed declarations in Court disclaiming
4 the language of the Curtailment Notice – claiming that the Curtailment Notice was nothing
5 more than general public information; and that there was no consequence for failing to
6 comply with the Curtailment Notice. BBID, along with others who challenged the
7 SWRCB's Curtailment Notice in court, was surprised to learn that the Curtailment Notice
8 was nothing more than a general public notice. Once informed by the SWRCB that it did
9 not intend the Curtailment Notice to have any legal effect, BBID notified the SWRCB that
10 it would continue to monitor water conditions itself as the summer progressed. The
11 evidence will show that, within 30 minutes of receiving BBID's letter, Tom Howard, the
12 Executive Director of the SWRCB, directed SWRCB staff to initiate enforcement action
13 against BBID.

14 Shortly thereafter, and before the SWRCB actually issued the ACL Complaint to
15 BBID, the Sacramento County Superior Court found that the Curtailment Notice violated
16 due process, because, among other things, it failed to provide the recipients with a pre-
17 deprivation hearing to initially determine whether water was available for diversion. The
18 evidence will show that, faced with the prospect of an injunction, the SWRCB "rescinded"
19 and "clarified" the Curtailment Notice. While the SWRCB attempted to rescind the
20 "curtailment" portions of the Curtailment Notice, it maintained the determination that water
21 was unavailable for diversion. It appears to any fair-minded person that the SWRCB did
22 so because it had already decided to take enforcement action against BBID in response
23 to BBID's decision to continue monitoring water conditions in the Delta. On July 20,
24 2015, the SWRCB issued the ACL Complaint, and used the ACL Complaint to convince
25 the Superior Court that a pre-deprivation administrative remedy was available to BBID. In

26 _____
27 ¹ Prior to commencing the civil action, BBID submitted to the SWRCB a request for reconsideration of the
28 Curtailment Notice. The SWRCB rejected the request on the grounds that the Curtailment Notice was
neither a Decision nor an Order of the Board, and therefore, no administrative remedy was then available to
BBID.

1 doing so, the SWRCB held itself out as a forum where BBID and WSID can obtain full
2 and fair consideration of all the complex legal and factual issues presented in both the
3 ACL Complaint, and by BBID's and WSID's civil actions against the SWRCB.

4 **III. THE ENFORCEMENT PROCEEDINGS SHOULD NOT PROCEED TO THE**
5 **EVIDENTIARY PHASE OF THE HEARING BECAUSE OF SIGNIFICANT**
6 **LEGAL ISSUES**

7 In assuring the Court that BBID and WSID will receive a full and fair hearing on all
8 of the complex legal and factual issues presented in these Enforcement Actions, the
9 SWRCB holds out its administrative hearings as quasi-judicial proceedings where the
10 Hearing Team act as "neutral" arbiters. This is, of course, one of the hallmarks of due
11 process: the right to an unbiased adjudicator. To the extent the SWRCB wants its
12 decisions to be durable and not perceived as simply promoting an agenda, it should
13 jealously guard the due process rights of the parties – even if it means finding its own
14 staff erred in carrying out the SWRCB's jurisdiction.²

15 Courts, consistent with their role as neutral arbiters, often dismiss cases well
16 before trial based upon initial pleadings. This is because, in part, Courts avoid wasting
17 judicial resources and the resources of the parties, and because frequently parties simply
18 have not demonstrated that the facts or law support going to trial. The Enforcement
19 Actions brought by the SWRCB against BBID and WSID, are the types of actions that a
20 Court would likely dismiss prior to trial. BBID and WSID, and other parties, filed
21 dispositive motions with the SWRCB requiring dismissal of these Enforcement Actions.
22 Two issues raised in these motions are particularly salient.

23 First, as BBID, WSID, and others have properly noted, nothing in the ACL
24 Complaint or in the Prosecution Team's case-in-chief demonstrates that BBID diverted

25 ² It is a curious and remarkable fact that the SWRCB Hearing Team always sides with the SWRCB's
26 Prosecution Team in water right proceedings. While the Hearing Team might differ on insignificant points,
27 credibility determinations and factual findings always favor the Prosecution Team. It is also remarkable that
28 the Hearing Team always sides with the Prosecution Team with respect to substantive legal arguments. To
a reasonable person this is simply a pragmatic example of the inherent problem with unitary agencies, and
with the SWRCB in particular, where co-workers are called to pass upon the veracity of each other, and
sometimes on their superiors; and a Board, completely reliant on its staff, is called upon to render judgment
on its Staffs' work and competence.

1 water subject to Division 2 of the Water Code. While the Prosecution Team makes the
2 unsupported argument that all water is subject to Division 2 of the Water Code, all the
3 reported case law examining the SWRCB's authority rejects such an interpretation.

4 Second, none of parties provide any credible argument that the SWRCB's water
5 availability analysis is anything other than an underground regulation. While the
6 Prosecution Team argues that the water availability analysis is a "fact" exempt from the
7 APA , that argument is absurd. The undisputed evidence will show that SWRCB staff,
8 including members of the Prosecution Team and the SWRCB's Executive Director, Tom
9 Howard, made judgment calls regarding what to include and exclude from the analysis,
10 made judgment calls regarding whether and when to send curtailment notices, and made
11 judgment calls to selectively allow some to divert water even when the analysis indicated
12 water was unavailable to them to divert. While the Prosecution Team is using the
13 analysis (regulation) to establish a fact – the analysis itself is not a fact. The water
14 availability analysis is unquestionably an underground regulation, and therefore void.

15 Not only would a Court dismiss these Enforcement Actions for these reasons, but
16 also because the SWRCB staff admitted, under oath, that they did not conduct any
17 analysis of the availability of water at BBID's or WSID's point of diversion, or anywhere
18 near BBID's or WSID's point of diversion. This fact, combined with the fact that the
19 written direct testimony submitted by the Prosecution Team fails to present a *prima facie*
20 case with respect to the allegations of a violation of Water Code section 1052 mandate
21 dismissal. The failure of the Prosecution Team to make a *prima facie* case of a violation
22 of Section 1052 requires dismissal of these proceedings before commencing the
23 evidentiary portion of the proceedings.

24 **IV. THE PROSECUTION TEAM FAILED TO CONSIDER WATER AVAILABLE IN**
25 **THE DELTA**

26 As described briefly above, it is undisputed that for more than 100 years, BBID and
27 WSID diverted water that was present in the Delta channels. The evidence will show that
28 BBID and WSID did so, irrespective of the source of that water. The evidence, in official

1 reports prepared by DWR, will show that BBID and WSID diverted water even in multiple
2 dry year periods from the reservoir that is comprised of Delta channels. The evidence will
3 show that the Delta is, and always has been, supplied with water from various upstream
4 sources and, at various times of the year, the water present at BBID's and WSID's points
5 of diversion is from a number of different sources, including some water from the San
6 Joaquin River, some water from the rivers entering the Delta from the east, some water
7 from the Sacramento River, some water that fell in and around the Delta in the form of
8 precipitation, and some water that flowed past BBID's and WSID's point of diversion only
9 to return later with the movement of the tides. The Prosecution Team will not provide any
10 authority to establish that BBID or WSID is no longer entitled to divert from this historic
11 source, nor will the Prosecution Team provide the outcome of any hearing or process
12 where an adjudicative authority determined that BBID or WSID had no right to this water.

13 Instead, the evidence will show that, for many decades, there was no dispute that
14 the presence of this water in the channels of the Delta provided the source of water to
15 in-Delta diverters like BBID and WSID. Even DWR recognized that the quantity of water
16 in the Delta is never a problem – it has always been a question of quality. As DWR
17 states in Bulletin 76 (1978):

18 Because the Delta is open to the San Francisco Bay complex and Pacific
19 Ocean and its channels are below sea level, it never has a shortage of
20 water. If the inflow from the Central Valley is insufficient to meet the
21 consumptive needs of the Delta, saline water from the bay fills the Delta
22 from the west. Thus, the local water supply problem in the Delta becomes
23 one of poor water quality, not insufficient quantity. Today degradation by
24 agricultural, municipal, and industrial waste discharges in the San
25 Francisco-Bay Delta area compounds the problem . . . During the 24-year
26 period from 1920 to 1944, there were 7 years of severe salinity intrusion in
27 the interior Delta. As the use of water upstream and export from the Delta
28 increased, average annual Delta outflow has been steadily reduced...

24 The evidence will show that the contract between the North Delta Water Agency
25 and DWR recognizes that there is never a lack of water supply in the Delta, but at times
26 there can be water quality problems. The evidence will show that the East Contra Costa
27 Irrigation District (ECCID) has a similar contract with DWR – that provides for certain
28 guarantees of water quality at ECCID's point of diversion. ECCID's facilities are close in

1 proximity to BBID's diversion facilities. The evidence will also show that the SWRCB
2 itself has recognized, in various Decisions, that "the [D]elta channels form a vast
3 reservoir[.]"

4 BBID's diversion facility is within the Delta – and is currently located on the intake
5 channel of the State Water Project (SWP). The evidence will show that originally, BBID's
6 point of diversion was located on Italian Slough, but the construction of the State Water
7 Project necessitated the relocation of BBID's original point of diversion to its current
8 location. In 1963, the State commenced construction of the Clifton Court facilities, which
9 included Clifton Court Forebay, the Harvey O. Banks Pumping Plant, and the intake
10 channel connecting Clifton Court Forebay to the Harvey O. Banks Pumping Plant. BBID's
11 pumping facilities were constructed on the intake channel under an agreement with DWR
12 executed in 1964.

13 The plain language of the 1964 Agreement provides for, among other things, the
14 relocation of BBID's pumping plants and points of diversion to the SWP intake channel.
15 Through the 1964 Agreement, the State of California also consented to the "permanent
16 and perpetual use by [BBID], without cost, of State's facilities and of that portion of its
17 right of way required for the construction, operation, and maintenance of [BBID's]
18 permanent facilities." The evidence will show that, under the 1964 Agreement, BBID
19 relocated its pumping facilities to their current location, and has operated those facilities
20 since that time.

21 The evidence will show that BBID operates two pumping plants off the Intake
22 Channel to the Harvey O. Banks Pumping Plant. Pumping Plant 1-North, with a pumping
23 capacity of 100 cubic feet per second (cfs), provides water for agricultural and municipal
24 and industrial (M&I) uses to lands within eastern Contra Costa County. The original
25 portion of Pumping Plant 1-South has a capacity of 100 cfs, and provides water for
26 agricultural and M&I uses to the eastern portions of Contra Costa and Alameda Counties.
27 The evidence will show that, in 2000, Pumping Plant 1-South was expanded to include
28 pumping and conveyance facilities, with a pumping capacity of 30 cfs, in order to provide

1 water to the community of Mountain House. The evidence will show that the Mountain
2 House water treatment plant operator controls the Mountain House pumping facilities at
3 Pumping Plant 1-South by remote flow selection.

4 The evidence will also show that Clifton Court Forebay acts as a regulating
5 reservoir for both the SWP and for BBID's pumping facilities. The gates at Clifton Court
6 Forebay are operated on schedules set by DWR, and BBID has no control over the gate
7 operation schedule. However, the evidence will show that BBID pumps water from the
8 Intake Channel to the Harvey O. Banks Pumping Plant, irrespective of whether the gates
9 are in the open or closed position. The evidence will show that, at times, the gates of
10 Clifton Court Forebay are closed for extended periods of time. During those times, BBID
11 continues to divert from the water stored in Clifton Court Forebay.

12 Finally, the evidence will show that BBID and WSID have historically diverted
13 water from the Delta channels even when upstream flows dropped, that various sources
14 contributed to that supply, and that the relocation of BBID's diversion facilities to the
15 intake channel of the SWP has no adverse impact on BBID's ability to divert water. The
16 Prosecution Team failed to consider these historic facts prior to issuing Curtailment
17 Notice to BBID and WSID.

18 **V. THE STATE WATER CONTRACTORS AND DEPARTMENT OF WATER**
19 **RESOURCES ARE OF NO ASSISTANCE TO THE PROSECUTION TEAM'S**
20 **CASE**

21 The evidence being offered, over objection, by the State Water Contractors (SWC)
22 and DWR doesn't support the Prosecution Team's case. The SWC and DWR represent
23 the largest "straw" in the Delta, with much of this water being transported to Southern
24 California users. The pumps for the SWP, which divert water to satisfy the SWC, are the
25 largest in-Delta diversion. While the largest, DWR is also among the most junior water
26 users in the Delta. This is why both DWR and the SWC continually try to restrict water
27 from those with the legal right to it. The more senior water rights DWR and the SWC can
28 constrain – the more water they believe they get for themselves. Efforts to restrict
diversions by in-Delta diverters started with accusations that the various water rights were

1 not valid and, having failed there, the SWC now turn to the SWRCB to try to restrict
2 BBID's and WSID's historic source of water – the water that has always been present in
3 the Delta channels. It is in this context that the SWC and DWR present evidence in this
4 Enforcement Action.

5 Indeed, even the SWC, the entity most intent on extinguishing uses of water in the
6 Delta, fail to demonstrate BBID violated Section 1052. The evidence will show that, in
7 preparing to ask the SWRCB to take action against in-Delta diverters like BBID, the SWC
8 engaged the services of CH2M. The evidence will show that the purpose of this
9 engagement is to develop a modeling scenario that shows that there was no water
10 available for those in the Delta, including BBID and WSID, during several years. The
11 evidence will show that the SWC and CH2M assumed, for the purpose of examining
12 water availability in the Delta, that Delta inflow was zero – and even negative flows – for
13 the entire summer of 2015. While the SWC have not divulged how they came to the
14 conclusion that Delta inflow would be zero for that period of 2015, they nonetheless
15 assume it for the modeling they had CH2M conduct to try to demonstrate in-Delta
16 diverters are taking “project water.”³ The problem for the SWC here, as the evidence will
17 show, is even with the worst-case scenario they try to create through the CH2M
18 modeling, the work they did shows that even with a no project condition in 2015, BBID
19 had available water of sufficient quality for at least the entire month of June 2015. In
20 other words, they couldn't manufacture a scenario bad enough to deprive BBID of water
21 in June 2015.

22 Thus, and while the SWC and DWR's testimony is objectionable for the reasons
23 stated in the various motions filed by the parties, it does not aid the Prosecution Team's

24 _____
25 ³ Of course, had Delta inflow dropped to zero, there would have been no water available for any upstream
26 pre-1914 appropriative water rights because all of that water would have been required to remain instream
27 to satisfy downstream riparian water rights. Moreover, if there would have been zero natural inflow into the
28 Delta as of May 1, 2015, it will be interesting to obtain the model and determine when flows sufficient to
satisfy DWR's storage rights for Oroville would have ceased. Indeed, whether using the SWRCB's
watershed-wide analysis or the SWC's modeling, it is likely that there would have been insufficient flow in
the system to satisfy DWR's water rights for Oroville which means that DWR violated Section 1052 at least
in the spring of 2015.

1 case against WSID or BBID.

2 **VI. BBID TOOK APPROPRIATE ACTION AFTER IT RECEIVED THE JUNE 12,**
3 **2015 CURTAILMENT NOTICE IN AN ATTEMPT TO AVOID LITIGATION**

4 BBID received the Curtailment Notice by certified mail on June 15, 2015. The
5 evidence will show that BBID, along with other water managers, understood that the 7-
6 day certification period contained in the Curtailment Notice meant that all diversions had
7 to cease by the end of that certification period. The evidence will show that, because
8 many growers within BBID had truck crops planted and near ready for harvest, BBID
9 used what it thought was a 7-day wind-down period to get the last irrigation to those
10 crops, and to get the soil profile of permanent crops saturated while BBID continued to
11 search for alternate water supplies.

12 The evidence will show that BBID participated as a member of the San Luis &
13 Delta-Mendota Water Authority's 2015 North of Delta Water Transfer Program. The
14 evidence will show that BBID and other agencies were concerned that water being stored
15 in Shasta would be held in Shasta by the Bureau of Reclamation throughout the summer
16 as a result of issues related to temperature of the Sacramento River and SWRCB cold
17 water pool mandates. The evidence will show that, because of these restrictions, and
18 other restrictions related to pumping at Jones Pumping Plant, BBID and other CVP
19 contractors lying between the Delta and San Luis Reservoir agreed to a "Pump Back
20 Project," whereby pumps would be installed at various locations in the Delta Mendota
21 Canal, and water that was in the San Luis Reservoir would be pumped up the Delta-
22 Mendota Canal to those districts.

23 The evidence will show that, as summer 2015 approached, and while BBID
24 disagreed with the SWRCB's planned/proposed curtailments of pre-1914 water rights,
25 BBID went to great lengths to try to find alternate water supplies in order to avoid legal
26 conflicts over curtailments.

27 The evidence will show that BBID first attempted to work out an arrangement with
28 DWR to secure water supplies from DWR. BBID even offered to institute an immediate

1 reduction in pumping to conserve water for use later in the season. The evidence will
2 show that BBID went to great lengths to try to work out this exchange agreement with
3 DWR in order to avoid challenging the SWRCB's curtailments. The evidence will show
4 that DWR eventually rejected the proposal.

5 The evidence will show that BBID then turned its focus to other possible short-term
6 solutions to get BBID through the irrigation season. Thus, BBID and the Zone 7 Water
7 Agency developed a water exchange, and Zone 7 submitted a Proposal for Water
8 Exchange between Zone 7 and BBID to DWR's State Water Project Analysis Office
9 (SWPAO). The evidence will show that BBID and Zone 7 worked hard to finalize the
10 exchange, only to be met with great resistance by SWPAO. The evidence will show that
11 DWR later informed BBID that the proposed exchanged with Zone 7 was rejected by
12 certain SWC members.

13 The evidence will show that BBID and Zone 7 then developed another exchange,
14 an exchange that did not involve SWP Water. The evidence will show that this exchange
15 also required DWR approval, and that DWR made the exchange so difficult that it was
16 impracticable and infeasible.

17 The evidence will show that, as part of BBID's discussion with DWR, staff at DWR
18 suggested that BBID might be able to purchase some water that was part of the Yuba
19 transfer to the SWC. BBID inquired about the possibility, but the SWC declined to allow
20 BBID to participate.

21 The evidence will show that BBID was able to finalize a one-time storage and
22 exchange project with Contra Costa Water District, which provided for the transfer of 500
23 acre-feet of water to BBID.

24 The evidence will show that BBID entered into a water transfer agreement with the
25 Carmichael Water District, which provided BBID with some water in June of 2015, which
26 BBID accessed following the SWRCB's issuance of the Curtailment Notice. The
27 evidence will also show that BBID was able to acquire minimal amounts of local
28 groundwater from local sellers to supplement BBID supplies.

1 The evidence will show that BBID proposed to the SWRCB and the Delta
2 Watermaster a voluntary reduction program whereby BBID would voluntarily cutback on
3 diversions and use of water ahead of curtailments in exchange for some regulatory
4 certainty of no curtailments later in the season. The evidence will show that the SWRCB
5 rejected the proposal.

6 The evidence will show that BBID attempted to purchase or appropriate
7 wastewater discharges from the community of Mountain House and from the Sacramento
8 Regional County Sanitation District. The evidence will show that both of these attempts
9 were unsuccessful.

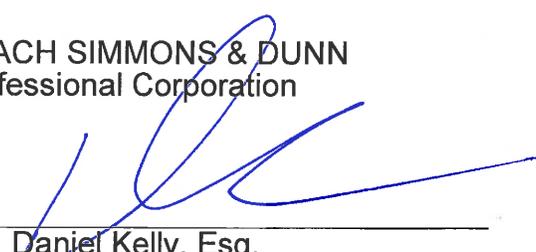
10 The evidence will show that the SWRCB assured BBID that it would not bring an
11 enforcement action against BBID for water diverted for use within Mountain House and
12 the Mariposa Energy Project; and the evidence will show that the ACL Complaint includes
13 water diverted for Mountain House and the Mariposa Energy Project.

14 **VII. CONCLUSION**

15 These proceedings are not the "easy" proceedings the SWRCB's Prosecution
16 Team proclaimed they would be. They are also not an appropriate "test case." The
17 SWRCB should not sacrifice the farmers and residents within BBID and WSID,
18 threatening millions of dollars of fines, in an attempt to "tee up" a couple of important legal
19 issues. Instead, the SWRCB should dismiss these proceedings and convene an
20 appropriate fact-finding proceeding to develop a method for determining water availability
21 in the Delta during times of drought.

22 Dated: February 29, 2016

SOMACH SIMMONS & DUNN
A Professional Corporation

24
25 By: 
26 Daniel Kelly, Esq.
27 Attorneys for Petitioner/Plaintiff BYRON-
28 BETHANY IRRIGATION DISTRICT

1 **PROOF OF SERVICE**

2 I am employed in the County of Sacramento; my business address is 500 Capitol
3 Mall, Suite 1000, Sacramento, California; I am over the age of 18 years and not a party
4 to the foregoing action.

5 On February 29, 2016, I served the following document(s):

6 **BYRON-BETHANY IRRIGATION DISTRICT'S COMBINED OPENING STATEMENT**

7 X (via electronic mail) by causing to be delivered a true copy thereof to the person(s)
8 and at the email addresses set forth below:

9
10 **SEE ATTACHED SERVICE LIST**

11 I declare under penalty of perjury that the foregoing is true and correct. Executed
12 on February 29, 2016 at Sacramento, California.

13 
14 Michelle Bracha

SOMACH SIMMONS & DUNN
A Professional Corporation

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**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**

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