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9 AUTHORITY, Real Party in Interest

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

11 ENFORCEMENT ACTION ENF01949) **SAN JOAQUIN TRIBUTARIES**
12 DRAFT CEASE AND DESIST ORDER) **AUTHORITY'S OPENING BRIEF**
13 REGARDING UNAUTHORIZED)
14 DIVERSIONS OR THREATENED)
15 UNAUTHORIZED DIVERSIONS OF)
16 WATER FROM OLD RIVER IN SAN)
17 JOAQUIN COUNTY - WEST SIDE)
18 IRRIGATION DISTRICT,)
19 and)
20 ENFORCEMENT ACTION ENF01951)
21 DRAFT ADMINISTRATIVE LIABILITY)
22 COMPLAINT REGARDING)
23 UNAUTHORIZED DIVERSIONS BY)
24 BYRON-BETHANY IRRIGATION)
25 DISTRICT)

26 **I. INTRODUCTION**

27 The State Water Resources Control Board (State Water Board) issued an
28 Administrative Liability Complaint (ACL Complaint) against the Byron Bethany Irrigation
District (BBID) on June 20, 2015. The State Water Board issued a draft cease and desist
order (CDO) against the Westside Irrigation District (WSID) on July 16, 2015. The ACL
Complaint and CDO (collectively referred to as "Enforcement Actions") are based primarily
on allegations that BBID and WSID continued to divert water after receiving notice that the
State Water Board staff had determined there was not sufficient water to support BBID
and/or WSID diversions. The State Water Board staff determined unavailability based on

1 the water availability analysis (WAA) developed and administered by staff to support
2 curtailment actions in 2015.

3 Each party to this matter has a different interpretation of what this matter is about.
4 The Prosecution Team will tell you this matter is an enforcement action and has nothing to
5 do with curtailment. The parties accused of unauthorized diversion, BBID and WSID,
6 rightfully understand this matter to be about authority and evidence to prove allegations of
7 unlawful diversion. For the San Joaquin Tributaries Authority (SJTA), this matter is
8 fundamentally about when the State Water Board is required to take action as a state
9 agency. The SJTA and its members are not accused of unauthorized diversion in this
10 matter. However, if the actions taken by the State Water Board staff in this matter are
11 determined to be valid or otherwise approved, the rules under which the SJTA and its
12 members are able to divert and store water will be dramatically altered. For this reason,
13 the SJTA and its members are vitally interested in the determinations made in the
14 Enforcement Actions.

15 The SJTA has previously submitted briefing in this matter regarding the State Water
16 Board's jurisdiction over pre-1914 water right holders, the due process violations inherent
17 within the staff determination of water availability, the authority to delegate the authority to
18 issue enforcement orders to staff, and the lack of continuing authority to regulate previously
19 appropriated water. The SJTA believes these issues are fundamental. However, despite
20 their importance, the SJTA will not repeat the arguments it has made previously, but
21 instead, incorporates them into this document by reference.

22 Instead, the SJTA will focus this opening brief on two issues: (1) State Water Board
23 involvement in curtailment actions; and (2) the primary deficiency of the WAA.

24 **II. STATE WATER BOARD ACTION RELATING TO CURTAILMENT**

25 The State Water Board was not involved and did not authorize the approach to
26 curtailing water users in 2015. One of the consistent and overarching themes in the
27 depositions of the State Water Board staff members was the lack of direction or
28 authorization from the State Water Board on curtailment and water availability analyses

1 issues. Brian Coats testified that he believed the authorization for curtailment actions in
2 2015 came from “upper management” within the State Water Board staff. He was not
3 aware of any direction from the State Water Board. (Coats Deposition, at 123:15-124:10;
4 173:16-174:21.) Jeff Yeazell created the spreadsheets for curtailment. He testified that he
5 was the only person that worked on the spreadsheets, and he only spoke with Brian Coats
6 about the spreadsheets; he never spoke with or received direction from the State Water
7 Board. (Yeazell Deposition, at 22:8-14; 27:12-28:10.) Kathy Mrowka testified that she and
8 her staff, including Brian Coats, Jeff Yeazell, and John O’Hagan, made water availability
9 analyses decisions unilaterally. (Mrowka Deposition, at 233:4-236:14; 237:3-238:9.) She
10 further testified that staff determined when water was and was not available for specific
11 groups of water users. (*Id.*, at 24:23-25.) When specifically asked about State Water Board
12 authorization, Ms. Mrowka testified that she believed the State Water Board was briefed
13 and “gave the nod” to go ahead with curtailment, but she did not receive direction from the
14 State Water Board directly. (*Id.*, at 192-18-193:19.) Mr. Howard testified he did not recall
15 whether he received direction from the State Water Board regarding curtailment. (Howard
16 Deposition, at 97:24-98:20.) Thus, it appears that staff did not receive any specific
17 direction or authorization from the State Water Board regarding curtailment.

18 The lack of State Water Board involvement in the 2015 curtailment is in stark
19 contrast to its role in the 2014 curtailment. In 2014, State Water Board staff developed two
20 different draft emergency curtailment regulations. (See State Water Resources Control
21 Board, *Emergency Regulations: Statewide Drought Related Curtailment to Protect Senior*
22 *Water Rights*, [http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/
23 emergency_regulations.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/emergency_regulations.shtml).) Both of the emergency regulations were based on the new
24 authority granted by Water Code section 1058.5. (State Water Resources Control Board,
25 Notice of Proposed Emergency Rulemaking (June 20, 2014) at N-1 *available at*
26 [http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/
27 emergency_regulations/nperm_sw_eregs_062014.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/emergency_regulations/nperm_sw_eregs_062014.pdf).) The first regulation curtailed post-
28 1914 water right holders and the second proposed to curtail pre-1914 water right holders.

1 The draft regulations were released for public comment. (State Water Resources Control
2 Board, June 20, 2014 Draft Regulations, at 20 *available at* [http://www.waterboards.ca.gov/
3 waterrights/water_issues/programs/drought/docs/emergency_regulations/attch5_draft_regs
4 and_info062014.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/emergency_regulations/attch5_draft_regs_and_info062014.pdf).) The State Water Board held a meeting at which they spent multiple
5 hours receiving comments, suggesting edits, and generally discussing the curtailment
6 regulations. In the end, the State Water Board chose to adopt a Resolution regarding post-
7 1914 curtailment regulations with several significant amendments. (State Water Resources
8 Control Board, Resolution No. 2014-0031 (July 2, 2014), *available at* [http://www.
9 waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/emergency_regulatio
10 ns/attach2_rs2014_0031_with_regs.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/emergency_regulations/attach2_rs2014_0031_with_regs.pdf).) The State Water Board chose not to adopt the
11 pre-1914 curtailment regulations. (*Id.*, at ¶ 21.)

12 The 2015 curtailment process was vastly different. The State Water Board staff did
13 not propose regulations. The public did not have the opportunity to comment on a
14 proposed regulation or approach. There was no opportunity for the public to provide
15 concern and/or input to State Water Board members. There was no public discussion or
16 deliberation among and between State Water Board members. There was no opportunity
17 for the State Water Board to provide staff with direction on how to proceed with curtailment.
18 There was no opportunity for the State Water Board to vote on the issue of whether to
19 curtail post-1914 or pre-1914 water right holders.

20 Instead, State Water Board staff unilaterally developed a methodology and issued
21 curtailment notices to post-1914 and pre-1914 water right holders. The staff actions
22 departed significantly from the State Water Board-approved actions the year before,
23 especially from the perspective of a pre-1914 water right holder. The evidence and
24 depositions in this matter to date do not make clear who is responsible for the decision to
25 change the course of curtailment so drastically from one year to the next or when that
26 decision was made.

27 The SJTA is concerned with the significant shift in approach for several reasons.
28 First, curtailment is a controversial issue that has statewide implications. These types of
decisions are historically handled at the State Water Board level and not by staff. In fact,

1 during the 2014 curtailment hearing, several State Water Board members recognized the
2 gravity of curtailment decisions and specifically expressed their opinion that curtailment
3 decisions were of such significance that they must be handled by the elected State Water
4 Board and could not be delegated to staff. Board Member D'Adamo stated: "I'd feel better
5 if the Board grappled with it because we are talking about some big issues that have been
6 around for quite some time." (Dorene D'Adamo, SWRCB Meeting Item 5, July 1, 2014
7 [Archived Copy 3 of 3 at 4:00].) Board Member Dudoc agreed and further remarked that
8 "we as a board have a responsibility to tackle these issues ourselves, and not just delegate
9 it to [staff] . . . we should have these discussions publicly . . . because the magnitude of
10 these topics is so critical and because we do need to have that in order to develop a level
11 of trust." (Tam Dudoc, SWRCB Meeting Item 5, July 1, 2014 [Archived Copy 3 of 3 at
12 18:14].)

13 The sentiments of the State Water Board members above make sense and reflect
14 existing rules and regulations for State Water Board delegation. Resolution 2012-029
15 prohibits the State Water Board from delegating any issue that requires substantive policy
16 decisions and is controversial in nature. Thus, the second reason the SJTA objects to the
17 2015 curtailment process is that staff acted without authorization. The State Water Board
18 is prohibited from delegating any authority it may have and allow staff to undertake
19 statewide curtailment action. Without lawful delegation, the staff has no authority to
20 conduct water availability analyses and make determinations of when water is available for
21 particular water users or particular groups of water users.

22 The third reason the SJTA objects to the 2015 curtailment process is that it lacked
23 transparency and public review. From the depositions of State Water Board staff, it has
24 become clear that the curtailment approach and water availability analyses were developed
25 by one or two individuals without any stakeholder input, peer review, or other testing of
26 inputs or approach. (Coats Deposition, at 123:15-124:10; 173:16-174:21; Yeazell
27 Deposition, at 22:8-14; 27:12-28:10; Mrowka Deposition, at 24:23-25; 233:4-236:14; 237:3-
28 238:9.) The individuals inputting numbers and running the spreadsheets simply input
numbers and assumptions provided by other staff. (*Id.*) It was unclear if any stakeholder

1 input was used to change or improve the WAA. (Yeazell Deposition, at 126:24-127:21.)
2 The WAA was not further reviewed outside Yeazell, Coats, and O'Hagan. (Coats
3 Deposition, at 123:15-124:10; 173:16-174:21; Yeazell Deposition, at 22:8-14; 27:12-28:10;
4 Mrowka Deposition, at 24:23-25; 233:4-236:14; 237:3-238:9.) In essence, a few staff
5 members alone unilaterally determined the water use and curtailment actions for the
6 Sacramento, San Joaquin, and Bay-Delta Watersheds.

7 Finally, the change in direction regarding how to approach curtailment also lacked
8 transparency. In 2014, staff proposed emergency regulations and had a full public process
9 before adopting regulations. In 2015, staff did not propose emergency regulations and did
10 not engage in any other public actions. Clearly, a decision was made to change directions.
11 However, even after depositions of State Water Board staff, it remains unclear who made
12 this decision, when the decision was made, and why the decision was made, and under
13 what authority it was made.

14 **III. DEFICIENCIES IN THE WATER AVAILABILITY ANALYSES**

15 There are several technical deficiencies with the WAA. The SJTA has previously
16 submitted briefing in this matter that explains these deficiencies. The SJTA will not repeat
17 these points here, but incorporates them by reference. Instead, the SJTA will discuss only
18 the primary deficiency of the WAA, which is that it only takes into consideration the full
19 natural flow of water. If the State Water Board were limiting the application of its water
20 availability analysis to the diversion of water pursuant to riparian rights, this approach may
21 be understandable. However, the State Water Board did not apply the water availability to
22 the riparian water right holders. Instead, the State Water Board applied the water
23 availability analysis only to appropriative water right holders. The water available for
24 appropriation by appropriative water right holders is not limited to natural flow.
25 Appropriative water right holders are allowed to divert water that has (a) previously been
26 stored, (b) been imported and/or transferred into the system, (c) been returned to streams
27 after use, (d) been used to meet water quality objectives and not subject to recapture, (e)
28 otherwise been abandoned and (f) been influenced by ocean or tidal means.

1 Thus, the water availability analysis conducted by State Water Board staff was only
2 applicable to riparian water right holders. However, the State Water Board staff applied the
3 riparian water availability analysis to determine when to curtail appropriative water right
4 holders. Due to the fundamental differences in how to determine supply and demand
5 between riparian and appropriative water right holders, it was not appropriate or legally
6 supportable to apply this analysis to appropriative water use.

7
8 **IV. RECOMMENDATION**

9 In this opening brief and in other briefing documents in this matter, the SJTA has
10 been critical of the State Water Board staff's actions during the 2015 curtailment process,
11 the development of the water availability analysis, and the enforcement actions resulting
12 therefrom. However, the SJTA understands it is easy to throw rocks, but more challenging
13 to offer a solution. In that spirit, the SJTA recommends the State Water Board re-direct the
14 enforcement efforts in the WSID and BBID matters into developing a method through which
15 the State Water Board can properly communicate water availability during times of water
16 shortage. The State Water Board has a critical role in times of drought by providing timely
17 information that will help water operators plan their water operations. If water users
18 understand and support how this information was developed, they will accept it and rely on
19 it as operational guidance. To the extent water users do not understand or support the
20 analysis, it will be questioned, resisted, and challenged. The goal of the curtailment actions
21 should be education and adherence, which avoid the need for enforcement.

22 DATED: February 29, 2016 O'LAUGHLIN & PARIS LLP

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24
25 By: 
26 TIM O'LAUGHLIN
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28 SAN JOAQUIN TRIBUTARIES AUTHORITY

1 Re: SWB - BBID-ACL/WSID CDO Hearings

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3 **PROOF OF SERVICE BY MAIL**
4 (Government Code §11440.20)

5 I, Linda L. Wood, declare that:

6 I am employed in the County of Sacramento, State of California. I am over the age of
7 eighteen years and not a party to the within cause. My business address is 2617 K Street,
8 Suite 100, Sacramento, CA 95814. On this date, in the following manner, I served the
foregoing document(s) identified as:

9 **SAN JOAQUIN TRIBUTARIES AUTHORITY'S OPENING BRIEF**

10
11 **▶▶▶ E-MAIL** [CCP §1010.6]: Based on pending consent of the parties, and/or court order
12 or an agreement of the parties to accept service by e-mail, I caused the documents to
13 be sent to the following persons at the following e-mail address, and did not receive,
14 within a reasonable time after the transmission, any electronic message or other
indication that the transmission was unsuccessful:

15 **PERSONAL DELIVERY** [CCP §415.10] I arranged to have the documents personally
16 delivered to the office of the persons identified below on _____:

17 **SEE ATTACHED SERVICE LIST**

18
19 I declare under penalty of perjury under the laws of the State of California that the
20 foregoing is true and correct. Executed this 29th day of February, 2016, at Sacramento,
21 California.

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24 By: 
25 Linda L. Wood, Legal Assistant

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**BYRON-BETHANY IRRIGATION DISTRICT
ADMINISTRATIVE CIVIL LIABILITY HEARING
(09/02/15; Revised 09/10/15; Revised 10/06/16; Revised 10/22/15)**

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**WEST SIDE IRRIGATION DISTRICT
CEASE AND DESIST ORDER
HEARING
(October 8, 2015)**

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