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

13
14 ENFORCEMENT ACTION ENFO1949
15 DRAFT CEASE AND DESIST ORDER
REGARDING UNAUTHORIZED
16 DIVERSIONS OR THREATENED
UNAUTHORIZED DIVERSIONS OF
17 WATER FROM OLD RIVER IN SAN
JOAQUIN COUNTY,
18

**WESTLANDS WATER DISTRICT'S
OPENING STATEMENT**

19 Westlands Water District ("Westlands") holds contractual water rights to receive 1.15 million
20 acre feet of Central Valley Project ("CVP") water from the Bureau of Reclamation ("Reclamation").
21 Much of the water delivered under Westlands' contract is water Reclamation has previously diverted
22 to storage and later released to travel through the Sacramento-San Joaquin Delta ("Delta") for export
23 at the C.W. "Bill" Jones Pumping Plant in the south Delta, and is ultimately delivered to Westlands
24 via the Delta-Mendota Canal and California Aqueduct. Anticipating a third consecutive year with a
25 zero percent CVP contract allocation, Westlands and its farmers and families have relied on water
26 transfers from its fellow water users; much of that transfer water must also survive its passage through
27 the Delta for export at Jones.

28 The issues raised in the current proceeding are not new ones for Westlands. During the current

1 drought, Westlands' staff has made repeated presentations to the State Water Resources Control Board
2 ("State Water Board") and its staff. Westlands has encouraged the State Water Board to protect water
3 released from federal reservoirs as it travels through the Delta, and Westlands has highlighted when
4 the available data indicates inadequate flows on the Sacramento or San Joaquin rivers to support the
5 diversions occurring in the Delta. Parties in the Delta have responded by arguing that the Delta is
6 "different," implying that the existing water rights regime is somehow insufficient to meet the
7 complexities of a tidal estuary that has been significantly altered by man. While aspects of this
8 argument may hold some merit, these maneuvers have not provided clarity or a path toward a durable
9 regime. Westlands has also advocated for measuring and monitoring efforts, as called for by law,¹
10 which would equip the State Water Board with the data it needs to regulate the diversion of waters of
11 the state. That advocacy was often met with claims that such measurements are not "locally cost
12 effective," which has resulted in an absence of data – a "black box" of water use in the Delta that may
13 be exploited to maintain the status quo. Finally, both Westlands and the San Luis & Delta-Mendota
14 Water Authority (of which Westlands is a member) have consistently engaged in litigation and in
15 enforcement proceedings regarding diversions of water in the Delta believed to be unlawful.² The
16 responses in these fora have often been allegations of a lack of State Water Board jurisdiction or
17 violation of due process – which has effectively achieved an internal state of anarchy in the Delta. To
18 be sure, the Delta is not extra-territorial, and there is a process that its water users are both afforded
19 and to which they are subject.

20 Westlands' primary interests in Enforcement Action ENF01949 ("Enforcement Action") are
21 twofold. First, Westlands encourages the State Water Board to protect CVP water from unauthorized
22 diversions, including threatened and actual unauthorized diversions by The West Side Irrigation
23 District ("WSID"). WSID's right to divert Old River water is limited by the terms of its water right
24 license and by principles of California water law; therefore any diversion that occurs outside those

25 ¹ See, e.g., Wat. Code, § 85086.

26 ² See, e.g., *El Dorado Irr. Dist. v. SWRCB* (2006) 142 Cal.App.4th 937; *Young v. SWRCB* (2013) 219
27 Cal.App.4th 397; *Modesto Irr. Dist. v. SWRCB*, Sacramento Superior Court Case No. 34-2011-
28 80000803; Woods Irrigation Company Cease and Desist Order Proceeding, leading to Order WR
2016-0006-EXEC.

1 limits is an unlawful diversion and is appropriately subject to enforcement. Second, Westlands
2 supports the State Water Board’s ability to effectively and properly enforce against unauthorized
3 diversions. In the exercise of this authority, it is imperative that, when the State Water Board
4 determines water is not available for diversion and issues an order to a water user to cease the
5 diversions upon which he or she relies, not only are the order and its underlying bases *actually*
6 legitimate, but the entire institution of water rights enforcement underlying the order is *perceived* as
7 legitimate. Westlands stands squarely beside its fellow water users against the arbitrary application of
8 unaccountable authority that deprives men and women of one of nature’s most fundamental rights:
9 water.

10 **I. The State Water Board Must Protect CVP Water From Threatened or Actual**
11 **Unauthorized Diversions of Water by WSID**

12 Because unauthorized diversions from Old River may reduce the supply of CVP and transfer
13 water available for diversion and use by Westlands, Westlands has an interest in ensuring that the
14 State Water Board can protect the water of the state from unauthorized diversions, including
15 threatened and actual unauthorized diversions by WSID. This Enforcement Action involves a draft
16 cease and desist order (“CDO”) issued to WSID by the State Water Board pursuant to Water Code
17 section 1831. (WR-1.) Section 1831, subdivision (d)(1), authorizes the State Water Board to issue a
18 CDO “in response to a violation or threatened violation of . . . [t]he prohibition set forth in Section
19 1052 against the unauthorized diversion or use of water . . .” Part of the State Water Board’s
20 enforcement against such unauthorized diversions is delineating the limits of applicable water rights
21 and holding water users to those limits.

22 WSID’s post-1914 appropriative water right is defined by License 1381, which identifies Old
23 River, a tributary of the San Joaquin River, as WSID’s source of supply. (WSID0005.) WSID is
24 entitled to divert and use water only to the extent allowed in its license. (See Wat. Code, § 1381; see
25 also Wat. Code, §§ 1605, 1610; *Pleasant Valley Canal Co. v. Borrer* (1998) 61 Cal.App.4th 472, 176
26 [“Appropriators . . . may divert only so much water as is authorized by their particular water right.”].)
27 The presence of water at WSID’s point of diversion does not necessarily entitle WSID to divert that
28 water under License 1381 or any other claim of right.

1 First, License 1381 does not entitle WSID to divert stored water. (See, e.g., *El Dorado*
2 *Irrigation Dist. v. SWRCB* (2006) 142 Cal.App.4th 937, 976; *Phelps v. SWRCB* (2007) 157
3 Cal.App.4th 89, 107, 111; SWRCB Order WR 2004-004 at pp. 16.) Although WSID does not indicate
4 whether stored water was present at its point of diversion during the relevant months in 2015, the
5 evidence shows that Reclamation and the Department of Water Resources made releases from storage
6 throughout 2015. (See SWC0001 at ¶ 18.) To the extent water present at WSID’s point of diversion
7 included CVP water that was previously stored by Reclamation, that stored water was not “available”
8 for diversion by WSID under License 1381.

9 Second, to the extent the State Water Board has properly concluded that water is not available
10 under WSID’s license, WSID has not shown whether some or all of the water present at its point of
11 diversion is abandoned and therefore potentially subject to appropriation under some of other claim of
12 right. As an appropriator, WSID may only divert natural flow or “foreign” water that has been
13 abandoned. (*United States v. SWRCB* (1986) 182 Cal.App.3d 82, 116; *Stevens v. Oakdale Irrigation*
14 *Dist.* (1939) 13 Cal.2d 343, 348-349.) WSID is not entitled to non-abandoned fresh water sources
15 present in Old River when water is not available under WSID’s license.

16 Third, although WSID may be entitled to divert drain water from Bethany Drain even when
17 Old River water is not available for diversion under License 1381, WSID’s ability to divert drain
18 water that has been commingled with other water sources is limited. Drain water from Bethany Drain
19 commingles with other water sources in the WSID Intake Canal. (WSID UMF ¶ 23; WR-1 at p. 7.)
20 WSID may not be entitled to divert the mixture if absent the commingling, the drain water could not
21 be put to reasonable and beneficial use. (Cal. Const., Art. X, § 2; *Joslin v. Marine Municipal Water*
22 *Dist.* (1967) 67 Cal.2d 132, 143.) And WSID is not entitled to divert water that is of better quality
23 than would exist under natural conditions. (See *Wright v. Best* (1942) 19 Cal.2d 368, 378-79; see also
24 *Crum v. Mt. Shasta Power Corp.* (1931) 117 Cal.App. 586, 610.) For the relevant period in 2015,
25 WSID has not established that it could put water from Bethany Drain to reasonable and beneficial use,
26 absent its commingling with other sources.

27 WSID’s diversion of commingled water is further limited by the prohibition against
28 diminishing “water already appropriated by another.” (Wat. Code, § 7075.) This prohibition

1 precludes a water user from commingling that diminishes the water quality of another water user's
2 water. (*Butte Canal & Ditch Co. v. Vaughn* (1858) 11 Cal. 143, 152-154.) Thus, WSID cannot
3 commingle water from Bethany Drain with stored water and other non-abandoned fresh water sources
4 if doing so impairs the higher water quality of those sources so they are no longer usable by others
5 entitled to them. For example, if WSID's diversion of the Bethany Drain-Old River commingled
6 mixture reduces the quality of water remaining in Old River, then WSID may be diminishing
7 Reclamation's exercise of its CVP water rights by impairing its ability to meet water quality
8 objectives and serve other CVP purposes. WSID is not entitled to diminish CVP water in this way.

9 **II. The State Water Board Must be Able to Effectively and Properly Enforce Against**
10 **Unauthorized Diversions**

11 For the same reasons that Westlands has an interest in the State Water Board's enforcement
12 against unauthorized diversions from Old River, Westlands has an interest in seeing that the State
13 Water Board can make the underlying water availability determinations necessary to exercise its
14 authority to prevent the unlawful diversion of water. (See Wat. Code, § 1825.) The need for such
15 determinations is heightened during times of drought. Without the ability to undertake threshold
16 availability analyses, the State Water Board may effectively be precluded from issuing CDOs or
17 imposing administrative civil liability to enforce against unauthorized diversions or trespasses when
18 inadequate water is available to serve all water rights. (Wat. Code, §§ 1831, 1055.)

19 In order for the State Water Board to effectively enforce against unauthorized diversions
20 during times of shortage, it must be able to undertake large-scale water availability analysis and make
21 large-scale determinations of availability. It must be able to set certain rules about how water
22 availability analyses will be undertaken. However, unfettered deference to the State Water Board's
23 choice of methodology is not warranted. At the same time the State Water Board should be
24 endeavoring to effectively prevent the unlawful diversion of water, it must *properly* be enforcing
25 against the same. This is not to say that all of WSID's criticisms of the State Water Board's water
26 availability analysis are valid. They are not. But improvements are warranted, and more should be
27 done to involve stakeholders and improve methodologies in preparation for continuing and future
28 conditions of shortage.

1 **A. The State Water Board May Determine Water Availability for the Purpose of**
2 **Enforcing Against Unauthorized Diversions³**

3 Two questions should guide the Hearing Officers' consideration of whether the State Water
4 Board may evaluate water availability in the context of an enforcement proceeding. First, if there is
5 insufficient water available under the priority of an appropriative water right to meet a water user's
6 demand, and the water user diverts or threatens to divert anyway, does that diversion or threatened
7 diversion constitute a trespass? Second, is the State Water Board authorized to make a threshold
8 determination of water availability in order to evaluate whether to initiate an enforcement action? For
9 the reasons explained below, the answer to both of these questions is yes, and the State Water Board
10 must therefore have the authority to determine whether water is available in order to enforce against
11 unlawful diversions.

12 **1. A Diversion When There is Insufficient Water Available Under the**
13 **Relevant Water Right Is a Trespass**

14 The State Water Board may issue a CDO "in response to a violation or threatened violation of
15 . . . [t]he prohibition set forth in Section 1052 against the unauthorized diversion or use of water."
16 (Wat. Code, § 1831, subd. (d)(1).) Section 1052 defines "[t]he diversion or use of water subject to this
17 division other than as authorized in this division" as a "trespass." (Wat. Code, § 1052, subd. (a).) The
18 "division" referenced in section 1052 is Division 2 of the Water Code, including sections 1000 to
19 5976. Water that is subject to a permit or license issued by the State Water Board is subject to
20 Division 2. (See, e.g., Wat. Code, §§ 1410, 1625.) The water subject to Division 2 likewise includes
21 water that is outside the scope of a riparian or pre-1914 appropriative right. (See Wat. Code, § 1201.)

22 There are obvious limits on a water user's diversion under a post-1914 appropriative water
23 right permit or license. The permit or license "gives the right to take and use water *only to the extent*
24 *and for the purpose allowed*" therein. (Wat. Code, § 1381, emphasis added; see Wat. Code, §§ 1605,
25

26 ³ Westlands agrees with the Prosecution Team and BBID that the State Water Board's authority to
27 "curtail" is not at issue in this coordinated proceeding. (Prosecution Team's Response to Pre-Hearing
28 Briefs of Legal Issues at pp. 1-2; BBID Notice of Position Regarding the SWRCB's Authority to Issue
Curtailments at pp. 1-2.)

1 1610.) The permit or license will include a host of details that define the “extent” and “purpose” of
2 the diversion available under that permit or license – the amount of water available for diversion, the
3 source of supply, the season of diversion, the purpose of use, the point of diversion, etc. (Wat. Code,
4 §§ 1301, 1391.) If a water user diverts beyond the extent allowed in the permit or license, e.g. in
5 excess of the amount of water *available* for diversion, he or she is making an unauthorized diversion,
6 and therefore committing a trespass.

7 There are also limits on a water user’s ability to divert pursuant to a pre-1914 appropriative
8 water right. Most significantly, a pre-1914 water right is limited to a specific amount of water. (See
9 *Millview v. SWRCB* (2014) 229 Cal.App.4th 879, 889-90; Hutchins, *The California Law of Water*
10 *Rights* at p. 132 [explaining that an appropriative water right attaches to a “definite quantity of
11 water”].) Accordingly, “appropriators may be deprived of all use of water when the supply is short.”
12 (*Id.* at p. 890.) In the same way that a water user who diverts water in excess of the amount available
13 under his license is committing a trespass, so too is a water user who diverts in excess of the amount
14 available under a pre-1914 water right committing a trespass.

15 **2. A Threshold Determination of Availability is Necessary to the State**
16 **Water Board’s Evaluation of Whether to Initiate an Enforcement**
17 **Action**

18 The Legislature has directed the State Water Board to “take vigorous action to . . . prevent the
19 unlawful diversion of water.” (Wat. Code, § 1825.) Thus, the State Water Board has “authority to
20 prevent illegal diversions and to prevent waste or unreasonable use of water, regardless of the basis
21 under which the right is held.” (*California Farm Bureau Federation v. SWRCB* (2011) 51 Cal.4th
22 421, 429.) In order to exercise this authority, California courts have confirmed that the State Water
23 Board is able to determine whether a threatened or actual diversion is in fact “unauthorized” or
24 “illegal.” In *Young v. State Water Resources Control Board* (2013) 219 Cal.App.4th 397, 406, the
25 court concluded that the State Water Board has the authority “to determine if any person is unlawfully
26 diverting water; to determine whether the diversion and use of water is unauthorized, it is necessary to
27 determine whether the diversion and use that the diverter claims is authorized . . .” The court in
28 *Millview*, 229 Cal.App.4th at p. 894, likewise confirmed the State Water Board’s authority to
determine the proper scope of a claimed pre-1914 appropriative right. The State Water Board’s

1 general investigatory powers support the *Young* and *Millview* courts' conclusions. (Wat. Code,
2 § 1051, subd. (a); see *Young*, 219 Cal.App.4th at p. 405.)

3 The State Water Board has jurisdiction to draw a line between a diversion that is authorized
4 under the claim of right, and a diversion that is unauthorized under the claim of right. This authority
5 is essential to the State Water Board's satisfaction of its mandate under Water Code section 1825 "to
6 prevent the unlawful diversion of water." (Wat. Code, § 1825.)

7 A determination of water availability is a threshold determination to drawing a line between
8 authorized and unauthorized diversions. If the amount of water from the relevant water source that is
9 associated with a water right is not available, a water user that diverts notwithstanding unavailability
10 is making an unauthorized diversion. (See *Temescal Water Co. v. Dept. of Public Works* (1955) 44
11 Cal.2d 90, 103-104 [finding the State Water Board's ability to determine whether unappropriated
12 water exists is a prerequisite to issue a permit for appropriation].) The State Water Board does not
13 require some separate, express grant of jurisdiction to be able to evaluate water availability; a
14 determination of water availability is a threshold determination that is the first step in the State
15 Board's enforcement against unauthorized diversions.⁴

16 **B. Any Water Availability Analysis Performed by the State Water Board Must**
17 **Enable Effective and Proper Enforcement**

18 Relevant to the WSID Enforcement Action, on May 1, 2015, the State Water Board issued a
19 Notice of Unavailability and Curtailment that reflected the State Water Board's "determination that
20 the existing water available in the Sacramento River and Sacramento-San Joaquin Delta watersheds
21 [was] insufficient" to meet WSID's demand under License 1381. (WR-1 at ¶¶ 18-19.) On July 16,
22 2015, the State Water Board issued a draft CDO to WSID, "based on lack of available water supply
23 under the priority of the right." (*Id.* at ¶ 35.) As explained above, the State Water Board was within
24 its authority to assess the availability of water under WSID's License 1381. Nothing in the Water
25

26 ⁴ Because the State Water Board has existing authority to determine whether water is authorized or
27 unauthorized under a claim of right, it was not necessary for the State Water Board to promulgate
28 emergency regulations before making threshold water availability determinations, although that course
of action was available to the State Water Board. (See Exec. Order B-29-15, WR-25 at ¶ 17.)

1 Code precludes a large-scale investigation or analysis of availability, or requires such an analysis to be
2 on a water right by water right basis.

3 However, it remains to be determined whether all of the specific decisions and choices that
4 informed the State Water Board's watershed-wide availability analysis with respect to WSID's
5 diversion were the right ones. Some of WSID's criticisms of the State Water Board's methodology
6 may be valid. However, obvious problems with some criticisms warrant special attention. For
7 example, WSID and Byron-Bethany Irrigation District expert Greg Young criticizes the State Water
8 Board's treatment of San Joaquin River Exchange Contractor ("SJEC") demand, and proposes
9 adjusting SJEC demands in a manner that increases the supply available to WSID and other water
10 users by 10 to 30 percent. (See BBID Exh. 392 at ¶¶ 16-17; BBID Exh. 389.) This ignores the fact
11 that the State Water Board conducted a without-Project supply and demand analysis; it looked at water
12 supply and demand that would exist without the CVP and SWP. (See WSID0042 at p. 4.) Without
13 CVP supply, the SJECs would be forced exercise their underlying rights to San Joaquin River water to
14 meet their demand. Although Mr. Young asserts in his rebuttal testimony that SJEC demand would be
15 satisfied by stored supplies, and not full natural flows on the San Joaquin River (BBID Exh. 395 at
16 ¶ 3), an evaluation that supposes the delivery of stored water without diminishing full natural flow
17 runs a high risk of double-counting water supplies on both the Sacramento and San Joaquin rivers.
18 Mr. Young's proposal is therefore inconsistent with a without-project evaluation of water supply
19 availability; it proposes a hybrid analysis with unclear delineations between the elements of with-and
20 without-project conditions that are to be considered. In this case, it was proper for the State Water
21 Board to include SJEC demand in its analysis of without-Project demand.

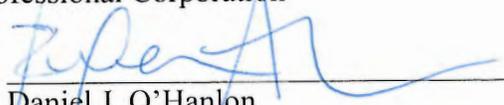
22 Nevertheless, improvements in the State Water Board's methodology for performing water
23 availability analysis are warranted. It is almost certain that water shortages will continue to plague
24 California; the need for enforcement against unauthorized diversions is not going to disappear anytime
25 soon. More stringent measuring and reporting requirements will help improve the accuracy of
26 demand inputs to future water availability analyses. The State Water Board should seek and
27 incorporate input from stakeholders to further improve its understanding of demand. As science and
28 data develop, the State Water Board should further improve the accuracy and precision of its water

1 availability analysis methodology. These steps will improve the actual and perceived legitimacy of
2 future enforcement actions, and therefore equip the State Water Board to effectively and properly
3 enforce against unauthorized diversions in the future.

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Dated: February 29, 2016

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Sacramento, State of California. My business address is 400 Capitol Mall, 27th Floor, Sacramento, CA 95814.

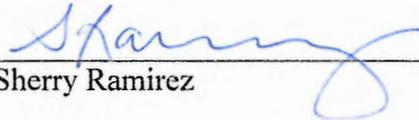
On February 29, 2016, I served true copies of the following document(s) described as **WESTLANDS WATER DISTRICT'S OPENING STATEMENT** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address sramirez@kmtg.com to the persons at the e-mail addresses listed in the Service List. The document(s) were transmitted at or before 5:00 p.m. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

Executed on February 29, 2016, at Sacramento, California.



Sherry Ramirez

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

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