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9 BEFORE THE  
10 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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

SWRCB Enforcement Action  
ENF01951 and ENF01949

BYRON-BETHANY IRRIGATION  
DISTRICT'S OPPOSITION TO  
PROSECUTION TEAM'S PRE-  
HEARING BRIEF OF LEGAL  
ISSUES

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

20 **Introduction**

21 The Prosecution Team's Pre-Hearing Briefing of Legal Issues (PT Brief) misstates  
22 the State Water Resources Control Board's (SWRCB) actions in 2015 regarding water  
23 right curtailments and water availability, and misstates the applicable law. The  
24 continuing attempt by the SWRCB to ignore the significant missteps by the SWRCB in  
25 2015, and to disregard the SWRCB's acts regarding water right curtailments and water  
26 availability as simply a "staff" effort ignores the substantial evidence clearly showing that  
27 the subject events of 2015 were orchestrated by the SWRCB's Executive Director, Tom  
28 Howard, with the approval of the SWRCB's Board members.



1 determination, depriving BBID of its right to divert water without a pre-deprivation  
2 hearing.

3 The Prosecution Team attempts to recast the Hearing Officer's question by asking  
4 whether the SWRCB may enforce against a water right holder "who diverts after  
5 [SWRCB] staff determine[]" that no water is available to serve the water right priority."  
6 (PT Brief at p. 2.) The Prosecution Team's "recast" poses a hypothetical question that  
7 may be true in some circumstance not before the SWRCB in Enforcement Action 01951  
8 (ENF01951) – but it is false and incorrect as applied to ENF01951.

9 **1. ENF01951 Is Based Upon the June 12, 2015 Notice**

10 The Prosecution Team argues that there is no alleged violation of the June 12,  
11 2015 Notice. (PT Brief at p.2.) The Prosecution Team's Administrative Civil Liability  
12 Complaint (ACL Complaint) definitively establishes, however, that the ACL Complaint is  
13 based entirely on BBID's alleged failure to comply with the June 12, 2015 Notice. The  
14 ACL Complaint itself alleges BBID's diversion of water after having received the June 12,  
15 2015 Notice. (SWRCB Exhibit WR-4 at p. 7, ¶¶ 7, 25, 28, 33.) In other words,  
16 ENF01951 is based on BBID's failure to cease diverting after receiving the June 12,  
17 2015 Notice. While the SWRCB may have later "rescinded" the curtailment portion of  
18 the June 12, 2015 Notice, it maintains the prior finding of unavailability of water – a  
19 determination that John O'Hagan, a member of the Prosecution Team, confirmed to the  
20 Superior Court on behalf of the SWRCB (not on behalf of staff). (Exhibits BBID345,  
21 BBID299.) This entire proceeding is based on the June 12, 2015 Notice, and BBID's  
22 refusal to comply with the demand that BBID immediately cease diverting water.

23 **2. The SWRCB's Authority to "Investigate" Does Not Translate to the**  
24 **Authority to Regulate Pre-1914 Appropriative Rights**

25 The Prosecution Team discusses the SWRCB's authority to "investigate" streams,  
26 to determine whether unappropriated water is available, and to determine whether  
27 anyone is violating Water Code section 1052. Then, relying on the Governor's Executive  
28 Order B-29-15, the SWRCB argues that its authority has been "reaffirmed and

1 strengthened.” (PT Brief at pp. 4-5.)

2 To be certain, through an Executive Order, the Governor may direct and guide  
3 subordinate executive officers in the enforcement of a particular law.

4 (63 Ops.Cal.Atty.Gen. 583 (1980).) However, “the Governor is not empowered, by  
5 executive order or otherwise, to amend the effect of, or to qualify the operation of  
6 existing legislation.” (75 Ops.Cal.Atty.Gen. 263 (1992).) The Governor is prohibited  
7 from amending the effect or qualify the operation of existing law based on the concept of  
8 the separation of powers. (*Lukens v. Nye* (1909) 156 Cal. 498, 501 [when the Governor  
9 is acting in his capacity as an executive officer, “he is forbidden to exercise any  
10 legislative power or function except as in the constitution expressly provided”].) Thus, if  
11 the Governor attempts “to exercise powers not given, his act will be wholly ineffectual  
12 and void for any and every purpose.” (*Id.* at p. 502.)

13 Nothing cited by the Prosecution Team supports an argument that the SWRCB  
14 can, in the absence of a valid regulation or pre-deprivation hearing, deprive a pre-1914  
15 appropriative water right holder of its right to divert water.

16 **3. Drought Water Supply and Demand Investigations Are Different From**  
17 **Curtailments and Findings of Unavailability**

18 The Prosecution Team argues that the June 12, 2015 Notice was the result of a  
19 “massive undertaking,” and that the Notice was issued by “staff.” (PT Brief at pp. 5-6.)  
20 As explained in the introduction above, neither the “undertaking” behind, nor the  
21 issuance of the June 12, 2015 Notice, was done by “staff.” Substantial undisputed  
22 evidence demonstrates that the “undertaking” involved staff, management, and upper  
23 management, all directed by SWRCB’s Executive Director Mr. Howard, who regularly  
24 briefed SWRCB Board Members and made certain Board members agreed with the  
25 decisions he made as the SWRCB’s Executive Director. The determinations and  
26 decisions – all made in the absence of any due process hearing and in violation of the  
27 California Administrative Procedures Act (APA) – were ultimately made by the Executive  
28

1 Director of the SWRCB with the behind the scenes approval of the Board itself.<sup>2</sup>

2 Nonetheless, the SWRCB's authority to engage in this "massive undertaking" is  
3 different from its authority to issue curtailment notices and make *findings* or  
4 *determinations* of unavailability. To the extent the SWRCB's method of determining  
5 "unavailability" is used to deprive water right holders of their right to divert water under a  
6 valid pre-1914 water right, that method must be the subject of a due process hearing or  
7 procedure consistent with the APA.

8 **4. The SWRCB's Method of Upholding the Rule of Priority Is an**  
9 **Underground Regulation**

10 The Prosecution Team is correct in explaining that the SWRCB must uphold the  
11 rule of priority. While there is undisputed evidence that the SWRCB's Executive Director  
12 failed to uphold the rule of priority in granting *some* water right holders "exceptions" to  
13 curtailments, and assuring other water right holders that the SWRCB would exercise its  
14 "enforcement discretion" in not enforcing the rule of priority as against them, the premise  
15 of the Prosecution Team's argument regarding the rule of priority is correct.

16 That the very "purpose of the [] drought water availability determination analyses",  
17 which forms the basis of ENF01951, is to "protect the rule of priority" underscores why  
18 the water availability determinations are an underground regulation. Regulations have  
19 "two principal identifying characteristics": (1) the agency must intend the rule to apply  
20 generally; and (2) the rule must implement, interpret, or make specific the law enforced  
21 or administered by the agency or govern the agency's procedure. (*Morning Star Co. v.*  
22 *State Bd. of Equalization* (2006) 38 Cal.4th 324, 333-334, citing *Tidewater Manni*  
23 *Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.)

24 \_\_\_\_\_  
25 <sup>2</sup> The PT Brief, if accurate, would establish that SWRCB "staff," without the approval or authority of the  
26 SWRCB, made water availability determinations and issued Curtailment Notices commanding water right  
27 holders to cease diverting water. These Curtailments Notices and findings of unavailability were sent out  
28 as if they were issued under the authority of the SWRCB. What the Prosecution Team is really arguing is  
that "staff" were acting under "color" of state law in issuing these Curtailment Notices and determinations  
of unavailability, as they were not authorized or approved by the SWRCB itself. (See 42 U.S.C. § 1983.)  
While this position conflicts with the actual language of the Notices, and is contrary to arguments made by  
the SWRCB in the Superior Court, apparently it is now the position of the Prosecution Team.

1            “If a rule constitutes a ‘regulation’ within the meaning of the APA . . . it may not be  
2 adopted, amended, or repealed except in conformity with 'basic minimum procedural  
3 requirements' that are exacting.” (*Morning Star Co. v. State Bd. of Equalization, supra*,  
4 38 Cal.4th at p. 333, internal quotations, citations omitted.) Any regulation that fails to  
5 comply with these requirements is invalid. (*Ibid.*; Gov. Code, § 11350.)

6            The SWRCB’s water availability analysis and curtailments, as confirmed by the  
7 Prosecution Team’s Brief, was applied generally (throughout the watershed) and was  
8 developed and implemented for the purpose of carrying out the rule of priority. Thus, the  
9 SWRCB’s water availability analysis and curtailments constitute a “regulation” within the  
10 meaning of the APA. Because the SWRCB failed to comply with the APA, the water  
11 availability analysis and curtailments constitute underground regulations, and are invalid.  
12 Thus, they cannot be a basis of support for ENF01951.

13            **5. Enforcement Actions Can Only Be Brought to Enforce Valid Orders or**  
14            **Determinations**

15            The Prosecution Team argues that “[d]iversion when water is not available to  
16 serve a claimed water right priority is an unauthorized diversion.” (PT Brief at p. 8.) The  
17 legal support cited for this argument is a generic reference to *Young v. State Water*  
18 *Resources Control Board* (2013) 219 Cal.App.4th 397 (*Young*) and *Millview County*  
19 *Water District v. State Water Resources Control Board* (2014) 229 Cal.App.4th 879  
20 (*Millview*). Through ENF01951, the SWRCB alleges BBID violated Water Code  
21 section 1052, which provides, in pertinent part, “[t]he diversion or use of water subject to  
22 this division other than as authorized in this division is a trespass.” Thus, a diversion of  
23 water is “unauthorized” if the water diverted is (1) subject to “this division” and, (2) is  
24 being diverted “other than as authorized in this division.” Neither *Millview* nor *Young*  
25 stand for the proposition put forth by the Prosecution Team, and neither case addresses  
26 the application of the rule of priority to Water Code section 1052.

27            The only jurisdictional issue determined in *Young* was the question of “whether  
28 the Water Code gives the [SWRCB] jurisdiction in enforcement proceedings *to determine*

1 *initially whether a diverter has either the riparian or pre-1914 appropriative rights it*  
2 *claims.” (Young, 219 Cal.App.4th at p. 404 (emphasis added).) In Millview, the Court*  
3 *held that the SWRCB has “the authority to determine the scope of a claimed right as well*  
4 *as its existence” in order to determine whether diversions were, in fact, consistent with a*  
5 *claimed pre-1914 appropriative or riparian right. (Millview, 229 Cal.App.4th at p. 895.)*

6 To the extent *Young* and *Millview* have application to ENF01951, they stand as a  
7 *limitation* on the SWRCB’s authority and mandate that ENF01951 be dismissed for  
8 failure to plead facts sufficient to prove a trespass under Water Code section 1052. In  
9 this regard, *Young* and *Millview* recognize that the SWRCB’s jurisdiction under Water  
10 Code section 1052 extends *only to unappropriated water* – water otherwise under the  
11 regulatory jurisdiction of the SWRCB. As thoroughly explained in BBID’s Motion to  
12 Dismiss Administrative Civil Liability Proceeding In ENF01951 for Lack of Statutory  
13 Authority Under Water Code Section 1052, dated January 25, 2016, the ACL Complaint  
14 in ENF01951 does not allege that BBID lacks a valid pre-1914 appropriative water right,  
15 nor does it allege that BBID was diverting water in excess of that right. Instead, the ACL  
16 Complaint alleges that BBID was diverting water needed to satisfy the needs of *more*  
17 *senior* pre-1914 appropriative and/or riparian water right holders. Thus, *Young* and  
18 *Millview* act as a bar to the Prosecution Team’s case.

19 **6. Water Code Section 1052 Applies Only to Water Under The SWRCB’s**  
20 **Regulatory Jurisdiction**

21 The Prosecution Team argues that *Young* and *Millview* stand for the proposition  
22 that the SWRCB has “enforcement authority” over pre-1914 appropriative and riparian  
23 water right holders. (PT Brief at p. 8) The Prosecution Team misconstrues *Young* and  
24 *Millview*.

25 First, *Young* and *Millview* stand only for the proposition that the SWRCB can  
26 make threshold determinations on the existence and extent of claimed pre-1914  
27 appropriative and riparian water rights. These cases go no further, and do not support  
28 the Prosecution Team’s argument. Moreover, the Prosecution Team completely glosses

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over the plain fact that the rulings in both *Young* and *Millview* are predicated on the water being diverted being otherwise subject to the SWRCB's regulatory jurisdiction. (*Young*, 219 Cal.App.4th at pp. 405-407, *Millview*, 229 Cal.App.4th at pp. 894-895.) As explained above, the ACL Complaint in ENF01951 does not allege that BBID diverted water subject to the SWRCB's regulatory jurisdiction (water "subject" to Division 2 of the Water Code), but instead merely alleges BBID diverted water needed by senior water right holders. Water needed by senior water right holders is not subject to Division 2 of the Water Code, and therefore falls outside the scope of Water Code section 1052.

Dated: February 22, 2016

SOMACH SIMMONS & DUNN  
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By: 

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**PROOF OF SERVICE**

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

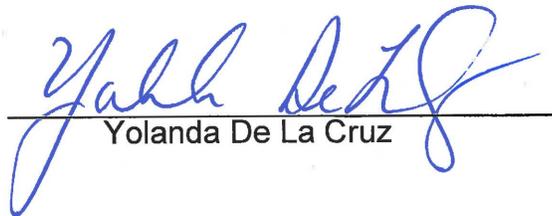
On February 22, 2016, I served the following document(s):

**BYRON-BETHANY IRRIGATION DISTRICT'S OPPOSITION TO PROSECUTION TEAM'S PRE-HEARING BRIEF OF LEGAL ISSUES**

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

**SEE ATTACHED SERVICE LIST**

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 22, 2016, at Sacramento, California.

  
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Yolanda De La Cruz

**SERVICE LIST OF PARTICIPANTS  
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 ADMINISTRATIVE CIVIL LIABILITY HEARING  
 (Revised 9/2/15; Revised: 9/11/15)**

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**SERVICE LIST  
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