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20 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

21 ENFORCEMENT ACTION ENF01949
22 DRAFT CEASE AND DESIST ORDER
23 REGARDING UNAUTHORIZED
24 DIVERSIONS OR THREATENED
25 UNAUTHORIZED DIVERSIONS OF
26 WATER FROM OLD RIVER IN SAN
27 JOAQUIN COUNTY

28 ENFORCEMENT ACTION ENF01951
DRAFT ADMINISTRATIVE LIABILITY
COMPLAINT REGARDING
UNAUTHORIZED DIVERSIONS BY
BYRON-BETHANY IRRIGATION
DISTRICT

**CENTRAL DELTA WATER AGENCY and
SOUTH DELTA WATER AGENCY
RESPONSE TO PROSECUTION TEAM
LEGAL ISSUES BRIEF; JOINDER OF
THE WEST SIDE IRRIGATION DISTRICT,
BANTA-CARBONA IRRIGATION
DISTRICT, PATTERSON IRRIGATION
DISTRICT**

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1 Central Delta Water Agency and South Delta Water Agency respectfully present this brief
2 in response to the legal issues brief filed by the Prosecution Team on January 25, 2016.

3 **I. THE PROSECUTION TEAM’S RE-FRAMING OF THE FIRST LEGAL ISSUE**
4 **DIRECTLY CONFLICTS WITH A CENTURY OF WATER LAW**
5 **PRECEDENT**

6 The Prosecution Team re-frames the first issue as: “[W]hether the Division may
7 commence administrative enforcement against a water right holder who diverts after the [State
8 Water Board] staff determines that no water is available to serve that water right priority.”

9 There are two serious flaws in the Prosecution Team’s statement of the issue. First
10 inherent in this “rewrite” is the assumption that the law allows the State Water Board staff to
11 determine when water is and is not available for the exercise of pre-1914 appropriative rights in a
12 manner that would require a property right holder to forego the enjoyment of the property right
13 prior to any notice or opportunity to be heard on that staff-level determination or face the risk of
14 devastating fines. Second, it is premised upon the assumption that enforcement actions can be
15 taken when staff determines that there is no water available for a large class of water rights of the
16 same priority, not when there is no water available for an individual water right diverter under his
17 water right. As we explained in our opening brief on the legal issues - there is absolutely no
18 authority for these positions. Rather, they directly conflict with at least three fundamental legal
19 doctrines that have governed water rights law in California for a century and were discussed in
20 detail in our opening brief:

- 21 • Fundamental due process requires that a diverter have notice and opportunity to be heard
22 before they are deprived of the right to divert. (See, e.g., *Mathews v. Eldridge* (1976) 424
23 U.S. 319, 333; *Los Angeles County FC Dist. v. Abbot* (1938) 24 Cal. App. 2d 728, 736
24 [water rights are “valuable property rights” that can be “necessary and essential to the use
25 of their property”]; *United States v. State Water Resources Control Bd.* (1986) 182 Cal.
26 App. 3d 82 [it is “axiomatic” that water rights “cannot be infringed or taken by
27 governmental action without due process and just compensation”].)
- 28 • A junior diverter is not required to stop diversions unless there is evidence that a senior
diverter is being injured by the junior’s diversions. (See *Nevada County & Sacramento*

1 *Canal Co. v. Kidd* (1869) 37 Cal. 282, 313 [senior water right holders have no recourse
2 against acts that cause them no injury]; *Waterford Irr. Dist. v. Turlock Irr. Dist.* (1920) 50
3 Cal. App. 213, 221 [to have any entitlement to relief, “[t]here must be a substantial, as
4 distinguished from a mere technical or abstract, damage to the right.”).

- 5 • The State Water Board does not have the authority to regulate pre-1914 appropriative
6 rights. (*Millview County Water Dist. v. State Water Resources Control Bd.* (2014) 229
7 Cal.App.4th 879, 893, as modified on denial of reh'g (Oct. 14, 2014); see also Wat. Code,
8 § 1831.)
- 9 • The Sacramento Superior Court addressed this issue in the *WSID et al v. SWRCB* Case
10 No. 34-2015-80002121 stating: “The Curtailment Letters, including the requirement that
11 recipients sign a compliance certification confirming cessation of diversion, result in a
12 taking of Petitioner’s property rights without a pre-deprivation hearing, in violation of
13 Petitioners’ Due Process Rights.” The required pre-deprivation hearing is where the
14 Prosecution Team must prove BBID had no right to continue to divert water - only after
15 which, BBID can be found guilty of diverting unlawfully (assuming the State Board even
16 has the authority to pursue such a process against a pre-1914 diverter - which was not
17 addressed by the Sacramento Superior Court at the preliminary hearing). In other words,
18 while a staff determination of unlawful diversion may form the basis for a decision to
19 bring a matter to hearing to make a final determination regarding water availability, it is
20 only the final outcome of the hearing that can possibly form the basis of enforcement -
21 and even then, the enforcement may only be prospective. As the Sacramento Superior
22 Court held - deprivation of property rights and related monetary penalties cannot accrue
23 prior to the required pre-deprivation hearing. (BBID Exhibit 301).

23 **A. The State Board’s Investigatory Powers Are Irrelevant Here**

24 The Prosecution Team’s brief touts the State Board’s authority to investigate and pursue
25 enforcement of waste or unreasonable use. (See PT Br. at 4-5). These powers are not in dispute,
26 but have nothing to do with this ACL action against BBID. In fact, as is evident from the written
27 testimony now filed by the Prosecution Team witnesses, the State Board made no investigation of
28

1 the water available at BBID’s point of diversion and no investigation of whether or not any senior
2 water rights were injured by BBID’s diversions in June. Further, the State Board made no
3 investigation of, and has not pursued any enforcement regarding, any alleged waste or
4 unreasonable use of water.

5 **B. The Governor’s Executive Order Did Not Grant The State Board Any New**
6 **Powers Beyond Those Granted By The Legislature**

7 The Prosecution Team also alleges that Governor Brown’s Executive Order B-29-15,
8 paragraph 10, directs the Board to conduct inspections and bring enforcement actions against
9 illegal diverters. (PT Br. at 5:3). Yet, the Governor’s Executive Order did not and could not
10 grant the State Board any authority that it did not already possess by statute. (See EO B-29-15 p.
11 7 second to last paragraph [WR 31]). Through an Executive Order, the Governor may only direct
12 and guide subordinate executive officers in the enforcement of a particular law. (63
13 Ops.Cal.Atty.Gen. 583 (1980).) “[T]he Governor is not empowered, by executive order or
14 otherwise, to amend the effect of, or to qualify the operation of existing legislation.” (75
15 Ops.Cal.Atty.Gen. 263 (1992).) Any finding to the contrary would violate the separation of
16 powers doctrine. (*Lukens v. Nye* (1909) 156 Cal. 498, 501 [when the Governor is acting in his
17 capacity as an executive officer, “he is forbidden to exercise any legislative power or function
18 except as in the constitution expressly provided.”]). If the Governor attempts “to exercise
19 powers not given, his act will be wholly ineffectual and void for any and every purpose.” (*Id.* at
20 p. 502.)

21 As we explained in our opening brief, the State Board’s authority to bring enforcement
22 actions for unlawful diversion of water is derived from Water Code sections 1052 and 1055.
23 Water Code section 1052’s scope is limited to “*diversion or use of water subject to this division*
24 *other than as authorized in this division.*” Section 1052 is found in Division 2 of the Water
25 Code. Part 2 of Division 2 contains the provisions for appropriation of otherwise unappropriated
26 water after December 19, 1914 and is the only part of Division 2 that authorizes the diversion or
27 use of water. Water Code sections 1201 and 1202 clarify that water subject to appropriation
28 under Part 2 does not include water used under riparian rights (section 1201) or water diverted
under valid pre-1914 appropriative rights (section 1202).

1 Further, even if the legislature were to grant the State Board the authority to pursue
2 enforcement actions against pre-1914 appropriators diverting within the limits of their water
3 rights, this authority would not remove the procedural requirement of due process and the
4 substantive requirement that the State Board prove injury to a prior right before pursuing a pre-
5 1914 diversion as “illegal”.

6 **C. The Prosecution Team Provides No Authority For The Proposition That State**
7 **Water Board Staff May Make Definitive Drought Water Supply And Demand**
8 **Determinations**

9 The Prosecution Team provides a heading on page 5 of its brief: “Drought Water Supply
10 and Demand Determinations are Within the Authority Granted to the State Water Board and
11 Staff.” Then, the brief proceeds to explain what staff did in 2015 - with absolutely no citation to
12 authority. As we explained in our opening brief, there is absolutely no authority for either the
13 State Water Board or its staff to make drought water supply and demand determinations -
14 particularly determinations that are binding on pre-1914 appropriative diverters for enforcement
15 purposes. Regardless of how hard staff may have worked on this process - their valiant efforts
16 are not a substitute for legal authority.

17 Further, the Prosecution Team is hopelessly contradicting itself. On page 3 of its brief,
18 the Prosecution Team argues the June 12 notice is not relevant, but then on page 5 argues that
19 staff’s drought supply and demand determinations, as reflected in the notice, are the proper
20 grounds for enforcement. The June 12 notice and the staff determinations of water availability
21 are one in the same and both form the improper foundation of this enforcement proceeding.

22 **D. The Rule Of Priority Cannot Be Enforced In The Abstract**

23 The Prosecution Team argues the “purpose of the Division’s drought water availability
24 determination analyses...was to protect the rule of priority.” (PT Br. at 7:5-23). Yet, the abstract
25 “rule of priority” is not entitled to protection under California law. Rather, water rights,
26 possessing indicia of property rights, are entitled to protection “against unlawful hostile acts of
27 injury inflicted by others, whether they be other appropriators, or riparian proprietors, or those
28 without valid claim of right.” *Peabody v. Vallejo* 2 Cal. 2d 351, 374 (1935). Water rights are
entitled to no less protection from actions of the State Water Resources Control Board.

1 It is not enough to state, as the Prosecution Team has, that protecting senior water right
2 holders “requires that some water remain in most streams to satisfy senior demands at the furthest
3 downstream point of diversion. . .” (See Testimony of Kathy Mrowka, WR-7 at Page 2). Junior
4 appropriators are not required to forego water based upon the *possibility* that downstream senior
5 water right holders will need the water. Such a requirement would violate the reasonable use
6 requirement set forth in Article X Section 2 of the California Constitution. *Herminghaus v.*
7 *Southern Cal. Edison Co.*, (1926) 200 Cal. 81, 252 P. 607. To the contrary, “whenever water in a
8 watercourse, whether the water is foreign or part of the natural flow, is not reasonably required
9 for beneficial use by the owners of existing rights to that water, those owners cannot prevent its
10 beneficial use by other persons”. *Miller & Lux, Inc. v. Bank of America* (1963) 212 Cal. App. 2d
11 719, 729. The same protections afforded senior right holders are also afforded junior
12 appropriators:

13 The right of the junior appropriator is entitled to protection to its full extent, just as the
14 right of a prior appropriator. The supreme court stated in 1872 ‘that if the person who first
15 appropriates the waters of a stream only appropriates a part, another person may
16 appropriate a part or the whole of the residue; and when appropriated by him his right
17 thereto is as perfect, and entitled to the same protection, as that of the first appropriator to
18 the portion appropriated to him.’ This protection of the junior appropriative right may be
19 had against unlawful acts by senior appropriators as well as others.

20 Hutchins, The California Law of Water Rights at p. 264, citing *Smith v. O’Hara* 43 Cal. 371, 375
21 (1875).

22 1. The Prosecution Team Has Not Proven Any Injury to Senior Water
23 Right Holders.

24 The Prosecution Team has not met its burden of establishing that BBID’s diversions were
25 unauthorized because it has provided no evidence that any senior water holders were actually
26 injured by BBID’s diversions. The determination of whether or not a water use is unauthorized is
27 “is a question of fact to be determined according to the circumstances in each particular case.”
28 *Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal. 2d 132. Here, the Prosecution Team has made
no effort to investigate or compile any evidence related to injury to senior rights as a result of
BBID’s diversions.

It is not incumbent upon BBID to prove that surplus water is available in order to justify
its diversions as “lawful”. To the contrary, “the plaintiffs must recover upon the strength of their

1 own title and not upon the weakness of defendant's title." Hutchins, *id.*, citing *Tulare Irr. Dist. V.*
2 *Lindsay-Strathmore Irr. Dist* 1935) 3 Cal. 2d 489, 547-548.

3 The trial court must now determine whether the complaining riparian...considering all the
4 needs of the those in the particular water field, is putting the water to any reasonable
5 beneficial use, giving consideration all factors involved, including reasonable methods of use
6 and reasonable methods of diversion...The court must find expressly the quantity of water
required and used for the riparian's reasonable and beneficial uses before enjoining the
appropriator from interfering with those uses.

7 Hutchins at p. 279; *see also Tulare, supra*, generally. More recently, the Supreme Court has
8 summarized: "It follows that any person having a legal right to surface or ground water may take
9 only such amount as he reasonably needs for beneficial purposes, and any water not needed for
10 the reasonable beneficial use of those having prior rights is excess or surplus water and may
11 rightly be appropriated. *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1241,
12 citing *California Water Service Co. v. Edward Sidebotham & Son* (1964) 224 Cal. App. 2d 715,
13 725-726. When there is a surplus, the holder of prior rights is prevented from enjoining its
14 appropriation:

15 Before one can invoke the power of a court of equity to restrain a diversion above his lands,
16 it is necessary for him to show first, that there is a wrongful diversion of water above such
17 lands, and second, that the amount wrongfully diverted would be rightfully used by him and
the water is being used or would be used for reasonable and beneficial purposes.

18 Hutchins, *supra* at p. 278, citing *Carlsbad Mutual Water Co. v. San Luis Rey Development Co.*
19 (1947) 78 Cal. App. 2d 900, 914.

20 The effect of this rule, then, is not to prohibit the appropriator from making any use of the
21 water, but is to prohibit his use of the water only at such times as the riparian owner under
his paramount right wishes to use it, and to prevent the destruction or impairment of the
22 riparian right by adverse use on the part of the appropriator.

23 Hutchins at p. 279.

24 2. California Law Requires Proof that a Senior Water Right Holder is
Substantially Injured.

25 Article X, section 2 of the California Constitution, and the cases upholding it, abolished
26 the prior common law doctrine that entitled riparian owners, as against appropriators, to the entire
27 natural flow of a stream even if the use of the water was wasteful or unreasonable. *Mojave, supra*,
28 at p. 1242. The California Supreme Court provided direction to the States Water Resources

1 Control Board:

2 [W]hen a senior water right holder such as a riparian, brings an action against an
3 appropriator, it is not sufficient to find that the plaintiffs are senior right holders and then
4 issue an injunction or curtailment based on such a finding. It is now necessary for the trial
5 court to determine whether such owners, considering all the needs of those in a particular
6 water field, are putting waters to any reasonable beneficial uses, giving consideration to
7 all factors involved, including reasonable methods of use and reasonable methods of
8 diversion. After a consideration of such uses, the trial court must then determine whether
9 there is a surplus of water subject to appropriation.

10 *Mojave, supra* at p. 1242, citing *Tulare, supra* at pp. 524-525. Therefore, the determination as to
11 whether unappropriated water is available for a junior appropriator by the Board or the court
12 requires first examining prior riparian and appropriative rights, whether they are putting water to
13 reasonable and beneficial uses, and then determining whether any excess water is available for
14 junior users. *El Dorado Irr. Dist. v. SWRCB* (2006) 142 Cal. App. 4th 937; *United States v. State*
15 *Water Resources Control Board* (1986) 182 Cal. App. 3d 82.

16 Contrary to the Prosecution Team's assertion that water must be left in a stream
17 prophylactically for seniors, a senior must prove more than simple trouble and expense to enjoin a
18 junior. Where a junior appropriator diverts the entire surplus water supply upstream, the senior
19 must use all reasonable diligence in handling what is left. "If with such diligence and the use of
20 ordinary means of diversion he can obtain all the water that he is entitled to, he cannot complain
21 of the trouble and expense involved." Hutchins, p. 265, citing *Natomas Water & Min. Co. v.*
22 *Hancock* (1892) 101 Cal. 42, 50-52.

23 3. Even with Interference to a Senior Right, the Law Does Not Always Permit
24 Injunction of the Junior Diversion.

25 Injunctions of diversions are only appropriate as a last resort, especially when the water
26 rights are for agriculture or domestic purposes. *Peabody v. Vallejo* (1935) 2 Cal. 2d 351, 382.
27 Even if the Prosecution Team could prove (1) legal, substantial (as opposed to mere technical)
28 injury to a paramount right; and (2) that such harm is to the paramount right holder's actual
reasonable and beneficial uses; there are still additional procedural safeguards in the California
Code of Civil Procedure that could prevent an injunction of the junior diversion.

California Code of Civil Procedure sections 530, 532, and 534 apply to the issuance of
injunctions to protect water rights. In short, these sections prevent the issuance of an injunction or

1 curtailment against a junior diversion for irrigation or domestic use if the defendant junior would
2 suffer irreparable harm as a result of the injunction. Section 530 (regarding an injunction to
3 protect water rights; notice; and effect of defendant’s bond) states:

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5 In all injunctions which may be hereafter brought when an injunction or restraining order
6 may be applied for to prevent the diversion, diminution or increase in the flow of water in
7 its natural channels, to the ordinary flow of which the plaintiff claims to be
8 entitled...[and] it be made to appear to the court that plaintiff is entitled to the injunction,
9 but that the issuance thereof pending the litigation will entail great damage upon the
10 defendant, and that plaintiff will not be greatly damaged by the acts complained of
11 pending the litigation, and can be fully compensated for such damage as he may suffer,
12 the court may refuse the injunction upon the defendant giving a bond such as provided for
13 in section 532; and upon the trial the same proceedings shall be had, and with the same
14 effect as in said section provided.

15 These procedural safeguards - enshrined in the Code of Civil Procedure - underscore the
16 fallacy of the Prosecution Team’s assertion that the rule of priority can be enforced in the
17 abstract. There is no legal support for the concept that a court or the State Board could merely
18 identify the priorities between competing users of water and curtail the junior user. Rather, in
19 enacting sections 530, 532, and 534, the Legislature acknowledged that it is necessary to balance
20 competing uses, and that it is also sometimes appropriate to protect the interests of junior
21 irrigators as against senior users. This rule may apply even in situations where junior irrigators
22 are trespassing seniors’ water rights, provided the injury can otherwise be remedied.

23 *Tulare Irr. Dist. v. Lindsay Strathmore Irr. Dist., supra*, discusses the effect of the section
24 534: “[S]ection [534] was undoubtedly intended to ameliorate the rule formerly prevailing that a
25 riparian as against an appropriator was entitled to an injunction regardless of damage...” *Tulare,*
26 *supra* at p. 534. These CCP provisions, predecessors to the Article X, section 2 reasonable
27 beneficial use doctrine, affirm that a junior’s competing use of water does not *per se* entitle a
28 senior to an injunction against him. Careful balancing between interests and a consideration of the
damage involved in relation to each party must be considered by the court before it may be
deemed appropriate to curtail a junior’s use.

Sections 530, 532, and 534 are so closely related to the reasonable and beneficial use
doctrine that immediately after Article X, section 2’s addition to the California Constitution some
critics argued that the reasonable use doctrine should supersede CCP sections 530, 532, and 534.

1 It was argued that Article X, section 2 superseded the CCP provisions because the reasonable use
2 doctrine performs a similar function by balancing interests in water rights, and by taking into
3 consideration factors outside of the strict application of the priority system.

4 Under this [Article X, section 2], it is clear that when a riparian or overlying owner brings
5 an action against an appropriator, it is no longer sufficient to find that the plaintiffs in such
6 action are riparian or overlying owners, and, on the basis of such finding, issue the
7 injunction. It is now necessary for the trial court to determine whether such owners,
8 considering all the needs of those in a particular water field, are putting the waters to any
9 reasonable beneficial uses, giving consideration to all factors involved, including
10 reasonable methods of use and reasonable methods of diversion. From a consideration of
11 such uses, the trial court must then determine whether there is a surplus in the water field
12 subject to appropriation. If the riparian is putting the water to any reasonable beneficial
13 uses, it is now necessary for the trial court to find expressly the quantity so required and
14 so used. A finding...to the effect that the riparian requires a “reasonable” amount for such
15 uses, under the new doctrine [in Article X, section 2], is clearly insufficient and a
16 judgment based thereon must be reversed. The trial court, under the new doctrine [in
17 Article X, section 2], must fix the quantity required by each riparian for his actual
18 reasonable beneficial uses, the same as it would be in the case of an appropriator.”

19 *Tulare, supra* at pp. 524-525.

20 Accepting the Prosecution Team’s position that the State Board can simply list water right
21 priorities and then declare junior diversions unlawful would gut the meaning of Article X, section
22 2 and the purpose of sections 530, 532 and 534 of the Code of Civil Procedure. Under section
23 534, after a senior files suit and requests an injunction against a junior’s diversion, the junior may
24 rely on Section 534 in defense - “for the purpose of having the court, in the event that the court
25 should find that the riparians did not require all the waters of the stream to which their lands are
26 riparian for their reasonable and beneficial uses, determine the damages such riparians would
27 suffer by reason of the taking of the excess over such requirements.” *Tulare, supra* at p. 531. The
28 Prosecution Team’s efforts in the BBID enforcement action fall far short of this requirement.

29 **E. Water Code Section 1825 Provides No Authority For The Board To Take
30 Enforcement Action Against A Pre-1914 Diverter**

31 The Prosecution Team oddly cites to Water Code section 1825 as a source of authority to
32 take enforcement action against BBID during “periods of unavailability.” (PT Br. 7:24-8:10).
33 Water Code section 1825 is expressly limited to enforcement of the “terms and conditions in
34 permits, licenses, certifications and registrations” and is entirely irrelevant to pre-1914

1 appropriate rights. In any event due process and a hearing would be required.

2 **II. THE PROSECUTION TEAM'S INTERPRETATION OF WATER CODE**
3 **SECTION 1052 AND *YOUNG* AND *MILLVIEW* IS FLAT WRONG AND**
4 **VIOLATES THE DUTY OF CANDOR TO THIS TRIBUNAL**

5 In direct violation of its duty of candor to this tribunal, the Prosecution Team ignores the
6 plain language of the Fifth Appellate District in the *Young* and *Millview* cases, stating “the Water
7 Board does not have jurisdiction to regulate riparian and pre-1914 appropriative rights.” (*Young v.*
8 *State Water Resources Control Bd.* (2013) 219 Cal.App.4th 397, 404; *Millview County Water*
9 *Dist. v. State Water Resources Control Bd.* (2014) 229 Cal.App.4th 879, 893).

10 The Prosecution Team argues that even if a pre-1914 diverter is diverting within the scope
11 of the valid pre-1914 right, it is within the authority of the State Board staff to determine that
12 water is no longer available under that right and therefore the diversion is in excess of the valid
13 right - again, with this entire determination process occurring informally, without due process and
14 in a manner that subjects the diverter to enormous monetary penalties after the fact for doing
15 nothing more than diverting water within the limits of a valid pre-1914 right. The determination
16 of no right to divert based on unavailability of water requires the determination of the rights of
17 others in an appropriate adjudicatory hearing addressing the specific quantity and timing of each
18 affected water right holder's entitlement.

19 Determining when and how someone may exercise a valid right is regulation of that right.
20 The legislature has not given the State Board the authority to regulate pre-1914 appropriative
21 rights. Also, as we explained in detail in our opening brief, Water Code section 1052, regarding
22 the unauthorized diversion of water, is expressly limited to diversions authorized under Division
23 2 of the Water Code - which does not include riparian and pre-1914 appropriative rights.

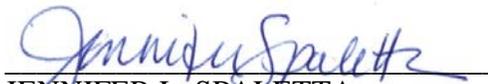
24 If the State Water Board wants the power to regulate pre-1914 rights it requires a change
25 in the law and is a job for the legislature.

26 Dated: February 22, 2016

Respectfully submitted,

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27 By:


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Dated: February 22, 2016

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JOINDER OF WSID, BCID AND PID

The West Side Irrigation District, Banta-Carbona Irrigation District and Patterson
Irrigation District hereby join in the Central Delta Water Agency and South Delta Water Agency
Response to Prosecution Team Legal Issues Brief.

Dated: February 22, 2016

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