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WATER RESOURCES

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8 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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10 **In the matter of the Draft Cease and Desist**  
11 **Order issued to The West Side Irrigation**  
12 **District, Enforcement Action ENF01949;**

13 **and**

14 **In the Matter of the Administrative Civil**  
15 **Liability Complaint issued to**  
16 **Byron-Bethany Irrigation District,**  
17 **Enforcement Action ENF01951.**

**CALIFORNIA DEPARTMENT OF**  
**WATER RESOURCES' REPLY BRIEF**

18 California Department of Water Resources ("DWR") files this brief in reply to the briefs  
19 filed by: (1) the State Water Resources Control Board ("Board") Office of Enforcement  
20 Prosecution Team ("Prosecution Team"); (2) Byron-Bethany Irrigation District ("BBID")<sup>1</sup>;  
21 (3) Central Delta and South Delta Water Agencies, which was joined by The West Side Irrigation  
22 District ("WSID"), and Banta-Carbona and Patterson Irrigation Districts (referred to jointly as  
23 "CDWA"); and (4) San Joaquin Tributaries Authority ("SJTA"). DWR also opposes WSID's  
24 motion for summary judgment or for summary adjudication.

25 DWR agrees with and joins in the brief submitted by the Board's Prosecution Team and  
26 believes it accurately states the law pertinent to the requested briefing. DWR's reply to BBID's

27 <sup>1</sup> In their 2/1/16 procedural ruling, Hearing Officers Doduc and Spivy-Weber indicated that BBID's motion  
28 to dismiss for lack of statutory authority, supporting brief, and notice of position were acceptable in response to  
Hearing Officer Doduc's request for legal briefing.

1 brief describes agreements between DWR and BBID to explain that BBID misinterprets these  
2 agreements and that BBID relies on its own water rights.

3 Portions of the CDWA and SJTA briefs describe issues that are outside the scope of the  
4 briefing requested by Hearing Officer Doduc in her October 30, 2015 ruling.<sup>2</sup> The portions of  
5 these briefs that argue factual and legal issues that are outside the scope of and are unresponsive  
6 to the hearing officer's request should be struck from the record. DWR provides responses to  
7 some of these nonresponsive issues to prevent further misinterpretations.

8 Specifically, CDWA's brief responds to Hearing Officer Doduc's request in pages 1 to 6  
9 and page 15, line 3 to page 17, line 15. SJTA's brief responds to Hearing Officer Doduc's request  
10 in page 1, line 13 to page 2, line 28 and page 6, lines 14 to 21. The remainder of CDWA's and  
11 SJTA's briefs are not responsive to the request and are summarized below.

12 The unresponsive issues briefed by CDWA are: the Board cannot prevent illegal diversions  
13 in the Delta because of the Delta's unique legal and factual circumstances where the tidally  
14 influenced Delta channels always have water, the Board's curtailment notices were intended to  
15 protect stored water moving through the Delta and were inconsistent with the Delta Protection  
16 Act ("DPA") and federal law, and the Board's curtailment notices shifted the burden for meeting  
17 Delta flow and salinity objectives to Delta diverters.

18 The unresponsive issues briefed by SJTA are: the Board does not have jurisdiction to  
19 initiate a water availability analysis outside the context of determining whether water is available  
20 for appropriation, the Administrative Civil Liability Complaint ("ACL complaint") issued to  
21 BBID violated BBID's due process rights, the Board lacked standing to issue the ACL complaint,  
22 the water availability analysis is arbitrary, capricious, and lacks evidentiary support, and the ACL  
23 complaint is void because it was issued by Assistant Deputy Director John O'Hagan and issuing a  
24 complaint is outside the scope of his delegated duties.

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26 <sup>2</sup> In her October 30, 2015 ruling, Hearing Officer Doduc requested briefing of two legal issues in the BBID  
27 enforcement action: *Whether, and in what circumstances: (1) does the State Water Resources Control Board have the*  
28 *authority to curtail, and (2) does Water Code section 1052 apply to diversions made under claim of a pre-1914 or*  
*riparian water right?*

1 In addition, portions of the CDWA and SJTA briefs are based on misinterpretations of law  
2 and facts. DWR provides responses to some of these arguments to prevent further  
3 misinterpretations.

4 Finally, in its motion for summary judgment or for summary adjudication, WSID failed to  
5 demonstrate that there are no triable issues of fact with respect to the issues in the enforcement  
6 action and should therefore be denied.

7 **I. THE AGREEMENTS BETWEEN BBID AND DWR HAVE NO BEARING ON**  
8 **THE BOARD'S AUTHORITY TO PREVENT ILLEGAL DIVERSIONS.**

9 BBID argues it is not subject to the Board's regulatory authority because its water use is  
10 pursuant to its contract with DWR, and therefore any issues related to its use of water are contract  
11 interpretation issues. This is not correct, because the agreements specify that the agreements  
12 neither enlarge nor restrict the District's water rights. (Exhibit DWR-4, Testimony of Maureen  
13 Sergent, at pp. 1 & 3.) BBID diverts under its water rights, which are subject to Board review.  
14 The Board issued the ACL complaint to BBID pursuant to Division 2, sections 1052 and 1055 of  
15 the Water Code. The purposes of Division 2 of the Water Code are: (1) to further the  
16 constitutional policy in favor of beneficial use and against waste and unreasonable use of the  
17 waters of the state; and (2) for the welfare and benefit of the people of the state and for the  
18 improvement of their prosperity and their living conditions. (Wat. Code, § 1050.) To carry out  
19 these purposes, the Board may investigate, take testimony, and determine whether water  
20 appropriations are legal. (Wat. Code, § 1051.) Further, although the Board has no permitting or  
21 licensing authority over riparian, pueblo, or pre-1914 appropriative rights, it does have "authority  
22 to prevent illegal diversions and to prevent waste or unreasonable use of water, regardless of the  
23 basis under which the right is held." (*Farm Bur. Federation v. State Water Resources Control Bd.*  
24 (2011) 51 Cal.4th 421, 429, as modified (Apr. 20, 2011); see also Wat. Code, § 275, *Young v.*  
25 *State Water Resources Control Bd.* (2013) 219 Cal.App.4th 397, 404, as modified (Sept. 20,  
26 2013), review denied (Nov. 13, 2013), and *Millview County Water Dist. v. State Water Resources*  
27 *Control Bd.* (2014) 229 Cal.App.4th 879, 893, modified on denial of reh'g (Oct. 14, 2014),  
28 review denied (Dec. 17, 2014).)

1           The agreements between DWR and BBID do not impact the Board’s authority to prevent  
2 illegal diversions. The 1964 agreement is a right-of-way agreement that specifically preserves  
3 BBID’s water rights. (Exhibit DWR-4, Testimony of Marueen Sergent, at p. 1.) The 1964  
4 agreement did not include a water supply component or water right settlement. (*Ibid.*) The 1993  
5 agreement was an exchange of water agreement so that BBID could supply water year-round to  
6 the Mountain House Community development. (*Id.*, at pp. 1–2.) BBID exchanged its summer  
7 water for an equal amount of DWR winter water, but did not expand BBID’s pre-1914 water  
8 rights. (*Ibid.*). The 2003 agreement settled a dispute between the parties regarding BBID’s annual  
9 amount of water it could divert from Clifton Court Forebay. (*Id.*, at p. 2.) Article 8 of the 2003  
10 agreement specifies that “water diverted by the District under this Agreement shall be deemed  
11 diverted under the District’s present water rights [and] . . . neither enlarges nor restricts the  
12 District’s present water rights.” (*Id.*, at p. 3.) DWR did not provide State Water Project (“SWP”)  
13 water to backup BBID water rights. Except for BBID’s exchange for SWP winter water to serve  
14 Mountain House, all of BBID’s water is diverted under its water rights. (*Id.*, at pp. 3–4.) The  
15 rights and obligations of the parties subject to these agreements are matters of contract law, but  
16 issues related to BBID’s water use are subject to the Board’s authority.

17       **II.    THE CDWA AND SJTA BRIEFS ARE BASED ON MISINTERPRETATIONS OF  
18           LAW AND FACTS.**

19           **A.    The Delta diverters do not have a right to an unlimited amount of water and  
20           can only divert according to their water rights.**

21           CDWA argues there are unique factual and legal circumstances in the Delta that affect the  
22 Board’s authority to regulate water use there. (CDWA brief, at 7:1–15:2.) However, the rule of  
23 priority and beneficial use doctrine apply to all water rights throughout the state regardless of  
24 location. (Wat. Code, § 275; *El Dorado Irr. Dist. v. State Water Resources Control Bd.* (2006)  
25 142 Cal.App.4th 937, 966; *Light v. State Water Resources Control Bd.* (2014) 226 Cal.App.4th  
26 1463, 1489, as modified on denial of reh’g (July 11, 2014), review denied (Oct. 1, 2014).) It does  
27 not matter whether or not water is “stored” in Delta channels and always available for diversion.  
28 Diverters there are only allowed to use water according to their water rights. The rule of priority

1 and beneficial use doctrine apply to those diversions, and the Board has authority to ensure that  
2 the rule of priority and beneficial use doctrines are enforced. (*Ibid.*)

3 The fact that water may be physically present at a certain location, in this case the tidally  
4 influenced Delta where water is always present due to ocean tidal influences, does not answer the  
5 issue of whether one has a right to divert that water. The evaluation of the right to divert water  
6 under specific water right priorities requires an analysis of many different factors, including the  
7 availability of natural flow at a specific location and whether that water can be diverted for  
8 beneficial use without adversely impacting other legal users of water or other beneficial uses.  
9 This analysis is the responsibility of the Board and is reflected in its water availability analysis.

10 **B. The Board did not shift the burden of meeting regulatory requirements to  
11 Delta diverters.**

12 CDWA contends, “[t]o the extent that the Board’s curtailment of senior rights was intended  
13 to protect stored water moving through the Delta,” it infringed on Delta users’ right to divert that  
14 stored water. (CDWA brief, at 9:14-10:9.) But CDWA provides no rationale as to why it believes  
15 this was the Board’s intention or evidence to show how the curtailment actually produced that  
16 effect.

17 **C. Delta diverters have no right to stored water.**

18 Downstream water right holders have no right to divert SWP or Central Valley Project  
19 (“CVP,” referred to jointly as “Project” or “Projects”) storage releases made either for re-  
20 diversion at Project facilities in the Delta or to meet Delta standards. (*El Dorado Irr. Dist. v. State  
21 Water Resources Control Bd.*, *supra*, 142 Cal.App.4th 937, 976; *State Water Resources Control  
22 Board Cases* (2006) 136 Cal.App.4th 674, 738–743, 771, referred to hereafter as “*Robie*,” for the  
23 judge who wrote the opinion.) Storage releases are water foreign to the natural watercourse—just  
24 as if they had been imported from a different watershed—and neither riparian nor appropriative  
25 rights attach to them as a matter of law. (*El Dorado Irr. Dist. v. State Water Resources Control  
26 Bd.*, *supra*, 142 Cal.App.4th 937, 976.) The fact that storage releases commingle with the natural  
27 flow in a watercourse does not change the fact that the law recognizes an exclusive right in the  
28

1 party making the releases. Consequently, administrative action that recognizes that foreign water  
2 is unavailable to other diverters cannot constitute an injury to their rights.

3 This is the reason that the Board's water availability analysis for water rights administration  
4 looked to full natural flow, but does not include stored water. (Exhibit WR-9, Testimony of Brian  
5 Coats, at pp. 2-3 & 9.) Stored water is not available for appropriation and is thus outside the  
6 scope of the water availability inquiry. CDWA's conclusion that the protection of storage releases  
7 violated Delta water right priorities has no basis in law. (*El Dorado Irr. Dist. v. State Water*  
8 *Resources Control Bd.*, *supra*, 142 Cal.App.4th 937, 962.) Riparian and appropriative water right  
9 holders with rights to divert water below Project reservoirs are not entitled to divert water  
10 previously stored or imported by the Projects that is released for use downstream, including  
11 stored water that is released for purposes of meeting water quality objectives. (*Robie, supra*, 136  
12 Cal.App.4th 674, 738-743, 771.)

13 CDWA then proffers a second, similarly framed argument: "To the extent the Board's  
14 curtailment of senior rights was intended to protect stored water needed for flow and salinity  
15 objectives in the Delta," it improperly shifted some of the burden for meeting those objectives to  
16 senior Delta diverters. (CDWA brief, at 12:25-13:8.) This speculative argument suffers the same  
17 lacks factual explanation and supposes that protecting stored water would somehow adversely  
18 affect the Delta diverters' ability to use their water rights. However, the presence of stored water  
19 in Delta channels has no effect on Delta diverters' water rights or their ability to exercise those  
20 rights.

21 There is, in fact, nothing in the Board's water availability analysis or curtailment notices  
22 that suggests this to be the case. To the contrary, the Board's methodology compared full natural  
23 flow with diversion demand. It did not include a Delta outflow demand or water quality  
24 component. Thus, the Board's analysis and the curtailment notices did not serve those regulatory  
25 purposes either directly or indirectly, because it excluded the Projects' releases that are dedicated  
26 to meeting those requirements. (Exhibit WR-9, Testimony of Brian Coats, at pp. 14-18.)

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**D. CDWA misinterprets the Delta Protection Act.**

CDWA argues that the Board's actions were inconsistent with the DPA. (Water Code §§ 12200 et seq., CDWA brief, at 10:10–12:20.) The argument focuses on salinity and water quality matters that it fails to connect to the Board's curtailment notices, the water availability analysis, or the assertion it makes that the Board's notices protect Project exports. The Projects were not exporting natural flow, and the curtailment notices only applied to the diversion of natural flow.

CDWA also cites the legislative findings and declaration section of the DPA and argues that because the DPA recites that a "general law cannot apply to the Delta," the Legislature intended to presumptively bar the application of all general laws like the Board's systemwide curtailments. (CDWA brief, at 11:14–11:22.) The quoted language, however, appears in the legislative findings and declaration section of the DPA. (Wat. Code, § 12200.) Therefore, it is not a mandate and cannot preclude the Board's actions. Further, this legislative intent language is similar to language found in many laws of limited geographical reach and exists to legitimate its own narrow application, not to exempt the area from laws and rules that are of general application.

As to the substantive provisions of the DPA, CDWA's arguments are vague and conclusory. To the extent the provisions of the DPA are even relevant, DWR submits that the discussion and holding in *Robie* are authoritative and controlling. In *Robie*, the court held that the protections under the DPA, inuring to both in-Delta water users and to Delta exporters, are the province of the Board to balance and determine in its water quality control planning processes, where it is charged with promulgating objectives that provide reasonable, not absolute, protection to all the users of Delta water supplies. (*Robie, supra*, 136 Cal.App.4th 674, 771.) Thus, *Robie* supports finding that CDWA's concerns are more properly addressed in a water quality control planning process rather than these enforcement actions.

**E. Project releases for exports or to meet Delta standards are not available for appropriation or use by Delta diverters.**

DWR releases water for multiple purposes and does not abandon any of its storage releases. Only water flowing in a natural channel not being applied to beneficial use or not otherwise

1 appropriated is available for appropriation. (Wat. Code, § 1201.) Water that is appropriated and  
2 flowing in a channel under the control of its appropriator is not subject to appropriation by others.  
3 (*Stevens v. Oakdale Irrigation Dist.* (1939) 13 Cal.2d 343, 352; Wat. Code, §§ 7044 & 7075.)  
4 Whether previously appropriated water has been abandoned depends on the acts and intent of the  
5 party who previously appropriated the water. (*Strain v. Superior Court of Los Angeles County*  
6 (1914) 168 Cal. 216, 222.)

7 DWR has taken no action nor manifested any intent to abandon stored water releases at any  
8 time. SWP stored water is conveyed through the Delta to benefit Delta water quality and for  
9 export and beneficial use within its authorized place of use. DWR does not manage releases to  
10 meet any single water quality objective. (Exhibit DWR-3, Testimony of Paul Marshall, at pp. 2–5  
11 & 11.) The Delta is complex and water releases can contribute towards meeting multiple  
12 objectives throughout the entire Delta and Suisun Bay. (*Ibid.*) Storage releases are not abandoned  
13 at any point within the entire Delta. (*Ibid.*) The Board and the courts have expressly recognized  
14 the right of the Projects to use the channels of the Delta to convey and recapture previously  
15 appropriated and stored water without the threat of diversion by others, a right codified in Water  
16 Code section 7075. (Wat. Code, § 7075; Board Order WRO 2004-0004 In the Matter of  
17 Administrative Civil Liability Complaints for Violations of Licenses 13444 and 13274 of Lloyd  
18 L. Phelps, Jr.; License 13194 of Joey P. Ratto, Jr.; License 13315 of Ronald D. Conn and Ron  
19 Silva, et al. (available at:  
20 [http://www.waterboards.ca.gov/waterrights/board\\_decisions/adopted\\_orders/orders/2004/wro2004\\_0004.pdf](http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2004/wro2004_0004.pdf)), referred to hereafter as the “*Phelps Order*”; *Phelps v. State Water Resources*  
21 *Control Bd.* (2008) 157 Cal.App.4th 89, 107–109.) SJTA’s argument that water released from  
22 storage to meet regulatory requirements is abandoned when it passes the compliance points  
23 (SJTA brief, at 9:9–10:2) is therefore without merit, because DWR releases water for multiple  
24 purposes and takes no action nor ever intends to abandon water.  
25

26 SJTA summarizes deposition testimony by Board staff on abandonment of water. However,  
27 Board staff’s opinions on when water is abandoned is irrelevant, because this is a question of law.  
28 SJTA also mischaracterizes the deposition testimony of Katherine Mrowka, stating that Ms.



1 Mrowka “testified water released for water quality objectives has been abandoned and not  
2 protected from Delta diversions.”<sup>3</sup> (*Id.*, at 9:10–9:24.) Ms. Mrowka testified that only abandoned  
3 flows are subject to appropriation, and whether flows are abandoned depends on the intent of the  
4 party that released the water:

5 BY MR. O’LAUGHLIN: What I’m trying to understand, Kathy, is in water rights,  
6 are you aware of anything in water rights that would say that if you release water  
7 to meet a water quality objective, that that water is protected as it moves through  
8 the stream system?

9 ...

10 THE WITNESS: And I believe it goes to the issue of was the water abandoned.  
11 Abandoned flows are subject to appropriation.

12 BY MR. O’LAUGHLIN: Great answer. Okay. Do you have an understanding that  
13 the water that was released by the projects in 2015, that was dedicated for the  
14 purpose of meeting either X2 or Delta outflow, was abandoned?

15 THE WITNESS: I don’t know. I’ve not had a discussion with the projects as to  
16 their intent.

17 SJTA’s statement that the Board has not taken a position on whether Project water is  
18 protected from in-Delta diversion is also incorrect. The Board has decided that users of water in  
19 the Delta must have adequate existing water rights before they can divert and use water from the  
20 channels of the Delta, and that these water rights do not include the right to divert water released  
21 from upstream reservoir appropriated during another season. (See Water Right Decision 1485,  
22 August 1978, at pp. 15–16; Revised Water Right Decision 1641, March 15, 2000, at p. 33, citing  
23 *Lindblom v. Round Valley Water Co.* (1918) 178 Cal. 450; and *Phelps Order*, *supra*, at pp. 20–  
24 21.) The Board’s decisions are consistent with case law on this issue. (*El Dorado Irr. Dist. v.*  
25 *State Water Resources Control Bd.*, *supra*, 142 Cal.App.4th 937, 976; *Robie*, *supra*, 136  
26 Cal.App.4th 674, 738–743, 771.) Futhermore, by not including Project releases as a source of  
27 supply in its water availability analysis, it seems the Board’s Division of Water Rights understood  
28 this issue when it undertook its analysis.

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<sup>3</sup> Ms. Mrowka’s deposition was taken in connection with these enforcement actions on November 16, 2015.

1           **III.    THERE ARE TRIABLE ISSUES OF FACT IN THE WSID ENFORCEMENT**  
2           **ACTION.**

3           A motion for summary judgment shall be granted if: (1) there is no triable issue as to any  
4           material fact; and (2) the moving party is entitled to judgment as a matter of law. (CCP §437c(c).)  
5           Here, there are triable issues of fact. WSID argues it is entitled to summary judgment because the  
6           Board’s Prosecution Team cannot prove there was no water available for WSID to divert after  
7           May 1, 2015, and usable water is always available at its point of diversion. (WSID Separate  
8           Statement, Material Facts 10, 12–13, 15–16 & 39.) However, the Prosecution Team has presented  
9           evidence setting forth its water availability methodology and explaining that application of its  
10          methodology shows that there was, in fact, no water available for WSID to divert after May 1,  
11          2015. (Exhibit WR-9, Testimony of Brian Coats, at p. 5; Exhibit WR-13, Testimony of Kathryn  
12          Bare, at pp. 2–3.) Also, DWR has submitted rebuttal evidence that because of the exceptionally  
13          dry conditions existing during the last three years, there was insufficient supply to meet reduced  
14          flow and salinity objectives and to meet all beneficial uses of water in the Sacramento-San  
15          Joaquin River basin causing it to seek temporary modifications to its water right permits. (Exhibit  
16          DWR-3, Testimony of Paul Marshall, at pp. 4–5.) Therefore, whether there was water available  
17          for WSID to divert after May 1, 2015 is a triable issue of fact, and granting summary judgment on  
18          this issue would be inappropriate.

19           **IV.    CONCLUSION**

20          DWR agrees with and joins in the brief submitted by the Board’s Prosecution Team. DWR  
21          opposes BBID’s brief because it relies on misinterpretations of its agreements with DWR. DWR  
22          also opposes arguments found in portions of the CDWA and SJTA briefs that describe issues that  
23          are outside the scope of the briefing that was requested and those that are based on  
24          misinterpretations of law and facts. Finally, WSID’s motion should be denied, because there are  
25          triable issues of fact with respect to the issues in the WSID enforcement action.

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CALIFORNIA DEPARTMENT OF WATER  
RESOURCES



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