

1 Tim O'Laughlin (SBN 116807
2 Valerie C. Kincaid (SBN 231815)
3 **O'LAUGHLIN & PARIS LLP**
4 2617 K. Street, Suite 100
5 Sacramento, California 95816
6 Telephone: (916) 993-3962
7 Facsimile: (916) 993-3688

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9 Attorneys for SAN JOAQUIN TRIBUTARIES
10 AUTHORITY, Real Party in Interest

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BEFORE THE STATE WATER RESOURCES CONTROL BOARD

In the Matter of:) **SAN JOAQUIN TRIBUTARIES**
) **AUTHORITY'S RESPONSE TO THE**
10 ALLEGED UNAUTHORIZED DIVERSION) **PROSECUTION TEAM'S LEGAL BRIEF**
11 OF WATER BY BYRON-BETHANY)
12 IRRIGATION DISTRICT)
13)
14)

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16 **I. INTRODUCTION**

17 Pursuant to the Hearing Officer's ruling on February 18, 2016, the San Joaquin
18 Tributaries Authority submits the following response to the prosecution team's legal brief.
19 The prosecution team's legal brief failed to provide argument or citation supporting the
20 State Water Resources Control Board (State Water Board) staff's curtailment actions as
21 lawful or authorized. Further, the prosecution team failed to explain how the enforcement
22 action against Byron-Bethany Irrigation District (BBID) is supported or authorized.

23 **II. THIS IS NOT AN UNREASONABLE USE PROCEEDING**

24 The prosecution team cites the unreasonable use doctrine several times in its brief.
25 (PT Brief, at 6:26-7:4; 9:3-9:12.) Further, the prosecution team cites the case of *Millview*
26 *County Water District v. State Water Resources Control Board* (2014) 229 Cal.App.4th 879,
27 which is a case that involved an enforcement action based on the unreasonable use
28 doctrine. The administrative civil liability complaint (ACL Complaint) against BBID is based
on allegations that BBID unlawfully diverted water in violation of Water Code section 1052.

1 The ACL Complaint is not based on unreasonable use and it does not allege BBID used
2 water unreasonably. To the extent the prosecution team relies on State Water Board
3 authority to enforce unreasonable use, this authority is not applicable to this matter. The
4 portions of the prosecution team brief that reference unreasonable use authority should be
5 stricken.

6 **III. THE STATE WATER BOARD'S AUTHORITY TO**
INVESTIGATE WATER SUPPLY AND DEMAND

7 The prosecution team's brief dedicates an entire section of its brief to explain the
8 State Water Board's authority to investigate water supply and demand. (PT Brief, at 4-5.)
9 This section is irrelevant. The issue in the present matter is not about the State Water
10 Board's investigatory actions. The State Water Board has not simply investigated supply
11 and demand; the State Water Board's actions went far beyond investigation. After it
12 investigated, the State Water Board developed a methodology regarding how and when to
13 curtail water users. The State Water Board then used the methodology to make a
14 determination regarding which water right holders are legally entitled to water, and issued
15 enforcement actions based on that determination. It is this series of actions that went
16 beyond the initial investigation that are at issue in this matter. The prosecution team brief
17 fails to provide legal support for the State Water Board's alleged authority to develop a
18 method for curtailment behind closed doors and use that method to determine when pre-
19 1914 water right holders are able to divert water.

20 **IV. CONTRADICTIONARY POSITION REGARDING**
JUNE 12 CURTAILMENT NOTICE

21 The prosecution team's legal brief takes contradictory positions regarding the June
22 12, 2015 curtailment notice. At the beginning of its brief, the prosecution team states that
23 the June 12, 2015 curtailment notice has nothing to do with the ACL Complaint and the
24 ACL Complaint was not based on the curtailment notice. (PT Brief, at 3:5-3:24.) This
25 assertion is not only inconsistent with the remainder of the prosecution team's brief – as
26 discussed below – but it is also inconsistent with the ACL Complaint itself. For instance, the
27 ACL Complaint states, the “June 12 Unavailability Notice applies to S021256 [BBID's
28 Statement of Diversion and Use] because BBID claims a priority date of May 18, 1914.”

1 (WR-4, p. 7.) The ACL Complaint further states that “BBID has continued its normal
2 diversions following the June 12 Unavailability Notice.” (WR-4, p. 7.)

3 In the remainder of its brief, the prosecution team appears to take a different position
4 regarding the applicability of the June 12, 2015 curtailment notice, discussing it at length
5 and citing to it as support for the ACL Complaint several times. (PT Brief, at 5:18-6:12; 7:5-
6 7:23.) The reason the June 12, 2105 curtailment notice remains relevant is because it was
7 the document that notified the public that the State Water Board determined water right
8 holders with the priority of 1903 and later no longer had water available for diversion. It is
9 the process and methodology that the Board used to reach this conclusion which formed
10 the basis for both the ACL Complaint and the June 12, 2015 curtailment notice.

11 The Board's motive for distancing itself from the June 12, 2015 curtailment notice is
12 readily apparent. When applied to a single water user such as BBID, the Board's process
13 and methodology for assessing when and whether pre-1914 water right holders can divert
14 water appears less like an underground regulation and more like an individualized
15 determination as to whether a single party has engaged in an unauthorized diversion of
16 water. However, when the Board's process and methodology are applied to all users in the
17 Delta and watersheds of the Sacramento and San Joaquin Rivers, as was the case with the
18 curtailment notice, the true nature of the Board's action in this matter is clear – the Board
19 enacted an underground regulation and then used it as the basis for an enforcement action
20 against BBID. The process and methodology used to issue the June 12, 2015 curtailment
21 notice is the same as was used to issue the ACL Complaint. For this reason, the June 12,
22 2015 curtailment notice remains relevant, despite the Board's assertions to the contrary.

23 **V. DEFENSIBILITY OF WATER AVAILABILITY ANALYSIS**

24 The prosecution team states that a “full description” of the efforts State Water Board
25 staff took to determine when “water would be available for various water right” holders was
26 “beyond the scope of this brief.” (PT Brief, at 6:5-6:10.) The prosecution team is mistaken.
27 The heart of this matter turns on the method developed and used by State Water Board
28 staff to determine water availability. The prosecution team should have dedicated its entire
legal brief describing in great detail the process and methodology of staff and providing

1 authority and support for the water availability analysis. Instead, the prosecution team used
2 the legal brief to discuss the State Water Board's investigatory powers and mistakenly
3 attempts to rely on Kathy Mrowka's testimony to provide legal support for the water
4 availability analysis. Ms. Mrowka's testimony included only legal conclusions which were
5 unsupported. The prosecution team's legal brief was the place for legal argument and
6 conclusion; however, it provided no legal support that established the State Water Board
7 staff has the authority to proceed in the manner it did.

8 **VI. AUTHORITY TO CURTAIL DURING DROUGHT**

9 The prosecution team states the State Water Board has the authority to make supply
10 and demand determinations during drought periods. (PT Brief, at 5:17-6:13.) Again, this
11 section does not actually provide the legal support for the assertion of State Water Board
12 authority. Instead of providing legal citation and support, the prosecution team brief simply
13 recites the actions taken by the State Water Board. The parties in this matter understand
14 what actions the State Water Board took. The question is not whether the staff acted, it is
15 whether staff had the authority to act. The prosecution team brief provides no legal
16 authority to establish that the actions of staff were authorized.

17 Glaringly absent in this section is any reference to Water Code section 1058.5. This
18 is the section of the Water Code that was amended to provide the State Water Board with
19 extraordinary authority and powers to respond to drought conditions. Section 1058.5
20 provides the State Water Board with the authority to adopt curtailment regulations during
21 times of drought. (Water Code, § 1058.5 [stating the State Water Board may adopt
22 emergency regulations to "require curtailment of diversions when water is not available
23 under the diverter's priority of right"].) Thus, the State Water Board has the authority to
24 curtail during drought times only through the adoption of regulations. In the present matter,
25 the State Water Board did not adopt a regulation pursuant to the requirements of Water
26 Code 1058.5. The previous year the State Water Board adopted emergency regulations
27 pursuant to section 1058.5. Those regulations expired. The State Water Board staff relied
28 on the same methodology it previously used in the regulatory context, but failed to go
through the required administrative and due process processes to notice, hear and adopt

1 revised regulations. This is an underground regulation; it is unlawful because it takes the
2 property rights of water right holders without any public input or comment.

3 **VII. AUTHORITY TO UPHOLD THE RULE OF PRIORITY**

4 The prosecution team brief dedicates a section to the State Water Board's authority
5 to uphold the rules of water right priority. (PT Brief, at 6:14-7:23.) This section does not
6 explain or support the State Water Board's authority to unilaterally interject itself into non-
7 existent priority disputes between pre-1914 water right holders, such as BBID and those
8 entities who may have more senior water rights. In fact, a review of the case law cited by the
9 prosecution team in this section demonstrates how the Board has overreached and
10 overstepped its authority.

11 First, the case of *Light v. State Water Resources Control Board* (2014) 226
12 Cal.App.4th 1463 (*Light*) does not stand for the proposition that the Board may interject
13 itself into matters of priority between pre-1914 water right holders. The *Light* case involved
14 challenges to State Water Board action on the ground that such action violated the rules of
15 water right priority. (*Light*, at 1488 ["the parties characterize the Board's regulation as a
16 violation of the rule of priority"].) Thus, contrary to the prosecution team's interpretation, the
17 case provides an assessment of what action the Board may take that is inconsistent with
18 the rule of priority.

19 The Court's own language in *Light* repudiates the Board's position. The Court stated,
20 "[w]hen the supply of water is insufficient to satisfy all persons or entities holding water
21 rights, it is ordinarily the function of the rule of priority to determine the degree to which any
22 particular use must be curtailed." (*Light*, at 1488-1489.) Thus, the Court explicitly stated
23 that the rule of priority, not the State Water Board, will ordinarily determine when and which
24 uses must be curtailed. Furthermore, the prosecution team has overlooked an integral part
25 of the Court's statement in *Light*. Implicit in the Court's statement that the rule of priority
26 applies "when the supply of water is insufficient" is a finding that demand has, **in fact**,
27 exceeded supply. In issuing the June 12, 2015 curtailment notice and subsequent ACL
28 Complaint, the Board did not consider actual – or real time – demand. Indeed, no water
user with a right senior to that of BBID ever objected to BBID's alleged diversions, nor

1 The answer is the State Water Board acted in both capacities. The State Water
2 Board's first action was the water availability analysis and determination that water was not
3 available for diversion. This action was regulatory. (*Morning Star Co. v. State Bd. Of*
4 *Equalization* (2006) 38 Cal.4th 324, 333; *Tidewater Marine Western, Inc. v. Bradshaw*
5 (1996) 14 Cal.4th 557, 568-69 [establishing that regulations have two principal identifying
6 characteristics: (1) the agency must intend the rule to apply generally; and (2) the rule must
7 implement, interpret or make law enforced or administered by the agency or govern the
8 agency's procedure].) The State Water Board's second action was the issuance of the
9 ACL Complaint to BBID. This was an enforcement action based on the regulation.
10 Thus, the State Water Board's original actions were regulatory and outside its jurisdiction.
11 Because the secondary enforcement action is based entirely on the first set of unlawful
12 actions, the enforcement actions of the State Water Board cannot be authorized. The
13 prosecution team fails to address the first set of regulatory actions by the State Water
14 Board. Instead, the prosecution team simply jumps to the secondary enforcement action
15 and declares these actions are authorized under the State Water Board's enforcement
16 authority. This oversimplification is flawed and not legally supportable. The State Water
17 Board cannot hide its unlawful regulation of pre-1914 water rights with the subsequent
18 issuance of the ACL Complaint.

19 **IX. CONCLUSION**

20 The prosecution team's legal brief does not establish the State Water Board has the
21 authority to allow staff to issue underground regulations, to develop a water availability
22 analyses without stakeholder input, and/or to determine when water is available for certain
23 sets of water rights. Similarly, the prosecution team's legal brief fails to establish the
24 authority under which the Assistant Deputy Director issued the ACL Complaint.

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

26 By: 
27 TIM O'LAUGHLIN
28 VALERIE KINCAID, Attorneys for
SAN JOAQUIN TRIBUTARIES AUTHORITY

1 Re: SWB - BBID-ACL Hearing

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

5 I, Linda L. Wood, declare that:

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

9 **SAN JOAQUIN TRIBUTARIES AUTHORITY'S RESPONSE**
10 **TO PROSECUTION TEAM'S LEGAL BRIEF**

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

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

17 **SEE ATTACHED SERVICE LIST**

18
19 I declare under penalty of perjury under the laws of the State of California that the
20 foregoing is true and correct. Executed this 22nd day of February, 2016, at Sacramento,
21 California.

22
23
24 By: 
25 Linda L. Wood, Legal Assistant

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

<p>Division of Water Rights Prosecution Team Andrew Tauriainen, Attorney III SWRCB Office of Enforcement 1001 I Street, 16th Floor Sacramento, CA 95814 andrew.tauriainen@waterboards.ca.gov</p>	<p>Byron Bethany Irrigation District Daniel Kelly Somach Simmons & Dunn 500 Capitol Mall, Suite 1000, Sacramento, CA 95814 dkelly@somachlaw.com</p>
<p>Patterson Irrigation District Banta-Carbona Irrigation District The West Side Irrigation District Jeanne M. Zolezzi Herum\Crabtree\Suntag 5757 Pacific Ave., Suite 222 Stockton, CA 95207 jzolezzi@herumcrabtree.com</p>	<p>City and County of San Francisco Jonathan Knapp Office of the City Attorney 1390 Market Street, Suite 418 San Francisco, CA 94102 jonathan.knapp@sfgov.org</p> <p>Robert E. Donlan Ellison, Schneider & Harris LLP 2600 Capitol Ave, Suite 400 Sacramento, CA 95816 (916) 447-2166 red@eslawfirm.com</p>
<p>Central Delta Water Agency Jennifer Spaletta Spaletta Law PC PO Box 2660 Lodi, CA 95241 jennifer@spalettalaw.com</p> <p>Dante Nomellini and Dante Nomellini, Jr. Nomellini, Grilli & McDaniel ngmplcs@pacbell.net dantejr@pacbell.net</p>	<p>California Department of Water Resources Robin McGinnis, Attorney PO Box 942836 Sacramento, CA 94236-0001 robin.mcgininis@water.ca.gov</p>
<p>Richard Morat 2821 Berkshire Way Sacramento, CA 95864 rjmorat@gmail.com</p>	<p>San Joaquin Tributaries Authority Valerie C. Kincaid O'Laughlin & Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95814 ykincaid@olaughlinparis.com lwood@olaughlinparis.com</p>
<p>South Delta Water Agency John Herrick, Esq. 4255 Pacific Ave., Suite 2 Stockton, CA 95207 jherrlaw@aol.com</p> <p>Dean Ruiz, Esq. Harris, Perisho & Ruiz, Attorneys at Law 3439 Brookside Road, Suite 210 Stockton, CA 95219 dean@hprlaw.net</p>	<p>State Water Contractors Stefani Morris, Attorney 1121 L Street, Suite 1050 Sacramento, CA 95814 smorris@swc.org</p>

**WEST SIDE IRRIGATION DISTRICT
CEASE AND DESIST ORDER
HEARING**

<p>Division of Water Rights Prosecution Team Andrew Tauriainen, Attorney III SWRCB Office of Enforcement 1001 I Street, 16th Floor Sacramento, CA 95814 andrew.tauriainen@waterboards.ca.gov</p>	<p>The West Side Irrigation District Jeanne M. Zolezzi Karna Harrigfeld Janelle Krattiger Herum\Crabtree\Suntag 5757 Pacific Ave., Suite 222 Stockton, CA 95207 jzolezzi@herumcrabtree.com kharrigfeld@herumcrabtree.com jkrattiger@herumcrabtree.com</p>
<p>State Water Contractors Stefani Morris, Attorney 1121 L Street, Suite 1050 Sacramento, CA 95814 smorris@swc.org</p>	<p>Westlands Water District Daniel O'Hanlon Rebecca Akroyd Kronick Moskovitz Tiedemann & Girard 400 Capitol Mall, 27th Floor Sacramento, CA 95814 dohanlon@kmtg.com rakroyd@kmtg.com</p> <p>Philip Williams of Westlands Water District pwilliams@westlandswater.org</p>
<p>South Delta Water Agency John Herrick, Esq. 4255 Pacific Ave., Suite 2 Stockton, CA 95207 jherrlaw@aol.com</p> <p>S. Dean Ruiz Harris, Perisho & Ruiz 3439 Brookside Rd, Ste. 210 Stockton, CA 95219 dean@hprlaw.net</p>	<p>Central Delta Water Agency Jennifer Spaletta Spaletta Law PC PO Box 2660 Lodi, CA 95241 jennifer@spalettalaw.com</p> <p>Dante Nomellini and Dante Nomellini, Jr. Nomellini, Grilli & McDaniel ngmplcs@pacbell.net dantejr@pacbell.net</p>
<p>City and County of San Francisco Jonathan Knapp Office of the City Attorney 1390 Market Street, Suite 418 San Francisco, CA 94102 jonathan.knapp@sfgov.org</p>	<p>San Joaquin Tributaries Authority Valerie C. Kincaid O'Laughlin & Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95814 ykincaid@olaughlinparis.com</p>
<p>California Department of Water Resources Robin McGinnis, Attorney PO Box 942836 Sacramento, CA 94236-0001 robin.mcginis@water.ca.gov</p>	<p>Byron Bethany Irrigation District Daniel Kelly Somach Simmons & Dunn 500 Capitol Mall, Suite 1000, Sacramento, CA 95814 dkelly@somachlaw.com</p>