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8 BEFORE THE CALIFORNIA

9 STATE WATER RESOURCES CONTROL BOARD

10 In the Matter of ENFORCEMENT ACTION
11 ENF01951 – ADMINISTRATIVE CIVIL
LIABILITY COMPLAINT REGARDING
12 UNAUTHORIZED DIVERSION OF
WATER FROM THE INTAKE CHANNEL
13 TO THE BANKS PUMPING PLANT
(FORMERLY ITALIAN SLOUGH) IN
14 CONTRA COSTA COUNTY

PRE-HEARING BRIEF BY THE CITY AND
COUNTY OF SAN FRANCISCO IN
RESPONSE TO PROSECUTION TEAM'S
PRE-HEARING BRIEF OF LEGAL ISSUES
AND BYRON-BETHANY IRRIGATION
DISTRICT'S MOTION TO DISMISS

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INTRODUCTION

The City and County of San Francisco (San Francisco) submits this brief in accordance with the Hearing Team's January 14, 2016 clarifying e-mail which provides, among other things, that the parties may respond to other parties' pre-hearing legal briefs and to the Motion to Dismiss filed by Byron-Bethany Irrigation District (BBID). More specifically, San Francisco writes in response to the Division of Water Right's Prosecution Team's Pre-Hearing Brief of Legal Issues (Prosecution Brief) and in support of certain arguments raised by BBID in its Motion to Dismiss.

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ARGUMENT

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I. **The Prosecution Mischaracterizes the Court of Appeal's Decisions in *Young* and *Millview*.**

Contrary to the Prosecution Brief's mischaracterization, the Court of Appeal's decisions in *Young v. State Water Resources Control Board* (2013) 219 Cal.App.4th 397, as modified (Sept. 20, 2013), and *Millview County Water District v. State Water Resources Control Board* (2014) 229 Cal.App.4th 879, as modified on denial of reh'g (Oct. 14, 2014), review denied (Dec. 17, 2014), do not stand for the proposition that "[d]iversion when water is not available to serve a claimed water right priority is an unauthorized diversion." (Prosecution Brief, at 8.) Neither of these decisions even applies the rule of priority.¹ Nor do these decisions address whether the State Water Resources Control Board's (State Water

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¹ Neither *Young* nor *Millview* involved a dispute over competing water right priority claims. In *Young*, the Court framed the question on appeal as "whether the Water Code gives the Water Board jurisdiction in enforcement proceedings to determine initially whether a diverter has either the riparian or pre-1914 appropriative rights it claims." 219 Cal.App.4th at 404. See also *Millview*, 229 Cal.App.4th 879, 894-95 (citing *Young*, 219 Cal.App.4th at 403) (emphasis added) (explaining that "the only issue directly raised by the facts in *Young* was the existence of the pre-1914 right . . ."). Similarly, in *Millview*, the Court held that the State Water Board has "the authority to determine the scope of a claimed right as well as its existence," *id.* at 895, and proceeded to affirm the agency's determination that the subject water district's diversions had exceeded the maximum perfected amount of water under its pre-1914 right, *id.* at 899. The *Millview* Court also analyzed the issue of forfeiture but ultimately concluded the trial court had applied the incorrect legal standard. *Id.* at 899-905. Thus, the Court of Appeal had no occasion to apply the rule of priority in either of these cases.

1 Board) has jurisdiction to enforce the rule of priority between pre-1914 appropriators under
2 Water Code section 1052,² which is the threshold jurisdictional question in this case.

3 Further, *Young* and *Millview* analyzed water availability as an inherent *limitation* on the
4 State Water Board's authority to enforce section 1052's prohibition against the unauthorized
5 diversion or use of water in cases involving pre-1914 rights. As previously explained by San
6 Francisco and other parties, the Court of Appeal's decisions in *Young* and *Millview* limit the
7 State Water Board's enforcement authority under section 1052 in cases involving pre-1914
8 rights to situations where the water diverted may be *unappropriated water* that would be
9 subject to the State Water Board's permitting authority, *i.e.*, because the right was never
10 validly established, the right – or some portion thereof – was never perfected, “the diversion
11 exceeds the maximum perfected amount of water under the right,” or the right has been
12 reduced or lost due to forfeiture.³ (*Millview*, 229 Cal.App.4th at 894-895.) These decisions
13 hold that the State Water Board's enforcement authority under section 1052 over pre-1914
14 rights depends on whether the water at issue may be unappropriated water that would be
15 subject to its permitting authority, and thus, *available* for diversion in accordance with the
16 statutory appropriation procedures set forth in part 2 of division 2 of the Water Code. (*Id.* at
17 894 (citing *Young*, 219 Cal.App.4th at 404) (noting “a permit *is* required to divert water
18 appropriated pursuant to a claimed pre-1914 water right that was never perfected, or has
19 been forfeited, or is otherwise invalid”).

20 However, the Prosecution Brief would have *Young* and *Millview* stand for the opposite
21 proposition – that the State Water Board can exercise its enforcement authority under section
22 1052 in cases involving pre-1914 rights when there is no unappropriated water available.
23 The central allegation of the Administrative Civil Liability complaint (ACL) is that there was no
24 water available for BBID to divert between June 12-25, 2015 because senior appropriators

25 ² All further statutory references are to the California Water Code unless otherwise specified.

26 ³ See Pre-Hearing Brief on Identified Legal Issues by the City and County of San Francisco, at 3-5;
27 BBID's Motion to Dismiss Administrative Civil Liability Proceeding in ENF01951 for Lack of Statutory
28 Authority Under Water Code Section 1052, at 7-8; Central Delta Water Agency and South Delta
Water Agency Legal Issues Brief, at 16-17.

1 with priority dates of 1902 and earlier were entitled to the water that was physically present at
2 BBID's point of diversion. (ACL, at ¶¶ 18, 24-28.) Under this theory, no unappropriated
3 water could have possibly been available to divert during the subject period in accordance
4 with the statutory appropriation procedures set forth in part 2 of division 2 of the Water Code.
5 (Wat. Code, § 1201 (emphasis added) (defining unappropriated water as “[a]ll water flowing
6 in any natural channel, *excepting so far as it has been or is being applied to useful and*
7 *beneficial purposes upon . . . or otherwise appropriated . . .*”); Wat. Code, § 1202 (declaring
8 that “unappropriated water” includes, among other things, “[a]ll water which has never been
9 appropriated”).)

10 The Prosecution Brief also argues that *Young* and *Millview* “stand for the proposition
11 that the Board and staff may make *any preliminary factual determinations necessary to*
12 *decide whether a party has engaged in the unauthorized diversion of water* [and may take
13 enforcement action under 1052 against parties claiming pre-1914 rights] who are diverting *in*
14 *excess of the water available* for those rights.” (*Id.* at 9 (emphasis added).) Again, the
15 Prosecution Brief’s characterization of these decisions is misleading and untenable. As
16 discussed above, *Young* and *Millview* limited the State Water Board’s enforcement authority
17 under section 1052 against pre-1914 water rights holders to situations where the water
18 diverted may be unappropriated water that would be subject to the State Water Board’s
19 permitting authority. (*Young*, 219 Cal.App.4th at 405 (emphasis added), 406-407; *Millview*,
20 229 Cal.App.4th at 894-895 (citing *Young*, 219 Cal.App.4th at 403).)

21 Regarding the State Water Board’s authority to make preliminary factual
22 determinations, the pertinent question is whether the agency’s assessment of how much
23 water is available for pre-1914 water rights with varying priority dates is, in fact, a “threshold
24 determination[] necessary to execute its responsibility to regulate water” under section 1052
25 against pre-1914 appropriators, such as BBID. (*Young*, 219 Cal.App.4th at 405.) It is not.

26 Even assuming *arguendo* that the allegations in the ACL against BBID are true, *i.e.*,
27 that the water diverted by BBID between June 12-25, 2015 was entitled to more senior

1 appropriators with earlier priority dates,⁴ the State Water Board would have no “responsibility
2 [or authority] to regulate” such water under section 1052 because the right to divert and use it
3 would be subject to prior rights of appropriation, and therefore not subject to the State Water
4 Board’s permitting authority. (*Young*, 219 Cal.App.4th at 405.) Accordingly, the State Water
5 Board’s determination that there was no water available for BBID to divert in June 2015
6 because the water was entitled to more senior appropriators could not be considered
7 “necessary” for – or even relevant to – its enforcement of section 1052 against BBID.⁵ (*Id.*)

8 Moreover, contrary to the Prosecution’s suggestion, there was no allegation in *Young*
9 or *Millview* that a pre-1914 appropriator was “diverting *in excess of the water available*” for
10 their right.⁶ (Prosecution Brief, at 9 (emphasis added).) In *Millview* the Court of Appeal
11 affirmed the State Water Board’s determination that the water district’s diversions had
12 *exceeded the maximum perfected amount of water* under its pre-1914 right,⁷ and expressly
13 limited application of section 1052 in cases involving pre-1914 rights to situations where the
14 water diverted may be unappropriated water that would be subject to the State Water board’s
15 permitting authority, for example, “because the diversion exceeds the maximum perfected
16 amount of water under the right.” (*Millview*, 229 Cal.App.4th at 895 (emphasis added).)
17 Thus, the Prosecution’s assertion that *Young* and *Millview* “stand for the proposition” that the
18 State Water Board may exercise its enforcement authority under section 1052 against pre-
19 1914 appropriators “who are diverting in excess of the water available for those rights,”
20 (Prosecution Brief, at 9 (emphasis added), is simply wrong and contravenes the rationale
21 underlying the Court of Appeal’s decisions in *Young* and *Millview* discussed above.

22 ⁴ ACL at ¶¶ 18, 24-28.

23 ⁵ By contrast, as noted by the *Young* Court, it is necessary for the State Water Board to make a
24 threshold determination “as to the availability of unappropriated water” prior to deciding whether to
25 exercise its discretion to issue a permit to appropriate water. *Young*, 219 Cal.App.4th at 404 (citing
Temescal Water Co. v. Department of Public Works (1955) 44 Cal.2d 90, 103-104).

26 ⁶ See *supra* note 1.

27 ⁷ *Millview*, 229 Cal.App.4th at 886-888, 899 (although the record showed that the water district had
28 diverted as much as 1,174.75 acre-feet per year (afa) under its pre-1914 right in recent years, the
State Water Board determined the district’s predecessor in interest of the right had never perfected
the claim for more than 243 afa and the Court affirmed).

1 **II. Contrary to the Prosecution’s Contentions, the Methodology Used by the State**
2 **Water Board to Determine Water Was Unavailable for Over 9,000 Water Right**
3 **Holders Under Their Priority of Right in 2015 was an Underground Regulation.**

4 San Francisco joins in BBID’s argument that the methodology used by the State Water
5 Board in 2015 as the basis for informing over 9,000 water right holders that there was no
6 water available under their priority of right (the “methodology”), and that continued diversions
7 were unlawful, is an improper underground regulation, and writes separately to raise a few
8 additional points.⁸

9 Although the Prosecution asserts the “supply and demand analysis and the resulting
10 notices to the affected community” are authorized by the State Water Board’s investigative
11 power,⁹ there is no statute, regulation, or State Water Board decision that authorized the
12 development or application of the methodology as the basis for curtailment, and related State
13 Water Board enforcement actions, such as issuance of the ACL to BBID, in 2015.¹⁰

14 The Prosecution’s reliance on the State Water Board’s general investigative authority,
15 and its specific authority to issue informational orders during the drought, is unavailing
16 because it wrongly suggests the agency’s enforcement power is co-extensive with its
17 investigative power – which it is not. (Prosecution’s Brief, at 4-5 (*citing* Wat. Code, §§
18 1051(a),(c); 183; 1058.5.) For example, the Prosecution, in part, relies on California Code of
19 Regulations, title 23, section 879(c) – an emergency regulation that authorizes the Deputy

20 ⁸ See BBID’s Motion to Dismiss, at 3-6. San Francisco also joins in BBID’s argument that the ACL
21 “must be dismissed for lack of delegation authority.” *Id.* at 11-13.

22 ⁹ Prosecution’s Brief, at 6 (wherein the Prosecution asserts that the “supply and demand analysis and
23 the resulting notices to the affected community are squarely within the authorities described in the
24 previous section.”) The preceding section of the Prosecution Brief, Section III(B), primarily identifies
25 sources of the State Water Board’s investigative authority, and is titled “[t]he State Water Board and
26 Staff have Broad Authority to Investigate Water Supply and Demand, Particularly During the Drought
27 Emergency.” *Id.* at 4-5.

28 ¹⁰ Notably, in his deposition, the Assistant Deputy Director for the Division of Water Rights, John
O’Hagan, conceded there was no statute, regulation, or State Water Board decision that supported
staff’s application of the methodology in 2015. Deposition Transcript of John O’Hagan, Vol. 1, Nov.
19, 2015 (O’Hagan Depo.), attached hereto as Exhibit A to Declaration of Jonathan Knapp, at 116:25-
117:8, 117:20-25, 118:1-7. See also Prosecution’s Brief, at 2-3 (explaining that the ACL against
BBID should not be understood as a curtailment action: “the question of whether, and in what
circumstances, is the State Water Board authorized to curtail, (e.g., issue enforceable curtailment
orders), is not relevant to the ACL Complaint proceedings.”).

1 Director of the Division of Water Rights (Deputy Director) to issue informational orders
2 requiring water right holders, diverters, or users to provide certain information concerning
3 their rights (Information Regulation) – as putative authority for the development and
4 application of the methodology. (Prosecution Brief, at 5-6.) However, the Information
5 Regulation does not augment the State Water Board’s enforcement authority in any way
6 other than to prescribe fines for violation of its reporting requirements. (23 CCR § 879(c)(4).)

7 The Prosecution also completely fails to explain how any of the authorities cited in its
8 brief specifically authorized the development and application of the methodology in 2015.
9 For example, although responses to informational orders issued pursuant to the Information
10 Regulation could contain relevant information for determining water availability, the regulation
11 says nothing about *how* the State Water Board or its staff should develop or apply a
12 methodology that would make use of such information, nor, as noted, does it authorize use of
13 the methodology in support of the agency’s enforcement efforts.

14 By contrast, in 2014 the State Water Board adopted California Code of Regulations,
15 title 23, section 875 – a regulation titled “Curtailments Due to Lack of Water Availability”
16 (Curtailment Regulation) – that did, in fact, specify elements of a methodology to be applied
17 “[i]n determining whether water is available under a diverter’s priority of right.”¹¹ However,
18 the Curtailment Regulation solely applied to post-1914 appropriators and expired by
19 operation of law on April 14, 2015.¹² (23 CCR § 875(b).) Remarkably, in his deposition,

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21 ¹¹ See State of California Office of Administrative Law Notice of Approval of Emergency Regulatory
22 Action, In Re: State Water Resources Control Board, OAL File No. 2014-0708-02E, dated July 16,
23 2014, attached as Exhibit G to Declaration of Lauren D. Bernadette in Support of BBID’s Motion to
24 Dismiss (Bernadette Decl.), 23 CCR § 875(c) (identifying information that the Deputy Director may
25 rely upon “[i]n determining whether water is available under a diverter’s priority of right and to issue or
26 suspend curtailment orders”); 23 CCR § 875(c)(1) (specifying assumption to be used in determining
27 water availability, *i.e.*, “[a]bsent evidence to the contrary, riparian water rights are presumed senior to
28 appropriative water rights with regard to natural flow for purposes of curtailments pursuant to this
section”); 23 CCR § 875(c)(4) (prescribing certain notification protocols, *e.g.*, “[w]hen issuing
curtailment orders to senior water right holders, the Deputy Director shall include information
regarding the quantity of water that should be made available by the prior curtailment of more junior
water rights.”)

¹² See *To Adopt an Emergency Regulation for Statewide Drought-Related Curtailment of Water
Diversions to Protect Senior Water Rights*, Resolution No. 2014-0031, July 2, 2014, 2014 WL
3398115, at ¶ 21 (emphasis added) (explaining that “[g]iven complexities surrounding the relative

1 Mr. O'Hagan acknowledged that the Curtailment Regulation was not re-adopted yet
2 explained "we are utilizing the same methodology that we did in 2014." (O'Hagan Depo., at
3 116:25-117:8.)

4 Moreover, even if one were to accept the Prosecution's theory that the cited statutes,
5 which grant investigative power to the State Water Board, also materially amplify the
6 agency's enforcement power, these statutes "must be read in conjunction" with the balance
7 of the applicable statutory scheme. (See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 433,
8 *modified* (May 2, 1990) disapproved of on other grounds by *Tidewater Marine Western, Inc.*
9 *v. Bradshaw* (1996) 14 Cal.4th 557.) This includes Government Code section 11340.5(a),
10 which requires the State Water Board to comply with the Administrative Procedure Act
11 (APA), (Gov. Code, §§ 11340, *et seq.*), in adopting regulations, and Water Code section
12 1058.5(a)(1), which authorizes the State Water Board to adopt emergency regulations to,
13 among other things, "require curtailment of diversions when water is not available under the
14 diverter's priority of right."¹³ (*Grier*, 219 Cal.App.3d at 433.) Thus, the pertinent question is
15 whether the methodology constitutes a "regulation" within the meaning of Government Code
16 sections 11340.5(a) and 11342.600, "or amounts only to an exempt internal management
17 rule." (*Id.*; Gov. Code, § 11340.9(d) (exempting "[a] regulation that relates only to the internal
18 management of the state agency" from the APA requirements).)

19 The methodology at issue here is a "regulation" because it is a "standard of general
20 application . . . adopted by [a] state agency to implement . . . the law [allegedly] enforced or
21 administered by it." (Gov. Code, § 11342.600) In *Grier*, the Court of Appeal held that the

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priority of individual pre-1914 appropriative water rights and riparian water rights, the emergency
23 regulation does not apply curtailment orders to these categories of water rights.")

24 ¹³ Although the Prosecution also relies on Governor Brown's Executive Order B-29-15 which, among
25 other things, directs the State Water Board "to bring enforcement actions against illegal diverters,"
26 Prosecution's Brief, at 4-5, it appears to overlook the Governor's prior April 25, 2014 Proclamation of
27 a Continued State of Emergency, that provides, in part, "the Water Board *will adopt and implement*
28 *emergency regulations pursuant to Water Code section 1058.5, as it deems necessary . . . to require*
curtailment of diversions when water is not available under the diverter's priority of right." April 25,
2014 Proclamation available online at <http://ca.gov/Drought/topstory/top-story-6.html>, and attached as
Exhibit F to Bernadette Decl. (emphasis added). Executive Order B-29-15 confirmed the Governor's
directive regarding section 1058.5 remains "in full force and effect." Executive Order B-29-15, at ¶ 1.

1 challenged audit method “was a standard of general application which, in implementing the
2 Department’s statutory auditing authority, affected Medi-Cal providers statewide.” (219
3 Cal.App.3d at 434-435, 438.) Significantly, the *Grier* Court “*found that a challenged method*
4 *of conducting an audit—by extrapolating from a small, select, sample of claims submitted—*
5 *was in fact a regulation*. The court concurred in the reasoning of the Office of Administrative
6 Law, *determining that the method was a regulation* because it was a standard of general
7 application applied in every Medi-Cal case reviewed by the Department Audit teams and
8 used to determine the amount of the overpayment.” (*Taye v. Coye* (1994) 29 Cal.App.4th
9 1339, 1345 (citing *Grier*, 219 Cal.App.3d at 434-435, 438, 440 (emphasis added).)

10 Similarly, the methodology for determining water availability used by the State Water
11 Board in 2015 as the basis for curtailment, and related enforcement actions, such as the ACL
12 against BBID, was a standard of general application, which, in allegedly implementing the
13 State Water Board’s investigative authority and/or the rule of priority¹⁴ affected water right
14 holders statewide. (*Grier*, 219 Cal.App.3d at 434-435, 438.) Thus, the State Water Board
15 was required to comply with the APA before using the methodology. (*Id.* at 438, 440.)

16 The methodology is not an exempt internal management rule because it impacts water
17 right holders throughout the state. (*Id.* at 437 (citing *Armistead v. State Personnel Board*
18 (1978) 22 Cal.3d 198, 203-204) (explaining that unlike “purely internal rules which merely
19 govern an agency’s procedure . . . rules which have external impact . . . invoke the APA.”) In
20 *Grier*, the agency used the challenged audit method to audit claims for payment by
21 physicians who were Medi-Cal providers and prove overpayments. (219 Cal.App.3d 428,
22 436-437.) In the instant case, the State Water Board used the challenged methodology to
23 determine whether and how much water was diverted during periods when water was
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25 ¹⁴ See Prosecution’s Brief, at 7 (emphasis added) (stating that “[t]he purpose of the Division’s drought
26 water availability determination analyses described in the June 12 Notice” at issue in this proceeding
27 “*was to protect the rule of priority.*”); *id.* (citing WR-9, at 3 [Testimony of Brian Coats]) (emphasis
28 added) (wherein Mr. Coats explains, “[i]n accordance with the State’s water right priority system, the
State Water Board notifies diverters of a water shortage when sufficient flows in a watershed are not
available for a water user’s needs, based on their priority of right.”)

1 allegedly unavailable for a particular priority of right, a determination that it then relied on as
2 the basis for enforcement action against water right holders, like BBID. Similar to the
3 agency's use of the auditing method in *Grier*, the State Water Board's use of the
4 methodology for determining water availability has significant external impacts, *i.e.*, on water
5 right holders such as BBID, and thus is not exempt from APA requirements. (See *Center for*
6 *Biological Diversity v. Department of Fish and Wildlife* (2015) 234 Cal.App.4th 214, 260-262
7 (where court found mitigation measure that required state biologists to "evaluate whether
8 water bodies should be stocked for the Fishing in the City program" was a regulation that
9 required compliance with the APA because the evaluation could lead to a "significant number
10 of water bodies" being removed from the program to the detriment of "numerous citizens . . .
11 especially children."); *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 736 (where court
12 held that a "classification system [which] determines the custody level of a prisoner and the
13 institution in which he will be housed . . . represents a rule of general application which must
14 be adopted in compliance with the [APA].").

15 As the *Grier* Court explained, the purpose of the APA is "to provide a procedure
16 whereby people to be affected by proposed regulatory action may be heard on the merits of
17 proposed rules," and thus to avoid "the problem of *house rules of the agency* which are
18 promulgated without public notice, opportunity to be heard, filing with the Secretary of State,
19 and publication in the California Code of Regulations." (*Grier*, 219 Cal.App.3d at 435 (citing
20 *Armistead*, 22 Cal.3d at 204-205) (emphasis added).) In his deposition, Mr. O'Hagan
21 explained that it was his decision to use the methodology for determining water availability in
22 2015, and that there were no applicable statutory or regulatory requirements that he needed
23 to comply with in developing the methodology. (O'Hagan Depo., at 23:12-14, 114:13-16,
24 119:12-16.) In fact, Mr. O'Hagan stated there were no constraints whatsoever imposed on
25 his discretion to decide what should be considered and what should be excluded from the
26 water availability analysis. (*Id.* at 119:17-25, 120:1-11.) San Francisco respectfully submits
27 that the methodology to determine water availability used by the State Water Board in 2015

1 represents a paradigmatic example of the problem of “house rules of the agency” that was
2 intended to be redressed by enactment of the APA.

3 **III. This is Not an Article X, Section 2 Case.**

4 Although the ACL against BBID contains no allegations of waste or unreasonable use
5 (or diversion) in violation of Article X, section 2 of the California Constitution, the
6 Prosecution’s Brief repeatedly refers to the Constitutional provision.¹⁵ These references to
7 Article X, section 2 appear to be offered as support for their argument that the Division of
8 Water Rights “may commence administrative enforcement against a water right holder who
9 diverts after State Water Board staff determines that no water is available to serve that *water*
10 *right priority.*” (Prosecution’s Brief, at 2 (emphasis added).) Given that the rule of priority is,
11 of course, separate and distinct from the prohibition against waste and unreasonable use
12 prescribed by Article X, section 2, and it is undisputed that there are no allegations of waste
13 or unreasonable use (or diversion) in the instant proceeding, the Constitutional provision
14 does not (and cannot) provide any support for the Prosecution’s arguments.

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16 Dated: February 22, 2016

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19 By: /s/ Jonathan Knapp
JONATHAN KNAPP

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21 Attorneys for City and County of San Francisco

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24 ¹⁵ See e.g., Prosecution Brief, at 4 (quoting *Light v. State Water Resources Control Board* (2014)
25 226 Cal.App.4th 1463, 1481-1482, as modified on denial of reh’g (July 11, 2014), review denied
26 (Oct. 1, 2014) (where the Prosecution states “the Board’s authority to prevent unreasonable or
27 wasteful use of water extends to all users, regardless of the basis under which the users’ water rights
28 are held” in apparent support of their argument that the State Water Board is authorized to investigate
the availability of water under a diverter’s priority of right); Prosecution’s Brief, at 6-7 (citing *Light*, 226
Cal.App.4th at 1488) (stating “[a]ll water users are subject to the prohibition against waste and
unreasonable use set forth in Section 2 of Article X of the California Constitution” in apparent support
of their argument that “Board and staff must uphold the rule of priority.”).

1 **PROOF OF SERVICE**

2 I, Patty Slomski, declare as follows:

3 I am employed in the County of Sacramento, State of California. I am over the age of eighteen
4 years and am not a party to the within action. My business address is ELLISON, SCHNEIDER
5 & HARRIS, L.L.P.; 2600 Capitol Avenue, Suite 400; Sacramento, California, 95816. On
6 February 22, 2016, I serviced the following documents described as:

7 **PRE-HEARING BRIEF BY THE CITY AND COUNTY OF SAN FRANCISCO IN**
8 **RESPONSE TO PROSECUTION TEAM’S PRE-HEARING BRIEF OF LEGAL ISSUES**
9 **AND BYRON-BETHANY IRRIGATION DISTRICT’S MOTION TO DISMISS**

10 **DECLARATION OF JONATHAN P. KNAPP IN SUPPORT OF PRE-HEARING BRIEF**
11 **BY THE CITY AND COUNTY OF SAN FRANCISCO IN RESPONSE TO**
12 **PROSECUTION TEAM’S PRE-HEARING BRIEF OF LEGAL ISSUES AND BYRON-**
BETHANY IRRIGATION DISTRICT’S MOTION TO DISMISS

13 on the attached service list.

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25 I declare under penalty of perjury that the foregoing is true and correct and that this declaration
26 was executed on February 22, 2016, at Sacramento, California.

27 

28 _____
Patty Slomski

**SERVICE LIST OF PARTICIPANTS OF
THE BYRON-BETHANY IRRIGATION
DISTRICT ADMINISTRATIVE CIVIL
LIABILITY HEARING
AND THE WEST SIDE IRRIGATION
DISTRICT CEASE AND DESIST ORDER
HEARING**

PARTIES	
THE FOLLOWING MUST BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (All have AGREED TO ACCEPT electronic service, pursuant to the rules specified in the hearing notice.)	
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	Byron Bethany Irrigation District Daniel Kelly Somach Simmons & Dunn 500 Capitol Mall, Suite 1000, Sacramento, CA 95814 dkelly@somachlaw.com
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	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 Robert E. Donlan Ellison, Schneider & Harris L.L.P. 2600 Capitol Avenue, Suite 400 Sacramento, CA 95816 (916) 447-2166 red@lawfirm.com
Central Delta Water Agency Jennifer Spaletta Spaletta Law PC PO Box 2660 Lodi, CA 95241 jennifer@spalettalaw.com Dante Nomellini and Dante Nomellini, Jr. Nomellini, Grilli & McDaniel ngmplcs@pacbell.net dantejr@pacbell.net	California Department of Water Resources Robin McGinnis, Attorney PO Box 942836 Sacramento, CA 94236-0001 Robin.mcginis@water.ca.gov

Byron-Bethany Irrigation District ACL Hearing
 West Side Irrigation District CDO Hearing

<p>San Joaquin Tributaries Authority Valerie Kincaid O'Laughlin & Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95814 vkinaid@olaughlinparis.com towater@olaughlinparis.com lwood@olaughlinparis.com</p>	<p>State Water Contractors Stephanie Morris 1121 L Street, Suite 1050 Sacramento, CA 95814 smorris@swc.org</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>Richard Morat 2821 Berkshire Way Sacramento, CA 95864 rmorat@gmail.com</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>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.org</p> <p>Philip Williams Westlands Water District pwilliams@westlandswater.org</p>