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12 **BEFORE THE STATE WATER RESOURCES CONTROL BOARD**

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14 ENFORCEMENT ACTION ENF01949
DRAFT CEASE AND DESIST ORDER
15 REGARDING UNAUTHORIZED
DIVERSIONS OR THREATENED
16 UNAUTHORIZED DIVERSIONS OF
WATER FROM OLD RIVER IN SAN
17 JOAQUIN COUNTY

**OPPOSITION TO MOTION FOR
SUMMARY JUDGMENT, OR IN THE
ALTERNATIVE, SUMMARY
ADJUDICATION**

Hearing Date: March 21, 2016

Hearing Officer: Frances Spivy-Weber

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19 Westlands Water District ("Westlands") opposes The West Side Irrigation District's ("WSID")
20 motion for summary judgment, or in the alternative, summary adjudication of the Enforcement Action
21 ENF01949 ("Enforcement Action"). Westlands' involvement in the Enforcement Action stems from
22 its interest in protecting Central Valley Project ("CVP") water from unauthorized diversion.

23 WSID has misstated the applicable law. There are limits on WSID's ability to divert that
24 undercut WSID's claims regarding water availability and its ability to divert commingled water.
25 WSID has failed to present the evidence it would need to prevail on its motion under the applicable
26 law. Therefore WSID is not entitled to judgment as a matter of law.
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1 **I. ARGUMENT**

2 **A. WSID Is Not Entitled To Judgment as a Matter of Law Regarding Water**
3 **Availability**

4 WSID argues that because the State Water Resources Control Board’s (“Water Board”) water
5 availability analysis did not include the Sacramento River as a primary source of supply available to
6 WSID under License 1381, the Prosecution Team cannot establish that no water was available to
7 divert for WSID after May 1, 2015. (Memorandum of Points and Authorities in Support of Motions
8 for Summary Judgment or Alternatively for Summary Adjudication, and Motions To Dismiss [“WSID
9 Mem.”] at 5:3-10.) This argument fails. First, WSID’s water right license (License 1381) identifies
10 the source of water for WSID’s diversions as Old River, a tributary of the San Joaquin River. The
11 presence of Sacramento River water at WSID’s point of diversion does not automatically entitle
12 WSID to divert Sacramento River water as an additional source of supply under License 1381, and
13 WSID does not establish that any Sacramento River water present is abandoned and available for
14 appropriation. Second, there are limits on WSID’s diversion of water, including the rule that WSID
15 may not divert previously stored water. Because WSID misstates the law regarding available sources
16 of supply and fails to present the evidence it would need to prevail on its claim regarding water
17 availability, the Hearing Officer should deny WSID’s motion.

18 **1. WSID Has Not Established that the Sacramento River Is a Source of**
19 **Supply for License 1381**

20 Water right permits and licenses are associated with specific sources of supply. Thus, an
21 application for an appropriative water right must identify the source of supply (Wat. Code, § 1301,
22 subd. (d)), and the Water Board must identify the source of supply in any permit or license ultimately
23 granted. The permit or license “gives the right to take and use water only to the extent and for the
24 purpose allowed in the permit.” (Wat. Code, § 1381; see Wat. Code, §§ 1605, 1610.) In practice as
25 well, a water right is generally limited by the quantity of water associated with the water source or
26 sources for that right. (See *Turner v. James Canal Co.* (1909) 155 Cal. 82, 90-91, 95; Hutchins, *The*
27 *California Law of Water Rights* at p. 186.) While foreign water may be a source of supply for
28 appropriators, appropriators may only divert foreign water if the water is abandoned, with no intention

1 on the part of the one abandoning the water to recapture it. (Hutchins, The California Law of Water
2 Rights at p. 69.)

3 License 1381 identifies Old River, a tributary of the San Joaquin River, as WSID's source of
4 supply. (WSID0005.) Consistent with License 1381, a 1985 Water Board inspection report identifies
5 the San Joaquin River as the source of supply, and its direction of origin as from the south.
6 (WSID0009.) Neither document identifies the Sacramento River as a source of supply for WSID.
7 Nor has WSID cited any evidence that Sacramento River water was a source of supply considered by
8 the Water Board when it evaluated whether to issue a permit leading to License 1381. In fact,
9 Prosecution Team witness Kathy Mrowka indicates that "only the waters of Old River, and not Delta
10 tidal flows, were considered in determining whether to issue a permit leading to License 1381 . . ."
11 (WR-7 at p. 13.) WSID argues that "Sacramento River water has historically been a source of supply
12 available to WSID under its License" (WSID Mem. at 5:6-7, citing UMF ¶3), but Bulletin 21, which is
13 cited as support, is not evidence of the source of supply considered by the Water Board when it
14 considered the original application for an appropriative water right. Bulletin 21 was prepared by the
15 Department of Public Works, not the Water Board, and was published in 1929, several years before
16 the Water Board issued License 1381.

17 WSID is not entitled to divert Sacramento River water that is present at its point of diversion
18 simply by virtue of its presence in Old River. WSID points to model simulations of 1931 to support
19 the concept that "the Sacramento River and agricultural runoff were the dominant source of water in
20 the summer months [in 1931]." (WSID UMF 12; BBID384 at pp. 12-13.) The modeling in exhibit
21 BBID384 apparently indicates that "[d]uring the summer of 1931, the water present at WSID's intake
22 consisted of approximately 35% to 50% Sacramento River water . . ." (BBID384 at p. 83.) More
23 modeling purports to establish that "approximately 65% to 75% or more of the water present at the
24 WSID intake during the irrigation season in 2015 originated from the Sacramento River or from
25 agricultural return flows . . ." (WSID UMF 13, BBID384 at p. 15.) It appears that the modeling for
26 2015 was not done on a without CVP and State Water Project basis, and did not account for the
27 presence of stored water. (See BBID388 at ¶ 21.f.vii; BBID384 at pp. 96-97.) Even assuming the
28 accuracy of this modeling, the presence of Sacramento River water in Old River in 1931 or even in

1 2015 does not make the Sacramento River a source of supply available under License 1381.

2
3 **2. There Are Limits on WSID's Ability To Divert Water Present at its Point
of Diversion, Including that WSID Has No Right To Divert Stored Water**

4 WSID has no right to divert previously stored water. Appropriators such as WSID are limited
5 to diverting either natural flow or abandoned flow. (Wat. Code, § 1202; *United States v. SWRCB*
6 (1986) 182 Cal.App.3d 82, 116.) Water that is released from CVP storage and travels through the
7 Sacramento-San Joaquin Delta ("Delta") to meet water quality standards and/or for export is not
8 "abandoned" flow that may be diverted. (*City of Los Angeles v. City of Glendale* (1943) 23 Cal.2d 68,
9 77; *Stevens v. Oakdale Irr. Dist.* (1939) 13 Cal.2d 343, 352.) WSID's post-1914 appropriative water
10 right does not entitle it to divert water that was previously stored by the CVP. (*El Dorado Irrigation*
11 *Dist. v. SWRCB* (2006) 142 Cal.App.4th 937, 976; *Phelps v. SWRCB* (2007) 157 Cal.App.4th 89, 107,
12 111; SWRCB Order WR 2004-004 at pp. 16.)

13 This limitation on WSID's appropriative water right is significant. When the CVP releases
14 previously stored water into the Delta for the purpose of satisfying water quality standards and/or for
15 diversion in the south Delta, and those supplies are diverted by water users alleging senior water
16 rights, CVP contractors, including Westlands, are injured. The unauthorized diversion of previously
17 stored water forces the CVP to release more stored water into the system than it would otherwise be
18 required to do to satisfy water quality and other regulatory standards. Without the unauthorized
19 diversions, some additional quantity of water would be available for CVP purposes.

20 WSID does not address whether its modeling shows stored water was present at its point of
21 diversion in 2015. But, if water at WSID's point of diversion includes Sacramento River water that
22 was previously stored by the CVP, that stored water is not "available" to WSID. It was not error for
23 the Water Board to exclude stored water from its water availability analysis.

24 In sum, WSID has not established that Sacramento River water is a source of supply under
25 License 1381. It has not established whether all or some portion of the Sacramento River water that is
26 present at WSID's point of diversion is abandoned, and therefore subject to appropriation. Nor has
27 WSID established whether all or some portion of the water that is present at WSID's point of
28 diversion is previously stored water, which is properly excluded from any water availability analysis.

1 For these reasons, the Hearing Officer should deny WSID's motion as to its claims regarding water
2 availability.

3 **B. WSID's Ability To Divert Commingled Water Is Limited**

4 WSID argues that its diversion of drainage water from its Intake Canal is authorized by
5 California case law and Water Code section 7075.¹ (WSID Mem. at 8:15-10:25.) WSID overstates
6 the law. As explained above, WSID's water right does not entitle it to divert water from all sources of
7 supply that may be present in the WSID Intake Canal. Moreover, there are specific limits on a water
8 user's right to divert commingled water. First, a water user is only entitled to divert water that may be
9 put to reasonable and beneficial use. Second, a water user may not divert commingled water if the
10 diversion diminishes another water user's ability to exercise his water right. WSID misstates the law
11 and fails to present the evidence it would need to prevail on its claim regarding its ability to divert
12 commingled water. Accordingly, the Hearing Officer should deny WSID's motion.

13 **1. WSID Is Not Entitled To Better Water Quality than Would Exist Under**
14 **Natural Conditions, and Cannot Divert Water that May Not Be Put To**
Reasonable and Beneficial Use

15 Water users are not entitled to divert water that may not be put to reasonable and beneficial
16 use. (Cal. Const., Art. X, § 2; *Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132, 143.)
17 Further, water users are generally only entitled to "substantially the same quantity and quality with
18 which nature provided [their] land." (*Crum v. Mt. Shasta Power Corp.* (1931) 117 Cal.App. 586,
19 610.) There is no entitlement to better water quality than would exist under natural conditions. (See
20 *Wright v. Best* (1942) 19 Cal.2d 368, 378-79.)

21 WSID admits that drain water from the Bethany Drain may commingle with Old River water
22 in the Intake Canal. (UMF ¶ 23.) Old River water includes Sacramento River water and stored water,
23 which WSID admits are present in the Delta in the summer months. (WSID Mem. at 5:4-7; see
24 BBID384 at pp. 67-68.) WSID essentially argues that it is entitled to the benefit of the higher quality

25 _____
26 ¹ WSID includes with this claim arguments that (1) the fact that WSID's drainage water derives from
27 several sources has no bearing on WSID's right to recapture, and (2) the fact that the Bethany Drain
28 travels outside the WSID boundaries has no bearing on WSID's right to recapture. (WSID Mem. at
9:10-10:25.) Westlands does not take a position on these argument, nor does it take a position on the
claims in WSID's motion to dismiss. (WSID Mem. at 11:1-19:16.)

1 exactness the quantity of water which parties are entitled to divert” (11 Cal. at p. 152), but explained:

2 If exact justice cannot be obtained, an approximation to it must be
3 sought, care being taken that no injury is done to the innocent party.
4 The burden of proof rests with the party causing the mixture. He must
5 show clearly to what portion he is entitled. He can claim only such
6 portion as is established by decisive proof. The enforcement of his
7 right must leave the opposite party in the use of the full quantity to
8 which he was originally entitled.

6 (*Id.* at pp. 152-53, emphasis added.) The Court went on to further clarify that the party causing the
7 commingling could not diminish the quality of the prior appropriator’s water right:

8 The first appropriator of the water of a stream passing through the
9 public lands in this State, has the right to insist that the water shall be
10 subject to his use and enjoyment to the extent of his original
11 appropriation, and that its quality shall not be impaired so as to defeat
12 the purpose of its appropriation. To this extent his rights go, and no
13 further. In subordination to these rights, subsequent appropriators may
14 make such use of the channel of the stream as they think proper, and
15 they may mingle with its waters other waters, and divert an equal
16 quantity, as often as they choose. Whilst resting in the perfect
17 enjoyment of their original rights, the first appropriators have no cause
18 of complaint.

14 (*Id.* at pp. 153-154.)

15 Under *Butte*, WSID cannot commingle water from Bethany Drain with water from other
16 sources if in doing so, it effectively depletes the quantity of higher quality stored water and other non-
17 abandoned fresh water sources in a manner that impairs other water uses by water users that are
18 entitled to use that water. For example, if the Old River water in question is comprised of previously
19 stored CVP water, and WSID’s diversion of the commingled water reduces the quality of water
20 remaining in the Intake Canal, then WSID may be interfering with Reclamation’s exercise of its water
21 right by impairing Reclamation’s ability to meet water quality objectives and serve other CVP
22 purposes. WSID is not entitled to diminish Reclamation’s exercise of its water rights in this way.

23 In sum, WSID has not established that its diversion of drainage water commingled with other
24 sources in the Intake Canal is authorized under California law. WSID has not established whether it
25 could put the drainage water from Bethany Drain to reasonable and beneficial use. Nor has WSID
26 established that it has any entitlement to stored water or other non-abandoned fresh water sources that
27 may be present in the Intake Canal. California law precludes WSID from diverting commingled water
28 if the diversion diminishes another water users’ ability to exercise his water right. For these reasons,

1 the Hearing Officer should deny WSID's motion as to its claims regarding commingling.

2 **II. CONCLUSION**

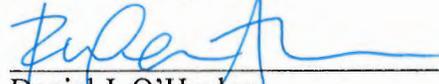
3 Westlands respectfully requests the Hearing Officer deny WSID's motion for summary
4 judgment, or in the alternative, for summary adjudication.

5

6 Dated: February 22, 2016

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
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By: 

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Sacramento, State of California. My business address is 400 Capitol Mall, 27th Floor, Sacramento, CA 95814.

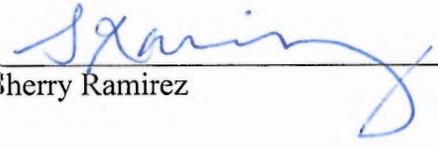
On February 22, 2016, I served true copies of the following document(s) described as **OPPOSITION TO MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address sramirez@kmtg.com to the persons at the e-mail addresses listed in the Service List. The document(s) were transmitted at or before 12:00 p.m. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 22, 2016, at Sacramento, California.


Sherry Ramirez

SERVICE LIST
THE WEST SIDE IRRIGATION DISTRICT CEASE AND DESIST ORDER HEARING

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