

1 SOMACH SIMMONS & DUNN
A Professional Corporation
2 DANIEL KELLY, ESQ. (SBN 215051)
MICHAEL E. VERGARA, ESQ. (SBN 137689)
3 LAUREN D. BERNADETT, ESQ. (SBN 295251)
500 Capitol Mall, Suite 1000
4 Sacramento, California 95814-2403
Telephone: (916) 446-7979
5 Facsimile: (916) 446-8199

6 Attorneys for Petitioner/Plaintiff BYRON-
BETHANY IRRIGATION DISTRICT
7

8
9 BEFORE THE
10 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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

Enforcement Action ENF01951

**DECLARATION OF DANIEL
KELLY IN SUPPORT OF
OPPOSITION TO PROSECUTION
TEAM'S MOTION FOR
PROTECTIVE ORDERS**

16
17 I, Daniel Kelly, declare:

18 I am an attorney at law licensed to practice before the courts of the State of California. I
19 am a shareholder with the law firm of Somach Simmons & Dunn and counsel of record for
20 Petitioner/Plaintiff Byron-Bethany Irrigation District (BBID). The following matters are within
21 my personal knowledge and, if called as a witness, I can competently testify thereto.

- 22 1) Attached hereto as Exhibit A is a true and correct copy of the State Water
23 Resources Control Board's Amended Consolidated Opposition to Ex Parte Parte Applications of
24 West Side Irrigation District and Byron-Bethany Irrigation District to Stay or Enjoin the State
25 Water Resources Control Board's Enforcement Action, filed on September 17, 2015 in the action
26 entitled *Coordination Proceeding, California Water Curtailment Cases*, Santa Clara County
27 Superior Court, Case No. 1-15-CV-285182, Judicial Council Coordination Proceeding No. 4838.

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2) Attached hereto as Exhibit B is a true and correct copy of the State Water Resources Control Board's Declaration of John O'Hagan in Opposition to Petitioner/Plaintiff's Application for Stay and/or In the Alternative Temporary Restraining Order and/or Preliminary Injunction, dated June 22, 2015, in the action entitled *Banta-Carbona Irrigation District v. California State Water Resources Control Board, et al.*, San Joaquin County Superior Court, Case No. 39-2015-00326421.

I declare under penalty of perjury under the laws of the State of California that the facts recited above are true and correct. Executed this 21st day of October at Sacramento, California.

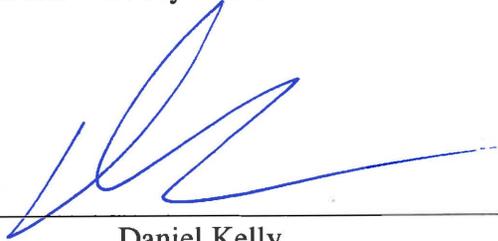
By: 
Daniel Kelly

EXHIBIT A

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Sep 17, 2015 12:54 PM

David H. Yamasaki

Chief Executive Officer/Clerk

Superior Court of CA, County of Santa Clara

Case #1-15-CV-285182 Filing #G-76557

By R. Walker, Deputy

1 KAMALA D. HARRIS
Attorney General of California
2 TRACY L. WINSOR
GAVIN G. MCCABE
3 Supervising Deputy Attorney General
MATTHEW BULLOCK
4 DEBORAH L. BARNES, SBN 124142
TARA L. MUELLER, SBN 161536
5 CLIFFORD T. LEE
Deputy Attorney General
6 State Bar No. 74687
455 Golden Gate Avenue, Suite 11000
7 San Francisco, CA 94102-7004
Telephone: (415) 703-5546
8 Fax: (415) 703-5480
E-mail: Cliff.Lee@doj.ca.gov
9 *Attorneys for Defendants and Respondents*
State Water Resources Control Board, et al

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 IN AND FOR THE COUNTY OF SANTA CLARA

15 **Coordination Proceeding Special title (Rule**
16 **3.550)**

17 **CALIFORNIA WATER CURTAILMENT**
18 **CASES,**

19 West Side Irrigation District, et al. v. State
Water Resources Control Board, et al.

20 Byron-Bethany Irrigation District v. State
21 Water Resources Control Board, et al.

Case No. 1-15-CV-285182

JUDICIAL COUNCIL COORDINATION
PROCEEDING
NO. 4838

CONSOLIDATED OPPOSITION TO EX
PARTE APPLICATIONS OF WEST SIDE
IRRIGATION DISTRICT AND BYRON-
BETHANY IRRIGATION DISTRICT TO
STAY OR ENJOIN THE STATE WATER
RESOURCES CONTROL BOARD'S
ENFORCEMENT ACTIONS

Date: September 22, 2015

Time: 3:30 p.m.

Dept: 1a

Judge: The Honorable Peter H. Kirwan

Action Filed: June 29, 2015

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Consolidated Opposition to Ex Parte Applications of West Side Irrigation District and Byron-Bethany Irrigation
District to Stay or Enjoin the State Water Resources Control Board's Enforcement Actions (1-15-CV-285182)

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INTRODUCTION

Having been denied a preliminary injunction of the water rights curtailment notices issued by the California State Water Resources Control Board (“State Water Board” or “Board”) in Sacramento County, petitioners Byron-Bethany Irrigation District (BBID) and West Side Irrigation District (WSID) now seek a second bite at the apple. This time, petitioners are attempting to convince this Court to stay the Board enforcement actions currently pending against them. Petitioners’ motions seek an extraordinary remedy that has no basis in law, and rely on mischaracterizations of the facts and documents at issue. For the reasons explained below, a stay or restraining order is inappropriate because it is not allowed or authorized by section 526 or 1094.5 of the Code of Civil Procedure, petitioners have failed to exhaust their administrative remedies, there is no “concurrent jurisdiction” exception to the exhaustion doctrine and even if there were, the doctrine of primary jurisdiction requires this Court to defer to the Board’s pending administrative proceedings, and petitioners have failed to establish that the Board’s adjudicatory hearings will impair petitioners’ procedural due process rights in any way. Therefore, the Board respectfully requests that petitioners’ stay motions be denied.

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FACTUAL AND PROCEDURAL BACKGROUND

The State of California is in the midst of the most severe drought in the State’s history. On January 17, 2014, Governor Brown issued a Proclamation of a State of Emergency resulting from the drought. (Board Request for Jud. Not. (Board RJN), Exh. A.) The Governor called for statewide reductions in water use and directed the State Water Board to “put water right holders throughout the state on notice that they may be directed to cease or reduce water diversions based on water shortages.” (*Id.*, ¶ 7.) On April 25, 2014, the Governor issued a continued proclamation of drought emergency, which maintained the previous emergency orders (Board RJN, Exh. B, ¶ 1), and further ordered the Board “to require curtailment of diversions when water is not available under the diverter’s priority of right.” (*Id.*, ¶ 17.)

On April 1, 2015, Governor Brown issued Executive Order B-29-15. (Board RJN, Exh. C.) It again extends the state of emergency (*id.*, ¶ 1) and orders that:

1 The Water Board shall require frequent reporting of water diversion and use by water
2 right holders, conduct inspections to determine whether illegal diversions or wasteful
3 and unreasonable use of water are occurring, and bring enforcement actions against
4 illegal diverters and those engaging in the wasteful and unreasonable use of water.

5 (*Id.*, ¶ 10.)

6 In April 2015, the State Water Board issued a notice to all holders of post-1914 water rights
7 in the Sacramento and San Joaquin River watersheds that they may need to curtail their diversions
8 due to insufficient projected water supplies. The Board issued a further such notice on May 1,
9 2015 (May notice). (WSID Second Amen. Pet. and Compl. (hereafter “WSID Compl.”), Exh.
10 B.) As directed by the Governor’s proclamations and Executive Order, the May notice informed
11 diverters, including WSID, based on the most recent projections from the Department of Water
12 Resources (DWR), that there was no water available for diverters with rights post-dating 1914.

13 On June 12, 2015, the State Water Board issued a further notice (June notice). (WSID
14 Compl., Exh. D.) As directed by the Governor’s proclamations, the June notice informed the
15 public, including BBID and WSID, that based on water supply projections provided by DWR,
16 there was only sufficient water to supply water right holders with a priority date of 1902 or
17 earlier. The May and June notices are collectively referred to as the “curtailment notices.”

18 On June 26, BBID filed an action in Contra Costa County, challenging the June notice. On
19 June 29, WSID, Central Delta Water Agency, South Delta Water Agency, and Woods Irrigation
20 Company (hereafter “the WSID Petitioners”) filed an action in Sacramento County challenging
21 both curtailment notices. The following day, the WSID Petitioners applied *ex parte* for a stay or
22 temporary restraining order (TRO) enjoining operation of the notices.

23 An *ex parte* hearing in the WSID case took place on July 7 before Sacramento County
24 Superior Court Judge Shelleyanne W.L. Chang. That same day, the State Water Board petitioned
25 the Judicial Council for coordination of the BBID case, the WSID case, and the three other cases
26 challenging the curtailment notices. On July 10, Judge Chang partially granted the WSID
27 Petitioners’ application for a TRO, finding that the notices could be construed as coercive orders
28 to cease diversions, and issued an order to show cause why a preliminary injunction should not
issue. (WSID Compl., Exh. F.)

1 On July 15, the State Water Board took steps, consistent with Judge Chang’s order, to
2 modify the curtailment notices, and a revised notice to all diverters who received curtailment
3 notices (hereafter “revised notice”). (BBID RJN, Exh. 21.) This revised notice rescinded the
4 curtailment notices to the extent either could be construed as “an order requiring [anyone] to stop
5 diversions under [their] affected water rights.” (*Ibid.*)

6 On July 16, the State Water Board’s Division of Water Rights issued charging documents
7 commencing an administrative cease and desist (CDO) order proceeding against WSID, followed
8 by an information order the next day, issued pursuant to California Code of Regulations, title 23,
9 section 879, subdivision (c)(1). (WSID Compl., Exh. I.) On July 20, the Board issued charging
10 documents commencing an administrative civil liability (ACL) proceeding against BBID. (BBID
11 RJN, Exh. 26.) In both enforcement proceedings, the primary, predicate issues will be the
12 determination of whether there is sufficient water available to divert, and if so, whether WSID
13 and BBID are or were engaging in the unauthorized diversion of water in violation of Water Code
14 section 1052. (BBID RJN, Exh. 32, p. 2; WSID Compl., Exh. K, pp. 2-3.)

15 On July 30, Judge Chang heard argument on the order to show cause why a preliminary
16 injunction should not issue. On Friday, July 31, pursuant to the direction of the Judicial Council,
17 the Presiding Judge of Alameda County Superior Court assigned the Honorable Evelio Grillo as
18 coordination motion judge and, on his own motion, Judge Grillo stayed the five actions included
19 in the coordination motion. On Monday, August 3, the Sacramento County Superior Court,
20 through Judge Chang, issued a minute order denying the preliminary injunction in the WSID
21 case, which order also had the effect of lifting the TRO. (Board RJN, Exh. F.) Later that day, the
22 parties and the Sacramento County Superior Court received notice of the stay issued by
23 Coordination Motion Judge Grillo in Alameda County. (Board RJN, Exh. H.)

24 On August 6, BBID requested a hearing before the Board (Board RJN, Exh. I) based on its
25 disagreement with the facts and allegations set forth in the July 20 ACL complaint, and on August
26 7, WSID likewise requested a hearing on the July 16 draft CDO. (WSID Mot. at p. 3 & Ex. E.)

27 On August 10, Judge Grillo issued an order granting the Board’s petition for coordination
28 and informing the parties that he was available to hear *ex parte* applications for temporary relief

1 on August 21. (Board RJN, Exh. J, pp. 3, 6.) No party applied to Judge Grillo for relief.
2 Significantly, Judge Grillo's order specifically stated that, while the included actions were to
3 remain stayed pending assignment of a coordination trial judge, "[t]his order does not address the
4 status of Judge Chang's order of 8/13/15 in the *West Side Irrigation* case that dissolved the
5 temporary restraining order and denied the motion for preliminary injunction." (*Id.* at p. 6.)

6 On August 14, WSID sent a letter to Judge Chang in Sacramento asking that she vacate her
7 denial of the preliminary injunction because Judge Grillo had issued a stay. Judge Chang denied
8 the request the following day. (Board RJN, Exh. G.)

9 Also on August 14, the Judicial Council assigned these coordinated actions to be heard in
10 Santa Clara County Superior Court. On September 2, the Santa Clara County Superior Court
11 assigned Judge Kirwan as the coordination trial judge. That same day, BBID filed a first
12 amended petition and complaint, adding new causes of action, including a challenge to the
13 Board's pending ACL enforcement proceeding. On September 8, WSID filed a "Second
14 Amended and Supplemental" petition and complaint, adding new causes of action including a
15 challenge to the Board's pending CDO enforcement proceeding.

16 On September 4, this Court informed the parties by email that it was holding September 15
17 open for *ex parte* hearings in this matter. On September 9, BBID and WSID both applied *ex parte*
18 to stay the enforcement proceedings. They also requested, and the Board agreed, to delay the *ex*
19 *parte* hearing on the requested stay and TRO until September 22, over one month later than they
20 could have had their applications heard by Judge Grillo.

21 STANDARD OF REVIEW

22 A. A Stay is Not an Available Remedy for These Proceedings.

23 Both petitioners apply to this court for a stay, or alternatively for a TRO, staying or
24 enjoining pending administrative enforcement proceedings before the State Water Board.
25 However, neither petitioner identifies any authority in support of its assertion that a stay is an
26 available remedy. Although unclear from their papers, it appears petitioners intend to apply for a
27 stay under Code of Civil Procedure section 1094.5, subdivision (g). But subdivision (g) only
28 authorizes a stay of the "operation of" a "*final* administrative order or decision made as the result

1 of a proceeding in which by law a hearing is required to be given, evidence is required to be
2 taken, and discretion in the determination of facts is vested in the inferior tribunal.” (Code Civ.
3 Proc., § 1094.5, subds. (a), (g), emphasis added.) The Board has not issued any final order or
4 decision here against either WSID or BBID. Section 1094.5, subdivision (g) only permits a stay
5 of the *effect* of a final decision, after the decision is made. Section 1094.5 does not permit a stay
6 of the *proceedings* that would lead to a final decision. A stay therefore is unavailable here.

7 **B. Standard of Review for a TRO.**

8 “A temporary restraining order is issued to prohibit the acts complained of, pending a
9 hearing on whether the plaintiff is entitled to a preliminary injunction.” (6 Witkin, Cal. Proc. (5th
10 ed. 2008) Provisional Remedies, § 284, p. 224; Code Civ. Proc., § 525 [TRO is a type of
11 preliminary injunction].) A TRO may be granted where: (1) it appears the plaintiff is entitled to
12 the relief demanded; (2) some act during the litigation would produce waste, or great or
13 irreparable injury, to a party to the action; (3) the restrained act is in violation of a party’s rights
14 and would tend to render the judgment ineffectual; and (4) when pecuniary compensation would
15 not afford adequate relief. (Code Civ. Proc., § 526, subd. (a).)

16 “In deciding whether to provide relief, a court must weigh two ‘interrelated’ factors: (1) the
17 likelihood that the moving party will ultimately prevail on the merits and (2) the relative harm to
18 the parties from issuance or non-issuance of the injunction.” (*Butt v. State of Calif.* (1992) 4
19 Cal.4th 668, 677–678.) The burden is on the party seeking injunctive relief to establish all
20 elements necessary to support the issuance of the injunction. (*O’Connell v. Superior Court*
21 (*Valenzuela*) (2006) 141 Cal.App.4th 1452, 1481.) Injunction is an extraordinary power and is to
22 be exercised with great caution and only in those cases where it fairly appears that the moving
23 party will suffer irreparable injury as a result of the action at issue. (*Tiburón v. Northwestern R.R.*
24 *Co.* (1970) 4 Cal.App.3d 160, 179.) In a case like this one, where petitioners seek to restrain the
25 performance of duties by a public agency, the public interest involved demands “a significant
26 showing of irreparable injury.” (*Tahoe Keys Property Owners’ Assn. v. State Wat. Resources*
27 *Control Bd.* (1994) 23 Cal.App.4th 1459, 1471.)

28

1 As explained below, petitioners are unlikely to succeed on the merits of their claims.
2 Petitioners also have failed to establish any of the other criteria for issuance of a TRO.¹

3 **ARGUMENT**

4 **I. WSID'S AND BBID'S REQUESTS FOR A STAY OF THE PENDING ENFORCEMENT**
5 **PROCEEDINGS ARE BARRED BY SECTION 526, SUBDIVISION (B)(4) OF THE CODE OF**
6 **CIVIL PROCEDURE**

7 Regardless of whether the Court construes WSID's and BBID's motions as requests for a
8 stay or applications for a TRO, they must be denied. Section 526, subdivision (b)(4) of the Code
9 of Civil Procedure, and its parallel provision in the Civil Code, section 3423, bar any such stay or
10 injunction. These sections prohibit injunctions "[t]o prevent the execution of a public statute by
11 officers of the law for the public benefit" and therefore bar this Court from granting the requested
12 relief. (Code Civ. Proc., § 526, subd. (b)(4); Civ. Code, 4323, subd. (d).)

13 Board staff (the Division of Water Rights' enforcement unit) initiated the contested
14 enforcement proceedings through the issuance of an ACL complaint against BBID for the alleged
15 unauthorized diversion of water under sections 1052 and 1055 of the Water Code. Similarly,
16 Board staff issued the challenged draft CDO and information order against WSID pursuant to
17 sections 1825-1836 of the Water Code and the Board's emergency drought regulations.² (Wat.
18 Code, §§ 1058, 1058.5, 1825-1836; Cal. Code Regs., tit. 23, § 849, subd. (c).) All of these
19 provisions are in Division 1 of the Water Code, and are declared to be in "furtherance ... in all
20 respects for the welfare and benefit of the people of the state." (Wat. Code, § 1050.) In addition,
21 the Governor's April 1, 2015, Executive Order specifically directs the Board to "bring
22 enforcement actions against illegal diverters and those engaging in the wasteful and unreasonable

23 ¹ Both WSID and BBID had opportunities before Judge Grillo to seek interim relief,
24 which they declined to avail themselves of. (Board RJN, Exh. J at p. 6.) Petitioners now request
25 a TRO, but fail to explain why they could not have sought such relief earlier. Nor do they
26 provide any evidence as to how they will be irreparably injured. (WSID Mot. at p. 14.) In
27 addition, the State's need to respond to the current drought crisis indicates that the public interest
28 would not be served by a stay. (See Code of Civ. Proc., § 1094.5, subd. (g) [stay may not be
granted if it is against the public interest].)

² The California Legislature specifically authorized the Board to promulgate emergency
drought regulations in response to the present critical drought conditions. (Wat. Code, §§ 1058,
1058.5.)

1 use of water” in response to the continued state of drought emergency. (Board RJN, Exh. C, ¶
2 10.) These enforcement actions are therefore in furtherance of a “law for the public benefit.”

3 In *People v. Crites* (1975) 51 Cal.App.3d 961, 965-966, the First Appellate District
4 reversed a trial court preliminary injunction that allowed hydraulic dredging in violation of state
5 water quality requirements. The Court of Appeal held that “courts of equity have no power by
6 injunction to restrain a public officer from performing an official act that he is required by valid
7 law to perform.” (*Id.* at p. 966.) The fact that “hardships will follow, or irreparable damage will
8 ensue, because the officer delegated to execute such law may act unwisely or injuriously to the
9 party seeking relief” is not grounds for an injunction. (*Ibid.*; see *Donaldson v. Lungren* (1992) 2
10 Cal.App.4th 1514-1623; *People v. Hy-Lond Enterprises* (1979) 93 Cal.App.3d 734, 753.)

11 While an injunction may be issued where a statute, valid on its face, is unconstitutionally
12 applied, no such facts are present here. (*Merandette v. San Francisco* (1979) 88 Cal.App.3d 105,
13 111.) The BBID ACL complaint is merely a charging document by the Division of Water Rights’
14 enforcement unit and is not a final Board decision (see section IV.B.1, *infra*). (BBID RJN, Exh.
15 26.) Similarly, the WSID draft CDO is a charging document without any force and effect absent
16 final approval by the Board members, which would not happen until after the evidentiary hearing
17 requested by WSID. The information order directed against WSID simply requires it to provide
18 the Board with relevant water use information, as authorized under the Board’s investigative
19 authority. (WSID Compl., Exhs. I, J; Cal. Code Regs., tit. 23, § 879, subd. (c)(1).)

20 Importantly, petitioners have adequate alternative remedies to a stay of the Board’s
21 enforcement proceedings. For example, if petitioners believe that the Board’s enforcement unit
22 has requested that the Board consider improper evidence, petitioners may move the Board to
23 strike that evidence during the hearings they have requested. If petitioners believe that the
24 enforcement unit includes staff members that hold dual prosecutorial and advisory roles, then
25 petitioners can move the Board to disqualify those members. (*Morongo v. State Water Resources*
26 *Control Bd.* (2009) 45 Cal.4th 731, 734.) Finally, if the petitioners believe that any Board
27 member is biased or has pre-judged the issues pending before it, then petitioners may move to
28 recuse that member and provide the Board with evidence and argument in support of recusal.

1 (State Water Resources Control Bd. Coordinated Cases (2006) 136 Cal.App.4th 674, 838-839.)
2 Petitioners, however, have taken no such steps and consequently they cannot contend that the
3 Board has applied its Water Code duties in an unconstitutional or otherwise unlawful manner,

4 **II. A STAY IS IMPROPER BECAUSE PETITIONERS HAVE FAILED TO EXHAUST THEIR**
5 **ADMINISTRATIVE REMEDIES**

6 Petitioners' stay motions also must be denied because they improperly seek to stay the
7 pending Board enforcement proceedings before they are final, in contravention of the doctrine of
8 exhaustion of administrative remedies. As the appellate court has recently held, "[w]hen a statute
9 or lawful regulation establishes a quasi-judicial administrative tribunal to adjudicate remedies, the
10 aggrieved party is generally required to initially resort to that tribunal and to exhaust its appellate
11 procedure." (*Tejon Real Estate v. City of Los Angeles* (2014) 223 Cal.App.4th 149, 155-156.)
12 Under this doctrine, "a controversy is not ripe for adjudication until the administrative process is
13 completed." (*Tejon, supra*, 223 Cal.App.4th at p. 156.) The doctrine is a "fundamental rule of
14 procedure." (*Campbell v. Univ. of Calif.* (2005) 35 Cal.4th 311, 321.) It is "principally grounded
15 on concerns favoring administrative autonomy (i.e. courts should not interfere with an agency
16 determination until the agency has reached a final decision) and judicial efficiency (i.e.
17 overworked courts should decline to intervene in an administrative dispute unless absolutely
18 necessary)." (*Farmers Ins. Exch. v. Superior Court (People)* (1992) 2 Cal.4th 377, 391.)

19 The separation of powers principle derived from the California Constitution provides the
20 constitutional basis for the exhaustion doctrine. (*County of Contra Costa v. State of Calif.* (1986)
21 177 Cal.App.3d 62, 76-77 (*County of Contra Costa*.) The *County of Contra Costa* court
22 observed that because an "administrative procedure is part of the legislative process," separation
23 of powers mandates that "a judicial action before the legislative process has been completed is
24 premature and a court is without jurisdiction until administrative remedies have been exhausted."
25 (*Id.* at p. 77.) Likewise here, if the courts are permitted to enjoin an ongoing quasi-judicial
26 agency procedure, this "would be to permit the courts to engage in an unwarranted interference"
27 and also would contravene the separation of powers. (*Ibid.*, citing *Santa Clara County v. Sup.*
28 *Court* (1949) 33 Cal.2d 552, 556.)

1 In *Temescal Water Co. v. Dept. of Public Works* (1955) 44 Cal.2d 90, 94, the California
2 Supreme Court specifically addressed the question of whether a water right determination of the
3 “existence of unappropriated water” is a matter to be considered first by the Department of Public
4 Works (the Board’s predecessor) or whether a private party is “entitled to a trial de novo” before
5 the superior court. According to the Supreme Court, “a holding that such danger is so imminent
6 as to justify an independent judicial proceeding to determine the availability of unappropriated
7 water *before* the department considers an application, would deprive the administrative
8 proceeding of all of its proper functions.” (*Id.* at p. 106, emphasis added.) Judicial relief from a
9 water right determination is only proper under section 1094.5 of the Code of Civil Procedure *after*
10 the agency has issued the water right permit and *after* the aggrieved party has exhausted all
11 administrative remedies. (*Ibid.*) In the present case, the exhaustion doctrine similarly bars
12 petitioners from “depriv[ing] the [Board’s] administrative proceeding of all of its proper
13 functions” by having a “trial de novo” before this Court regarding the contested water rights
14 issues prior to a final Board determination of those issues. (*Ibid.*)

15 Petitioners may assert that the “futility” exception to the exhaustion doctrine allows them to
16 obtain a stay of proceedings. However, the California Supreme Court has held that this
17 “exception applies only if the party invoking it can positively state that the administrative agency
18 has declared what its ruling will be in a particular case.” (*Steinhart v. County of Los Angeles*
19 (2010) 47 Cal.4th 1298, 1313.) A statement by an agency representative “other than the body
20 charged with hearing and deciding” is not sufficient to invoke the “futility” exception. (*Tejon,*
21 *supra*, 223 Cal.App.4th at p. 158.) In the present case, petitioners have, at best, only suggested
22 that certain Board *staff* have rendered opinions on issues to be considered in the pending
23 enforcement proceedings. But petitioners have provided this Court with no evidence that any
24 Board member has “positively” rendered a “ruling” on the “particular” enforcement actions
25 contested by the petitioners. (*Steinhart, supra*, 47 Cal.4th at p. 1313.) Since the Board, not its

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1 staff, is the “body charged with hearing and deciding,” the “futility” exception does not apply
2 here, and the exhaustion doctrine precludes the stays requested by the petitioners.³

3 **III. THE CONCURRENT JURISDICTION DOCTRINE ARTICULATED IN *NATIONAL AUDUBON***
4 **DOES NOT OBTIATE THE EXHAUSTION REQUIREMENT**

5 Petitioners assert that in *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419,
6 448-451 (*National Audubon*) the California Supreme Court applied the concurrent jurisdiction
7 doctrine to overturn the exhaustion doctrine as to the Board where an aggrieved party has brought
8 a judicial challenge to the Board’s water right authority while a Board administrative proceeding
9 directed against that party remains pending. (BBID Mot. at p. 3; WSID Mot. at pp. 3-4.)

10 According to petitioners, this Court’s concurrent jurisdiction trumps the Board’s jurisdiction,
11 since petitioners’ judicial actions challenging the Board’s pending enforcement proceedings
12 allegedly preceded the Board’s initiation of the pending enforcement proceedings. Petitioners’
13 reading of *National Audubon* and the concurrent jurisdiction doctrine is erroneous and should be
14 rejected for at least three reasons.

15 First, *National Audubon* did not involve a private party action against the Board. Rather,
16 *National Audubon* involved an action by private parties (several environmental organizations)
17 against another private party (the City of Los Angeles Department of Water and Power – “City”).
18 The environmental plaintiffs challenged the City’s water diversions from the Mono Lake basin in
19 superior court. (*National Audubon, supra*, 33 Cal.3d at p. 425.) The plaintiffs did not seek
20 judicial review of any Board decision or proceeding, or any relief against the Board. While the
21 Board was named as a real party in interest, the plaintiffs did not challenge and could not have
22 challenged the Board’s decision to issue water rights to the City for its Mono basin diversions

23 ³ In addition to requesting a stay of the CDO proceedings directed against it, WSID has
24 also requested a stay of the Division of Water Rights’ August 7, 2015, order asking WSID to
25 provide the Division with certain water use information. WSID filed a petition for
26 reconsideration of that order with the Board on September 4, 2015, which the Board has not yet
27 acted upon. (WSID Mot. at p. 3.) Judicial review of this information order requires the filing of a
28 petition for reconsideration, and judicial review is not ripe until at least 90 days from the date that
the information order was issued, unless the Board acts on the petition for reconsideration before
that date. (Wat. Code, §§ 1122, 1126, subd . (b).) This 90-day period does not run until
November 4, 2015. WSID therefore has failed to exhaust its administrative remedies as to the
information order and cannot currently challenge that order.

1 because the Board's issuance of such water right licenses occurred in 1974, and the statute of
2 limitations for challenging that action had long since run. (*Id.* at p. 428, fn. 8.)

3 *National Audubon* stands for the unremarkable proposition that if a private party brings a
4 water right action under the public trust doctrine against another private party, then the courts
5 have concurrent jurisdiction with the Board to consider the dispute and the private party does not
6 first have to bring the action before the Board. As *National Audubon* noted, California superior
7 courts have historically had jurisdiction to resolve water right disputes among private parties. (*Id.*
8 at p. 449; see also *Environmental Defense Fund v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d
9 183, 200.)

10 Second, petitioners' attempt to expand *National Audubon's* concurrent jurisdiction holding
11 to include the situation where parties have filed superior court challenges to currently pending
12 Board proceedings conflicts with *National Audubon's* reasoning in support of concurrent
13 jurisdiction. *National Audubon* recognized that the Board's "experience and expert knowledge"
14 as to water resource matters argued in favor of applying the exhaustion doctrine, even as to water
15 disputes among private parties. (*National Audubon, supra*, 33 Cal.3d at p. 451.) However, the
16 Supreme Court concluded that the trial court could retain original jurisdiction to consider water
17 disputes among private parties and still rely upon the Board's expertise by invoking the water
18 reference provisions of the Water Code. (Wat. Code, §§ 2000 *et seq.*) These provisions authorize
19 the trial court to refer "any or all issues involved in the suit" to the Board for the preparation of a
20 special-master-style referee report. (Wat. Code, §§ 2000, 2010-2020.) As *National Audubon*
21 explained, "[t]hus the courts, through the exercise of sound discretion and use of their reference
22 powers, can substantially eliminate the danger that litigation will bypass the Board's expert
23 knowledge." (*National Audubon, supra*, 33 Cal.3d at p. 451.)

24 The *National Audubon*-endorsed reference option would not be available to the trial court
25 where the dispute is not one between private parties, but where, as here, the case involves a
26 private-party challenge to an ongoing Board administrative proceeding. In the latter situation, it
27 is the very judgment of the Board that is being challenged, so the Board would not be able to
28 provide the trial court with referee services under the court reference provisions of the Water

1 Code. In such situations, *National Audubon's* reasoning in support of concurrent jurisdiction
2 disappears and the concurrent jurisdiction doctrine becomes inapplicable.⁴

3 Third, assuming *arguendo* that the exhaustion doctrine does not apply and this Court and
4 the Board have concurrent jurisdiction to consider the water rights issues raised in petitioners'
5 pleadings, then the doctrine of primary jurisdiction nevertheless compels this Court to defer to the
6 pending Board enforcement proceedings. As the California Supreme Court has explained,
7 primary jurisdiction, unlike exhaustion:

8 applies where a claim is originally cognizable in the courts, and comes into play
9 whenever enforcement of the claim requires the resolution of issues which, under a
10 regulatory scheme, have been placed with the special competence of an
administrative body; in such a case the judicial process is suspended pending referral
of such issues to the administrative body for its views.

11 (*Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 390.) The primary jurisdiction
12 doctrine "advances two related policies: it enhances court decision-making and efficiency by
13 allowing courts to take advantage of the administrative expertise and it helps assure uniform
14 application of regulatory laws." (*Jonathan Neil & Assoc. Inc. v. Jones* (2004) 33 Cal.4th 917,
15 932.)

16 Application of the primary jurisdiction doctrine in the present case would advance both of
17 these policies. As the California Supreme Court has noted, "[t]he scope and technical complexity
18 of issues concerning water resource management are unequalled by virtually any other type of
19 activity presented to the courts." (*Environmental Defense Fund, supra*, 26 Cal.3d at p. 194.)
20 Section 174 of the Water Code states that "[t]he Legislature hereby finds and declares that in
21 order to provide for the orderly and efficient administration of the water resources of the state it is
22 necessary to establish a control board which shall exercise the adjudicatory and regulatory
23 functions of the state in the field of water resources." (Wat. Code, § 174.) Underscoring the

24 ⁴ Petitioners cite to *County of Siskiyou v. Superior Court* (2013) 217 Cal.App.4th 83, 88 in
25 support of their arguments. (BBID Mot. at p. 3, n. 3; WSID Mot. at p. 4.) However, the
26 concurrent jurisdiction question raised in that case is entirely distinguishable from this case. The
27 issue in *County of Siskiyou* was what court had jurisdiction as between the Sacramento and
28 Siskiyou County Superior Courts, and not, as here, a jurisdictional conflict between the superior
court and the Board. (*County of Siskiyou, supra*, 217 Cal.App.4th at pp. 88-89.) This decision
therefore does not support petitioners' claim that *National Audubon* grants this Court exclusive
jurisdiction in this case.

1 technical complexity of the issues, the Legislature required four of the five Board members to
2 have specific expertise in water resources. (Wat. Code, §175.) The need for expert judgment and
3 uniform application of regulatory requirements becomes particularly important as the Board
4 engages in the highly challenging and complex task of managing water use throughout the State
5 in this critical drought year. Petitioners' stay motions therefore contravene the primary
6 jurisdiction doctrine and should be denied.

7 **IV. THE BOARD'S ENFORCEMENT ACTIONS DO NOT VIOLATE PETITIONERS' DUE**
8 **PROCESS RIGHTS**

9 Petitioners also argue that the Board's enforcement actions must be enjoined because they
10 allegedly will impair their procedural due process rights on multiple grounds. For the
11 reasons discussed below, none of these arguments has merit.

12 **A. The Curtailment Notices Were Superseded by the July 15 Revised Notice,**
13 **and the Sacramento Superior Court Expressly Held that These Notices Do**
14 **Not Violate the Notice Recipients' Due Process Rights**

15 BBID argues that the curtailment notices violate its procedural due process rights because
16 they "command" that "BBID cease diverting water." (BBID Mot. at p. 6.) However, Board
17 removed any such "command" through the July 15 revised notice. (BBID RJN, Exh. 21.) The
18 revised notice fully addresses the alleged procedural due process deficiencies of the initial
19 curtailment notices. First, the revised notice states that "[t]he purpose of this notice is to rescind
20 the 'curtailment' portions of the unavailability notices you received." (*Ibid.*) Second, the notice
21 declares that "[t]o the extent that any of the notices described above contain language that may be
22 construed as an order requiring you to stop diversions under your affected water right, that
23 language is hereby rescinded." (*Ibid.*) Third, the notice announces that "any language that may
24 be construed as requiring affected water right holders to submit curtailment certification forms is
25 hereby rescinded." (*Ibid.*) Fourth, the notice informs the recipient that there is insufficient water
26 available for certain categories of junior water rights holders, but provides that "[i]f you believe
27 you received this notice in error, or have information that you want to provide in response to this
28 notice, or have information you believe the State Water Board staff should otherwise consider,
you may submit that information" to the Board. (*Ibid.*) Finally, the notice makes clear that it

1 “does not establish or impose any compliance responsibilities” and that “[n]on-compliance with
2 this notice shall not constitute a basis for the State Water Board’s initiation of any enforcement
3 action.” (*Ibid.*) The revised notice therefore makes it clear that the notices themselves do not
4 “command” BBID or any other water user to cease diverting water and therefore do not “deprive
5 BBID of its right to divert water.” (BBID Mot. at p. 7.)

6 According to the U.S. Supreme Court and the California Supreme Court, procedural due
7 process is a “flexible” concept that “calls for such procedural protections as the particular
8 situation demands.” (*Mathews v. Eldridge* (1976) 424 U.S. 319, 334; *Oberholzer v. Commission*
9 *on Judicial Performance* (1999) 20 Cal.4th 371, 390.) The *Mathews* Court identified the relevant
10 due process factors as follows:

11 [f]irst, the private interest that will be affected by the official action; second, the risk
12 of an erroneous deprivation of such interest through the procedure used, and probable
13 value, if any, of additional or substitute procedural safeguards; and finally, the
14 Government’s interest, including the function involved and the fiscal and
administrative burdens that the additional or substitute procedural requirement would
entail.

15 (*Mathews, supra*, 424 U.S. at p. 335.)

16 Application of the *Mathews* three-part balancing test demonstrates that the curtailment
17 notices as clarified by the revised notice are consistent with procedural due process. First, the
18 revised notice states that the curtailment notices are not to be construed as a command to stop
19 diversions or to submit certification forms, that the notices do not establish or impose any specific
20 compliance responsibilities, and that the notices “shall not constitute a basis for the State Water
21 Board’s initiation of any enforcement action.” (BBID RJN, Exh. 21 at p. 2.) Thus, the
22 curtailment notices as clarified by the revised notice have no direct effect on the petitioners’
23 claimed post-1914 or pre-1914 appropriative water rights. As such, the curtailment notices do not
24 implicate the “private interest” factor of the *Mathews* balancing test.

25 Second, the Water Code enforcement procedures provide the petitioners with ample due
26 process protection. Where the Board files a complaint seeking civil penalties under section 1055
27 of the Water Code, or the Board invokes its cease-and-desist authority under section 1831 of the
28 Water Code, the named party is entitled to a hearing, if one is requested within 20 days from

1 service of the complaint or from receiving notice of the CDO. (Wat. Code, §§ 1055, subd. (b),
2 1834, subd. (a)) The full Board independently reviews the evidence and may take additional
3 evidence. (Wat. Code, §§ 1055, subd. (b), 1832.) The parties are entitled to introduce exhibits,
4 cross-examine and impeach witnesses and submit rebuttal testimony. (Gov. Code, § 11513, as
5 incorporated by Cal. Code Regs., tit. 23, § 648, subd. (b).) The Board's final decision is subject
6 to judicial review. (Wat. Code, § 1126.) Given that the Water Code expressly provides for a
7 public hearing process and judicial review, the present curtailment notices provide no risk of any
8 "erroneous deprivation" of the petitioners' property interests under the "deprivation" factor of the
9 *Mathews* balancing test.

10 Finally, the State's interest in issuing the curtailment notices is significant and compelling.
11 As the Governor's drought proclamations have repeatedly noted, the State is facing the worst
12 drought conditions in recorded California history. As part of the State's drought management
13 efforts, the Governor has called for statewide reductions in water use and has directed the State
14 Water Board to "put water right holders throughout the state on notice that they may be directed
15 to cease or reduce water diversions based on water shortages." (Board RJN, Exh. A, ¶ 7.) In
16 order to address the worsening drought conditions, the Governor's proclamations direct the State
17 Water Board "to require curtailment of diversion when water is not available under the diverter's
18 priority of right." (Board RJN, Exh. B, ¶ 17.) Therefore, application of the "governmental
19 interest" factor of the *Mathews* balancing test also yields the conclusion that the Court should find
20 the contested curtailment notices are consistent with due process.

21 While the WSID matter was pending in Sacramento County Superior Court, Judge Chang
22 reviewed the same due process claim, then raised by WSID, in light of the revised notice. She
23 concluded that because the notice "no longer requires recipients to cease diverting water or
24 requires them to sign a curtailment certificate form under penalty of perjury," but only "notif[ies]
25 the recipient that the Board has information indicating that there is insufficient water available for
26 their water right priority, such a determination, in and of itself, does not violate Due Process
27 principles." (Board RJN, Exh. F, p.3.) BBID's due process argument likewise fails for the same
28 reasons.

1 **B. The Curtailment Notices Do Not Make a Final Determination Regarding**
2 **the Unavailability of Water**

3 BBID also argues that the Board's enforcement action will violate its due process rights
4 because the July 15 revised notice "maintains the [Board's] findings that there is no water
5 available for BBID to divert under its pre-1914 water right, and maintains that BBID's diversion
6 of water after receiving the Curtailment Notice is unlawful." (BBID Mot. at p. 8; see BBID RJN,
7 Exhs. 14, 21.) WSID similarly argues, relying on a general fact sheet and a statement at a press
8 conference, that the enforcement hearing will violate its due process rights because it will not be
9 allowed to challenge the Board staff's conclusion in the July 15, 2015, revised notice that there is
10 insufficient water available in the San Joaquin River to divert under WSID's priority of right.
11 (WSID Mot. at p. 10.) These arguments are based on a fundamental misreading of the relevant
12 documents.

13 **1. The curtailment notices are determinations of Board staff, not the**
14 **Board**

15 First, any statements in the curtailment notices and revised notice as to the unavailability of
16 water are determinations of Board *enforcement* staff based on the information available to them at
17 the time the notices were issued, not final determinations of the Board itself. Neither the Board
18 itself nor any Board member has yet made any determinations or findings regarding the
19 unavailability of water or the illegality of BBID's or WSID's diversions -- that is the very
20 purpose of the Board enforcement hearings, which are scheduled to commence on October 28 and
21 November 12, respectively. (BBID RJN, Exh. 32; WSID Compl., Exh. 32.) Petitioners'
22 arguments fail to recognize the fundamental distinction between a finding of Board staff
23 regarding the general unavailability of water, made after staff conducts an investigation as
24 authorized under sections 183 and 1051 of the Water Code, versus a finding of the Board as
25 applied to a particular water right holder that it is unlawfully diverting water in violation of its
26 priority of right due to the unavailability of water in the system.

27 This distinction is confirmed by the Board's letter explaining that BBID's petition for
28 reconsideration of the June notice is improper. (BBID RJN, Exh. 27, pp. 1-2[June notice "is not

1 an order or decision of the Board or Board's staff acting under delegated authority"].) Petitioners
2 cite to no evidence that the Board itself or any Board member has made any determination or
3 findings regarding the unavailability of water or the unlawfulness of petitioners' diversions.

4 **2. Petitioners will have an opportunity to contest all legal and factual**
5 **issues at the Board's enforcement hearings**

6 BBID asserts that the Board's ACL complaint and notice of enforcement hearing (BBID
7 RJN, Exhs. 26, 32) establish that BBID cannot challenge Board staff's allegation of water
8 unavailability at the Board hearing. BBID erroneously claims that this issue has been pre-
9 determined and the only remaining issue is the amount of administrative penalties to be assessed.
10 (BBID Mot. at pp. 9-10, 12-13.) WSID makes the same argument, but ignores the language of
11 the draft CDO and notice of enforcement hearing altogether. (WSID Compl., Exhs. I, K.)

12 The July 20, 2015, notice of enforcement action against BBID states that "BBID is *alleged*
13 to have diverted" water while none was available to serve BBID's water right and that, "This
14 violation is further described in the enclosed ACL Complaint." (BBID RJN, Exh. 22, p. 1,
15 emphasis added.) The notice further states that "if you disagree with the facts or allegations set
16 forth in the ACL Complaint, you may request a hearing before the State Water Board," and
17 notifies BBID that it may submit written testimony and other evidence that it desires the Board to
18 consider. (*Id.* at p. 2; see also Water Code § 1055, subs. (a)-(b).) The July 16, 2015, notice of
19 enforcement action against WSID makes similar statements. (WSID Compl., Exh. I.)

20 The ACL complaint against BBID sets forth a number of "Allegations," including that, by
21 June 12, 2015, "available supply was insufficient to meet the demands of appropriative rights
22 with the priority dates of 1903 and later through the Sacramento and San Joaquin River
23 watersheds and the Delta," that Board staff issued a notice of unavailability to these water rights
24 holders on June 12, 2015, and that BBID continued to divert approximately 2,067 acre-feet of
25 water following this notice. (BBID RJN, Exh. 26, ¶¶ 17, 18, 24, 25, 28.) The ACL complaint
26 then contains a section entitled "Proposed Civil Liability," and again notifies BBID of its right to
27 a Board hearing on the entire matter. (*Id.* at pp. 5 ¶¶ 32-41, 7, ¶ 42.) The ACL complaint
28 specifically states that:

1 [i]f BBID requests a hearing, BBID will have an opportunity to be heard and to
2 contest the allegations in this Complaint and the imposition of an ACL by the State
3 Water Board. . . . If BBID requests a hearing, the State Water Board will consider
whether to impose the civil liability, and if so, whether to adjust the proposed liability
within the amount authorized by statute.

4 (*Id.* at ¶¶ 43-44, emphasis added; see also BBID RJN, Exh. 27 at p. 2 [letter finding BBID
5 petition for reconsideration of June notice improper].) BBID requested such a hearing on August
6 6, 2015, specifically stating that it “disagrees with the facts and allegations” in the ACL
7 complaint. (See Board RJN, Exh. 1, p. 1.)⁵

8 The issues identified in the Board’s notice of public hearing for the enforcement action
9 against BBID include “[w]hether the State Water Board should impose administrative civil
10 liability upon BBID for trespass and if so, in what amount and on what basis.” (BBID RJN, Exh.
11 32, p. 2, emphasis added.) The notice of hearing also identifies the purpose of the hearing as for
12 the Board “to receive evidence relevant to determining *whether* to impose administrative civil
13 liability against” BBID for “*alleged* unauthorized diversion of water” and if so, in what amount.
14 (*Id.* at p. 1, emphasis added; see also Board RJN, Exh. K, p. 2 [identifying as a key issue
15 “whether [BBID] engaged in the unauthorized diversion of water”].) The Board’s determination
16 *whether* to impose civil liability necessarily entails a predicate determination whether BBID in
17 fact diverted water when no water was available for diversion under any rights it was purporting
18 to exercise at the time, in violation of the prohibition against unauthorized diversion of water in
19 Water Code section 1052. (See *id.*, Exh. 26, ¶¶ 1-2; Exh. 32, pp. 1-2 and Water Code, § 1055,
20 subd. (c).)

21 Likewise, issue number 2 in the September 1, 2015, notice of enforcement hearing against
22 WSID, to determine whether to adopt the July 16, 2015 draft CDO against WSID, states: “[h]as
23 WSID violated, or is WSID threatening to violate, the prohibition set forth in Section 1052
24 against the unauthorized diversion or use of water?” (WSID Compl., Exh. K at p. 3.) Again, in
25 order to determine whether WSID’s diversion are actually unauthorized, the Board will

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27 ⁵ WSID also requested a hearing before the Board to contest the draft CDO. (WSID Mot.
28 at p. 3 & Ex. E.)

1 necessarily have to determine whether there was sufficient water in the system to enable WSID to
2 legally divert water under its priority of right.

3 Finally, the Board's final determination of BBID's and WSID's liability after the
4 enforcement hearings will be subject to reconsideration by the Board and judicial review by writ
5 of administrative mandate. (Wat. Code, §§ 1122, 1126; Code Civ. Proc., § 1094.5.) Therefore,
6 the petitioners' due process arguments are groundless because they can contest their liability for
7 unauthorized diversions in the Board hearings.

8 **3. The curtailment notices are fully consistent with the U.S. District**
9 **Court's decision in *Duarte Nursery v. U.S. Army Corps of Engineers***

10 Contrary to BBID's assertion, the Board's notices and enforcement action against BBID are
11 not "at odds with" *Duarte Nursery v. U.S. Army Corps of Engineers* (E.D. Cal. 2014) 17
12 F.Supp.3d 1013. (BBID Mot. at p. 11.) In fact, these general notices are, if anything, *more*
13 consistent with due process principles than the Regional Water Quality Control Board's specific,
14 individualized Notice of Violation (NOV) that the court upheld against a due process challenge in
15 that case. (See Board RJN, Exh. D; see also Exh. G, p. 3 [Chang ruling holding that the July 15
16 revised notice is "akin to the notice of violation" in *Duarte*.) In *Duarte*, the Regional Water
17 Board had issued an NOV asserting that the plaintiffs were "in violation of" the prohibitions
18 against discharges in the federal Clean Water Act and state Porter Cologne Water Quality Control
19 Act. (*Id.* at p. 1016.) However, similar to the July 15 revised notice, the NOV did not order the
20 plaintiffs to cease their violations, but rather notified them that the cited violations subjected them
21 to potential administrative civil liability and required them to submit a plan to mitigate the
22 violation. (*Ibid.*) Plaintiffs challenged the NOV on due process grounds, asserting the Regional
23 Water Board was required to provide a hearing prior to issuing the notice. (*Id.* at p. 1024.)

24 The court rejected this challenge, holding that "[t]he NOV does not divest plaintiffs of
25 anything, nor does it order them to stop doing anything." (*Id.* at p. 1025.) Rather, the order
26 simply:

27 notified plaintiffs of the Board's view that they are in violation of the law. The only
28 thing it commands is that plaintiffs submit a plan to mitigate the impacts of the
discharges. However, (1) nothing in the letter threatens any consequences for failure
19

1 to submit such a plan, (2) plaintiffs identify nothing in the law or regulations that
2 authorizes any such consequences, and (3) plaintiffs do not allege that in fact any
such consequences have occurred.

3 (*Ibid.*; see also *Machado v. State Water Board* (2001) 90 Cal.App.4th 720, 725-728 [holding
4 Regional Water Board cleanup and abatement order issued without prior notice and hearing did
5 not violate due process].) Likewise, here, as discussed above, nothing in the curtailment notices,
6 revised notice, notice of enforcement actions, ACL complaint, draft CDO, notices of hearing or
7 the Water Code threatens any consequences against petitioners for continued diversions prior to a
8 full evidentiary hearing before the Board and the Board's issuance of a final order determining
9 liability; nor do petitioners argue that they have suffered any adverse consequences from these
10 notices at this stage of the proceedings.⁶

11 **C. Petitioners Provide No Evidence of Any Violation of the Separation of**
12 **Functions or *Ex Parte* Communications Rules**

13 Petitioners further argue that their due process rights to a fair hearing will be violated
14 because the Board is not an "impartial" decision maker and has failed to maintain appropriate
15 separation between its decision making and prosecutorial functions as required by the California
16 Supreme Court's decision in *Morongo, supra*, 45 Cal.4th 731. At the outset, petitioners'
17 generalized assertion of Board bias fails because they have not asserted, let alone established, any
18 actual bias or risk of bias on the part of the Board or any individual Board members. As the Third
19 District Court of Appeal has stated:

20 [b]ias and prejudice are not implied and must be clearly established. A party's
21 unilateral perception of bias cannot alone serve as a basis for disqualification.
22 Prejudice must be shown against a particular party and it must be significant enough
23 to impair *the adjudicator's* impartiality. The challenge to the fairness of the
adjudicator must set forth concrete facts demonstrating bias or prejudice.

24
25 ⁶ BBID cites the portion of the Duarte opinion that addressed a cease and desist order
26 issued by the U.S. Army Corps of Engineers. (*Id.* at p. 1023.) The court held that the CDO
27 violated the plaintiff's due process rights because, wholly unlike the situation here, "[t]he Corps
28 ordered plaintiffs to stop their activities, and plaintiffs complied with the order, reasonably
believing that they were not free to ignore a command of the United States Government In
so complying, plaintiffs lost their crop, and to the degree they are still complying, they have lost
their right to farm or use their land." (*Ibid.*)

1 (State Water Bd. Coordinated Cases, *supra*, 136 Cal.App.4th at pp. 840-841, emphasis added.)
2 Moreover, the alleged bias of staff is not automatically attributable to individual Board members.
3 Rather, a claim of bias “must establish an unacceptable probability of actual bias *on the part of*
4 *those who have actual decision-making power over their claims.*” (*BreakZone Billiards v. City of*
5 *Torrance* (2000) 81 Cal.App.4th 1205, 1236, emphasis added.) Staff bias is not attributable to
6 the decision-maker. (*Kenneally v. Lungren* (9th Cir. 1992) 967 F.2d 329, 333-334.)

7 Morongo holds that the due process guarantee of a fair hearing can be violated upon proof
8 of actual bias on the part of the decision-maker or a showing that the “probability of actual bias . .
9 is too high to be constitutionally tolerable.” (*Morongo, supra*, 45 Cal.4th at p. 737.) In the
10 context of administrative agency adjudications, impartiality of the adjudicator is presumed and
11 this presumption “can be overcome only by specific evidence demonstrating actual bias or a
12 particular combination of circumstances creating an unacceptable risk of bias.” (*Id.* at pp. 741-
13 742.) Neither BBID nor WSID have made any such showing here.

14 First, BBID claims that Board staff’s prior issuance of water rights curtailment notices in
15 these and other watersheds in 2014 and 2015 demonstrates that the Board “cannot now be
16 expected to provide BBID with a fair hearing.” (BBID Mot. at p. 14; see BBID RJN, Exhs. 34-
17 40.) This assertion fails under *Kenneally, supra*, 967 F.2d at pp. 333-334, because, as explained
18 above, BBID has not shown how these curtailment notices are Board orders or decisions
19 attributable to the Board or Board members themselves.

20 Second, both BBID and WSID assert that because the Board staff allegedly has violated the
21 internal separation of adjudicative, investigative, prosecutorial, and advisory functions within the
22 agency with respect to water rights curtailments and water availability generally over the last year
23 and a half, this has created an unacceptable risk of bias on the part of the Board. (See BBID Mot.
24 at pp. 17; WSID Mot. at pp. 11-14; see also Gov. Code, § 11425.10, subd. (a)(4).) Government
25 Code section 11430.10 provides that, when an agency adjudicatory proceeding is pending, no
26 employee or representative of the agency who is acting as a party (which includes a prosecutor) to
27 the proceeding shall communicate directly or indirectly to the presiding officer of the proceeding
28 without notice and opportunity for all other parties to participate in the communication. (Gov.

1 Code, § 11430.10, subd. (a).) A proceeding is “pending” within the meaning of this statute once
2 the agency issues a pleading or there is an application for an agency decision, whichever is
3 earlier. (*Id.*, subd. (c); see also Board RJN, Exh. E, p.5.)

4 Here, BBID claims that Board members were “advised regularly throughout 2015 by
5 [Board] Enforcement Staff and members of the [Board’s] Prosecution Team on matters critical to
6 the Enforcement Action.” (BBID Mot. at p. 15.) However, there was no “pending proceeding”
7 within the meaning of the Government Code, and the Board’s *ex parte* procedures that prohibit
8 such communications did not apply, until the enforcement proceedings at issue here commenced
9 when Board staff issued the ACL complaint to BBID on July 20 and the draft CDO to WSID on
10 July 16. Also, the regular updates provided by staff at public Board meetings are not prohibited
11 *ex parte* communications because they occurred at open, public Board meetings where all
12 interested parties have an opportunity to participate in the communication, as required by the
13 Government Code.

14 Further, none of the evidence cited by WSID or BBID establishes that there were any
15 prohibited *ex parte* communications from members of the prosecution team to members of the
16 Board, or that there was otherwise a failure to adequately separate the Board staff’s prosecutorial
17 and advisory functions -- either after or before the current ACL and CDO proceedings became
18 pending. The Government Code “does not prohibit an agency employee who acts in a
19 prosecutorial capacity in one case from concurrently acting in an advisory capacity in an
20 unrelated case.” (*Morongo, supra*, 45 Cal.4th at p. 738 [only forbidden contact is “a prosecutor
21 cannot communicate off the record with the agency decision maker or the decision makers
22 advisors about the substance of the case”].)

23 The notices of hearing for BBID and WSID appoint Andrew Tauriainen, Attorney III,
24 Office of Enforcement, and Kathy Mrowka, Manager, Enforcement Section as the Prosecution
25 Team. (BBID RJN, Exh. 32, p. 3; WSID Compl, Exh. K, p. 3.) The Hearing Team will be
26 Nicole Kuenzi, Senior Staff Counsel and Ernest Mona, Water Resource Engineer. (*Ibid.*)⁷ The

27 ⁷ Jane Farwell-Jensen, Environmental Scientist, also is assigned to the BBID Hearing
28 Team. (*Ibid.*)

1 Presiding Officer for the BBID proceeding is Board Member Tam Doduc, and the Presiding
2 Officer for the WSID proceeding is Board member Frances Spivy-Weber. (*Ibid.*) Both BBID
3 and WSID claim that, because Mr. Tauriainen and Ms. Mrowka provided general informational
4 updates to the Board between February and July 2015 on staff's water availability analyses and
5 water rights curtailment notices, this somehow violates the separation of functions and *ex parte*
6 rules applicable to the BBID and WSID enforcement proceedings. (See BBID RJN, Exhs. 6, 9,
7 19, 25; WSID Mot. at pp. 12-13.) But general informational briefings on the water rights
8 curtailment notices are not the same proceeding as the ACL complaint against BBID and draft
9 CDO against WSID, which are now pending before the Board. Under WSID and BBID's
10 proposed construction of administrative law, the Board presumably must refuse to hear general
11 informational briefings from its staff regarding any issue that might subsequently invoke an
12 enforcement proceeding for fear that they might commingle agency functions. But such chilling
13 of informed governance is not required by procedural due process.

14 BBID and WSID also assert that John O'Hagan, who oversees the Enforcement Section of
15 the Division of Water Rights, violated the separation of functions due to his general involvement
16 in the water rights availability analyses and curtailment notices as a supervisor of enforcement
17 actions. BBID and WSID state that "throughout 2014 and 2015, Mr. O'Hagan has directly
18 advised the SWRCB Board members on curtailments and water availability issues." (BBID Mot.
19 at p. 16, citing BBID RJN, Exhs. 2, 4, 11, 13, 31; see also WSID Mot. at p. 12.) However, the
20 notices of hearing specifically state that:

21 [t]he prosecution team is separated from the hearing team and is prohibited from
22 having *ex parte* communications with any members of the [Board] and any members
23 of the hearing team regarding substantive issues and controversial procedural issues
within the scope of this proceedings. *This separation of functions also applies to the
supervisors of each team.*

24 (WSID Compl., Exh. K, p. 3; BBID RJN, Exh. 32, p. 3, emphasis added.) Additionally, as
25 previously discussed, petitioners have adequate alternative remedies, such as moving the Board to
26 disqualify members of the prosecution or hearing team, or moving to recuse any allegedly biased
27 Board member. (*Morongo, supra*, 45 Cal.4th at p. 734; *State Water Bd. Coordinated Cases*,
28 *supra*, 136 Cal.App.4th at pp. 838-839.)

1 For all of these reasons, petitioners have failed to establish that the Board's enforcement
2 hearings will violate their due process rights due to a violation of the separation of functions or *ex*
3 *parte* rules.

4 **D. The "Fruit of the Poisonous Tree" Doctrine Does Not Require the Board's**
5 **Enforcement Actions to Be Stayed**

6 Finally, WSID argues that the Board's CDO order will violate its due process rights
7 because the draft CDO issued by Board staff allegedly relies on information unlawfully obtained
8 through the certification forms required by the curtailment notices, which allegedly was expressly
9 prohibited by Judge Chang's July 10 TRO Order (e.g. "the fruit of the poisonous tree"). (WSID
10 Mot. at p. 8; see WSID Compl., Exs. B, D and F.) This argument is both legally and factually
11 incorrect. The argument is legally incorrect because WSID cites no case law or other authority
12 applying the "fruit of the poisonous tree" doctrine to civil administrative proceedings, and the
13 Board is not aware of any such authority. In addition, WSID's argument mischaracterizes Judge
14 Chang's TRO ruling, as that ruling did not expressly prohibit the Board from relying on
15 information contained in the certification forms. Rather, the order only prohibited the Board
16 "from taking any action against" WSID "on the basis of" the curtailment notices themselves or
17 based on "a *failure* to complete a Curtailment Certification Form." (WSID Compl., Exh. F, p. 5.)
18 The TRO Order expressly authorizes the Board to continue to exercise its statutory authority,
19 which includes the authority to conduct investigations and request a broad array of information.
20 (*Id.* at pp. 4-5; see Wat. Code, §§ 183, 1051.)

21 More importantly, neither the CDO nor the ACL charging documents hinge on the
22 curtailment notices or the certification forms associated with those notices in any case. However,
23 the notice of enforcement action and draft CDO issued against WSID do not rely solely on the
24 information in the curtailment notices and certification forms. (WSID Compl., Exh. L.) The
25 references in the draft CDO to these documents are merely factual recitals of chronological
26 events, which the Board itself is free to change when it adopts a final CDO. (*Id.* at ¶¶ 17, 25, 26,
27 29.) Paragraphs 19-23 of the draft CDO explain that, in making a determination of water
28 unavailability, Board staff relied on a wide variety of information, including information from

1 DWR and information supplied by water right holders on their annual or triennial reports of water
2 diversion and use required pursuant to Water Code section 5100 *et seq.* (*Id.*, ¶¶ 19-23; see also
3 Decl. of John O’Hagan, WSID Compl. Exh. L, ¶¶ 10-13.)

4 Most importantly, as discussed above, WSID (as well as BBID) will have a full opportunity
5 to contest any evidence that the Board’s prosecution staff ask the Board to consider or to rely
6 upon at the enforcement hearing currently scheduled to commence on November 12, 2015, and to
7 challenge the Board’s final decision in reliance on any allegedly improper evidence. (See WSID
8 Compl., Exh. K; Wat. Code, §§ 1834, subd. (a), 1126; Cal. Code Regs., tit. 23, § 648 *et seq.*) As
9 Judge Chang stated in her order denying the preliminary injunction: “Respondents have
10 acknowledged that Petitioners may challenge the use of the subject information as part of the
11 administrative process, should they request a hearing.” (Board RJN, Exh. F, p. 4.) There is no
12 indication that the Board will rely on improper evidence in making its final determinations in the
13 enforcement proceedings. And the fact that the prosecution team might attempt to introduce
14 potentially improper evidence does not warrant a stay of the administrative proceeding, just as the
15 potential for a District Attorney to introduce improper evidence would warrant staying a trial.

16 **CONCLUSION**

17 For the foregoing reasons, petitioners’ motions to stay or enjoin the Board’s enforcement
18 proceedings should be denied.

19
20 Dated: September 15, 2015.

Respectfully Submitted,

21 KAMALA D. HARRIS
22 Attorney General of California
23 TRACY L. WINSOR
24 Supervising Deputy Attorney General

25 
26 CLIFFORD T. LEE
27 Deputy Attorney General
28 *Attorneys for Defendants and Respondents
State Water Resources Control Board, et al*

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EXHIBIT B

1 KAMALA D. HARRIS
Attorney General of California
2 GAVIN G. MCCABE
Supervising Deputy Attorney General
3 MATTHEW G. BULLOCK, SBN 243377
CLIFFORD T. LEE, SBN 74687
4 Deputy Attorneys General
455 Golden Gate Avenue, Suite 11000
5 San Francisco, CA 94102-7004
Telephone: (415) 703-1678
6 Fax: (415) 703-5480
E-mail: Matthew.Bullock@doj.ca.gov
7 Attorneys for Respondent and Defendants State
Water Resources Control Board, et al.

8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF
10 SAN JOAQUIN

11
12 BANTA-CARBONA IRRIGATION
DISTRICT,

13 Petitioner/Plaintiff

14 vs,

15 CALIFORNIA STATE WATER
16 RESOURCES CONTROL BOARD;
THOMAS HOWARD, EXECUTIVE
17 DIRECTOR OF THE CALIFORNIA STATE
WATER RESOURCES CONTROL BOARD

18 Respondents/Defendants
19
20
21

Case No. 39-2015-00326421-CU-WM-WTK

**Declaration of John O'Hagan in
Opposition to Petitioner/Plaintiff's
Application for Stay and/or in the
Alternative Temporary Restraining Order
and/or Preliminary Injunction**

Hearing Date: June 23, 2015

Time: 9:15 a.m.

Dept: 41

Judge: The Honorable Carter P. Holly

Trial Date: TBA

Action Filed: June 18, 2015

By Fax

1 I, John O'Hagan, declare:

2 1. I have been an employee of the State Water Resources Control Board (State Water
3 Board) for the past 34 years, and I am currently employed by the Board. Since May 2003 I have
4 overseen the Enforcement Section of the State Water Board's Division of Water Rights
5 (Division). Since April 2014, I have been the Division's Assistant Deputy Director overseeing the
6 Enforcement Section and the Permitting and Licensing Section. As Assistant Deputy Director, I
7 supervise the State Water Board's analyses for determining if water supplies are sufficient to
8 meet current water use demands in critical watersheds during the 2014 and 2015 drought. I am
9 responsible to meet with stakeholders of the watershed and ensure our information is transparent
10 and I provide monthly updates to the Board at its monthly Board Meetings. I have a 1980
11 Bachelor of Science Degree in Civil Engineering from California State University at Sacramento,
12 and I have been registered as a Professional Civil Engineer in California since 1984.

13
14
15 2. As part of my responsibility for overseeing the Enforcement Section, I am
16 responsible for the work of the Enforcement Section that includes, but is not limited to, statewide
17 compliance and complaint investigations of water diversion projects and initiating formal
18 enforcement actions. Part of these activities is monitoring diversions to ensure compliance with
19 the state's water rights priority system. These activities include monitoring for the purpose of
20 determining whether any diversion and use of water is authorized under the Water Code.
21

22 3. The State Water Board has been vested by the Legislature with the authority to
23 prevent unauthorized diversions and supervise the water right priority system. (See, e.g. Wat.
24 Code §§ 174, 186, 1050, 1051, 1051.5, 1052, 1825.)

25 4. The water right priority system provides the primary basis for determining which
26 users may divert, and how much, when there is insufficient water in the stream for all users.
27 Riparian right holders generally have the most senior priority to natural flows in a stream, and

1 older, more senior appropriative water rights have priority over more junior appropriative water
2 rights. Senior water right holders are more likely to receive water at times of shortage than more
3 junior water right holders. However, once water is stored or imported from another watershed,
4 the entity that stored or imported the water has the paramount right to that water. Other
5 appropriative water rights holders may divert any abandoned return flows. Riparian water right
6 holders are only entitled to divert natural flow, so are not entitled to divert releases, or the return
7 flows from upstream releases of stored water.
8

9 5. When the amount of water available in a surface water source is not sufficient to
10 support the needs of existing water right holders, the more junior right holders must cease
11 diversion in favor of more senior right holders. However, it is not always clear to a junior
12 diverter whether there is sufficient flow in the system to support their diversion and at the same
13 time support senior water uses downstream. It can also be difficult to determine whether releases
14 of stored water are abandoned flows that may be diverted or whether those flows are not available
15 for diversion because they are being released for downstream purposes. Similarly, it can be
16 difficult for a riparian to know if water is natural flow, or stored or imported water and whether
17 and when and to what extent correlative reductions in water use are needed due to the need to
18 share limited supplies amongst riparians. In accordance with the State's water right priority
19 system, the State Water Board notifies diverters of the need to curtail water diversions when
20 sufficient flows in a watershed are not available for a water user's needs, based on their priority
21 of right.
22

23 6. A curtailment notice is a notification to water right holders of a certain priority of
24 right that, due to water shortage conditions, the State Water Board has determined water is not
25 available under their priority of right. A notice of curtailment is not an enforceable decision or
26 order of the State Water Board. The notice provides the affected water right holder with the State
27

1 Water Board's findings of the unavailability of water under their priority of right for a certain
2 right and the need to cease diversion under that right, the exceptions to the notice for direct
3 diversion of water for power, and for continued use of previously stored water, and the potential
4 for future enforcement for unauthorized diversions. A curtailment notice does not consider any
5 particular diverter's other senior water rights or other facts such as water supply contracts,
6 agreements, transfers or groundwater supplies that may allow the diverter to continue to divert
7 lawfully. The notice is therefore not a State Water Board determination that any individual
8 diverter is taking water without authorization under the Water Code. A diverter who continues to
9 divert after receiving a notice of curtailment is not subject to penalties for violation of the
10 curtailment notice, but may be subject to enforcement for an unauthorized diversion if their
11 diversions do not fall within the exceptions enunciated in the notice and are not entirely
12 authorized by other, non-curtailed water rights.
13
14

15 7. I have reviewed the Notice of Unavailability of Water and Need for Immediate
16 Curtailment dated June 12, 2016 and addressed to Patterson Irrigation District and attached as
17 Exhibit A to the petitioner's petition for writ of mandate. This notice is the type of curtailment
18 notice that I described in paragraph 6. This notice does not constitute a decision or order of the
19 State Water Board or a determination that Patterson Irrigation District, petitioner, or any other
20 individual diverter has engaged in an unauthorized diversion of water under the Water Code.
21

22 8. Diversion of water when it is unavailable under a diverter's priority of right
23 constitutes an unauthorized diversion and a trespass against the state. The State Water Board may
24 subject such unauthorized diversions to an Administrative Civil Liability (ACL) of up to \$1,000
25 per day and \$2,500 per acre-foot of water unlawfully diverted in a drought year, or refer a diverter
26 to the Attorney General's office for enforcement. The State Water Board may also issue
27 administrative cease and desist orders and request court injunctions to require that diversions
28

1 stop.

2 9. Before issuing such an order, the State Water Board must have particularized
3 information regarding an unlawful diversion or the potential of such a diversion: the Board may
4 not issue an enforceable order requiring diversion to cease simply based on lack of water
5 availability, absent information that there is a risk of or actual continued diversion. Additionally,
6 before issuing a final enforcement order, the State Water Board must first issue a draft Cease and
7 Desist Order or an ACL Complaint. If such enforcement action is proposed, a water right holder
8 is entitled to, upon written request within 20 day of receipt of the draft enforcement action, an
9 evidentiary hearing on all issues before the order takes effect.
10

11 10. The general analysis for determining the necessity for curtailment of water rights
12 in any watershed compares the current and projected available water supply with the total water
13 right diversion demand. For the water availability determination of the curtailment analysis, the
14 State Water Board relies upon the full natural flows of watersheds calculated by the Department
15 of Water Resources (DWR) for certain watersheds in its Bulletin 120, and in subsequent monthly
16 updates. "Unimpaired Runoff" or "Full Natural Flow" represents the natural water production of
17 a river basin, unaltered by upstream diversions, storage, or by export or import of water to or
18 from other watersheds. The full natural flow amount is different than the measured stream flows
19 at the given measurement points because the gauged flows are increased or decreased to account
20 for these upstream operations. Forecasted flow data is uncertain so DWR provides the data in the
21 form of "levels of exceedance" or simply "exceedance" to show the statistical probability that the
22 forecasted supply will occur. The exceedance is simply the percent of the time that the actual
23 flow is expected to exceed the projected flow. The 90 percent exceedance hydrology assumes
24 inflows from rainfall and snowmelt at levels that are likely to be met or exceeded by actual flows
25 with a 90 percent probability, or in other words, there is a ten percent or less chance of actual
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27
28

1 conditions turning out to be this dry or drier. The 50 percent exceedance is the 50/50 forecast.
2 The State Water Board uses both exceedances for its analyses.

3 11. Specifically, for the San Joaquin River watershed, the State Water Board totaled
4 DWR's full natural flows for the Stanislaus, Tuolumne, Merced, Upper San Joaquin, Cosumnes
5 and Mokelumne rivers on a monthly basis as the monthly available water supply for the San
6 Joaquin River watershed. State Water Board staff also increased these total full natural flow
7 amounts by adding monthly quantities for smaller watersheds and estimated return flows based on
8 the DWR's May, 2007 Report of Unimpaired Flow Data, Estimates in the report for 1977 were
9 used for these adjustments. The monthly adjusted water supply is provided in acre-feet per month
10 and the State Water Board converts these amount into average monthly cubic feet per second for
11 graphic purposes (at two exceedance levels). The State Water Board also shows DWR's daily
12 full natural flow calculations on the graph for consideration before any curtailment. DWR's daily
13 full natural flow calculations are less accurate because they are based on less data than is
14 available at the completion of each month. Due to the lag between the effect of upstream
15 operations and downstream flow measurements, calculated daily FNF will fluctuate from day to
16 day. State Water Board staff also checks available forecast information from the California-
17 Nevada River Forecast Center, real time flow conditions from the DWR and United States
18 Geological Survey. This real time information and forecasted precipitation events can delay the
19 curtailment notice.
20
21

22
23 12. For water right demands, the State Water Board relies on information supplied by
24 water right holders on annual or triennial reports of water diversion and use required to be true
25 and accurate to the best of the knowledge of the diverters. The State Water Board also received
26 2014 diversions data from water right holders that represents 90 percent of the water diverted
27 from April through September in the Delta, and 90 percent of the water diverted from the upper
28

1 Sacramento and San Joaquin Rivers. This information was required pursuant to Order WR 2015-
2 0002 dated February 4, 2015. All reported monthly water diversion data is compiled by
3 watershed, type of right and priority dates. The State Water Board performs quality control
4 checks and removes obvious errors, excess reporting, removes demand for direct diversion for
5 power, and makes additional changes based on stakeholders comments. The corrected demand
6 data includes the 2014 reported data for 90% of the watershed demand plus for the remaining
7 diverters, an averaged diversion amount for 2010 through 2013. These monthly diversion
8 demands are grouped into water right types (riparian, pre-1914 and post-1914 rights) and by
9 priority dates for pre-1914 and post-1914 rights. For the Sacramento-San Joaquin River
10 Watersheds, special consideration of the Delta diversions is made. To be most conservative for
11 the San Joaquin River, the State Water Board performs a proportional analysis based on the
12 inflows from the watersheds. For example, for the month of June, the proportional full natural
13 flow of the San Joaquin River watershed based on 90% exceedance, was 17 percent. Therefore,
14 the San Joaquin watershed Delta demand was 17 percent of the total Delta demand.
15
16

17 13. The State Water Board provides graphical summations of these priorities with
18 monthly demands for the total riparian demand at bottom, the pre-1914 demands added to riparian
19 and depicted above the riparian demand. The monthly amounts are averaged into cubic feet per
20 second for graphical purposes.
21

22 14. The State Water Board is consistently making adjustments to its analyses based on
23 new information obtained from stakeholders, or adjustments to projected flows from the DWR.
24 State Water Board staff reviews this information and provides revisions to its data set and graphs
25 that are all shown on the Drought Website.
26

27 15. The goal of curtailments is principally to ensure that water to which senior water
28 right holders are entitled is actually available to them. To ensure that this occurs generally

1 requires that some water remain in most streams to satisfy senior demands at the furthest
2 downstream point of diversion of these senior water rights.

3 16. Attached as Exhibit B¹ is a water supply and demand chart prepared by the State
4 Water Board and issued on June 11, 2015 entitled "2015 San Joaquin River Basin Senior
5 Supply/Demand Analysis with Proportion Delta Demand." The bar graph data discloses in terms
6 of cubic feet per second the anticipated demand for water by riparian and pre-1914 water users
7 for the period of March through September, 2015. The variable solid blue line displays the daily
8 full natural flow from March 1, 2015 through June 7, 2015 of the San Joaquin River basin. The
9 declining dotted lines represent the forecasted full natural flow through September, 2015 for the
10 adjusted 50% and 90% exceedance levels. Based upon the data and information from which
11 Exhibit B¹ was derived and other relevant data, the State Water Board concluded that there is
12 insufficient water in the San Joaquin River basin to satisfy water right claimants with priorities of
13 1903 or later.
14

15
16 17. On January 17 and April 2, 2014, the State Water Board issued a Notice of Surface
17 Water Shortage and Potential for Curtailment of Water Right Diversions. The notice advised that
18 if dry weather conditions persist, the State Water Board will notify water right holders of the
19 requirement to limit or stop diversions of water under their water rights, based on water right
20 priority.
21

22 18. In April, the State Water Board began issuing drought-related curtailment notices
23 to water right holders in a number of water-short watersheds.

24 The following notices of curtailment have been mailed to water right holders:

25 April 3, 2015- Antelope Creek Fishery Protection Regulation

26 April 17, 2015- Deer Creek Fishery Protection Regulation

27 April 23, 2015- Post-1914 and Surplus Class Rights in Scott River

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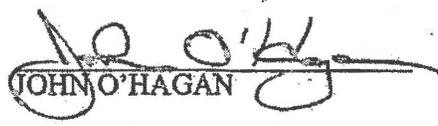
April 23, 2015- All post-1914 rights in the San Joaquin River Watershed.

April 30, 2015- all Permits and Licenses subject to Term 91 in Sacramento-San Joaquin watersheds and Delta.

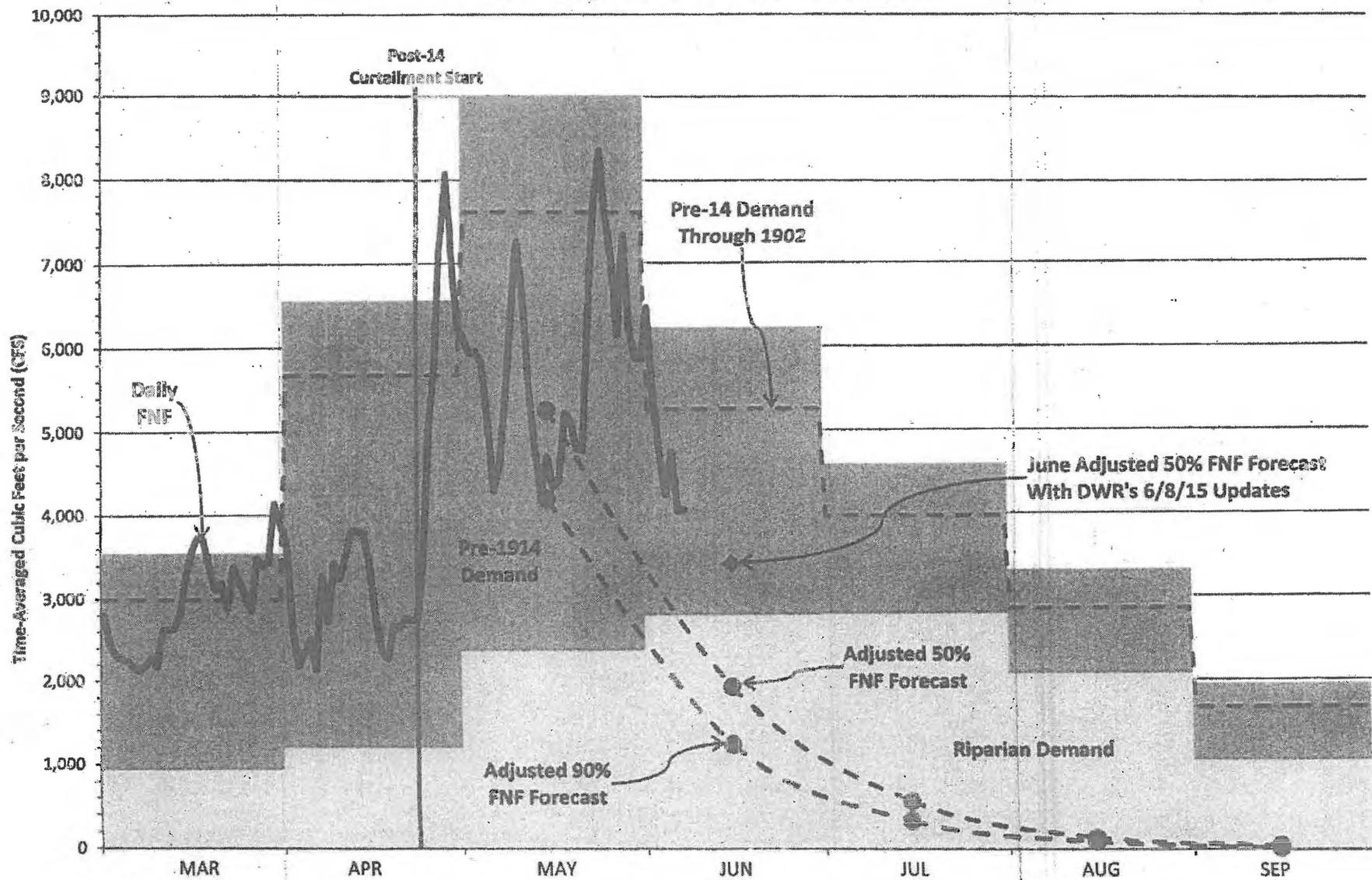
May 1, 2015- All post-1914 rights in Sacramento River Watershed and Delta

June 12, 2015- Pre-1914 rights with a priority dated of 2003 or later in the Sacramento-San Joaquin watershed and Delta.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge. Executed this 22 day of June, 2015 in Sacramento, California


JOHN O'HAGAN

2015 San Joaquin River Basin Senior Supply/Demand Analysis With Proportional Delta Demand



See following page for additional information.

EXHIBIT 1

6/11/2015

SERVICE LIST
BYRON-BETHANY IRRIGATION DISTRICT
ADMINISTRATIVE CIVIL LIABILITY 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>State Water Contractors Stefani Morris 1121 L Street, Suite 1050 Sacramento, CA 95814 smorris@swc.org</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>Patterson Irrigation District Banta-Carbona Irrigation District The West Side Irrigation District Jeanne M. Zolezzi Herum\Crabtree\Suntag 5757 Pacific Avenue, Suite 222 Stockton, CA 95207 jzolezzi@herumcrabtree.com</p>
<p>Central Delta Water Agency Jennifer Spaletta Law PC P.O. Box 2660 Lodi, CA 95241 jennifer@spalettalaw.com</p> <p>Dante John Nomellini Daniel A. McDaniel Dante John Nomellini, Jr. NOMELLINI, GRILLI & MCDANIEL 235 East Weber Avenue Stockton, CA 95202 ngmplcs@pacbell.net dantejr@pacbell.net</p>	<p>California Department of Water Resources Robin McGinnis, Attorney P.O. Boc 942836 Sacramento, CA 94236-0001 robin.mcginis@water.ca.gov</p>
<p>Richard Morat 2821 Berkshire Way Sacramento, CA 95864 rmorat@gmail.com</p>	<p>San Joaquin Tributaries Authority Tim O'Laughlin Valerie C. Kincaid O'Laughlin & Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95816 towater@olaughlinparis.com vkincaid@olaughlinparis.com</p>

South Delta Water Agency John Herrick Law Offices of John Herrick 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 Email: Jherrlaw@aol.com	
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