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June 3, 2016

Via Electronic Mail

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor [95814]
P.O. Box 100
Sacramento, CA 95812-0100
commentletters@waterboards.ca.gov

Re: Comments on Draft Order Dismissing the Administrative Civil Liability
Complaint Against Byron-Bethany Irrigation District and Dismissing the Draft
Cease and Desist Order Against the West Side Irrigation District

Dear Ms. Townsend:

The State Water Resources Control Board (SWRCB), in its Draft Order Dismissing the Administrative Civil Liability Complaint (ACL Complaint) Against Byron-Bethany Irrigation District (BBID) and Dismissing the Draft Cease and Desist Order Against the West Side Irrigation District (Draft Order), issued on May 26, 2016, states that the SWRCB has the authority under Water Code section 1052 to determine water availability for pre-1914 water rights and to prioritize water availability among pre-1914 water right holders.

BBID expressed its position on the SWRCB's authority over pre-1914 water rights in BBID's Motion to Dismiss Administrative Civil Liability Proceeding in ENF01951 for Lack of Statutory Authority Under Water Code Section 1052, filed with the SWRCB on January 25, 2016. To reiterate here, water satisfying pre-1914 appropriative and riparian water rights is not subject to Division 2 of the Water Code, as "this division" is used in Water Code section 1052, subdivision (a). The SWRCB contends that the allegations in the ACL Complaint against BBID are no different than an action based on a diversion without a basis of right, citing *Young v. State Water Resources Control Board* (2013) 219 Cal.App.4th 397 (*Young*), or an action based on a division in excess of a perfect right, citing *Millview County Water District v. State Water Resources Control Board* (2014) 229 Cal.App.4th 879 (*Millview*).

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The ACL Complaint does not allege that BBID lacks a valid pre-1914 appropriative water right, nor does it allege that BBID was diverting water in excess of that right. The ACL Complaint alleges that BBID diverted water needed to satisfy the needs of more senior pre-1914 appropriative and/or riparian water right holders, as confirmed in depositions preceding the enforcement hearing. The ACL Complaint's allegation is different than the factual situations presented in *Young* and *Millview*, and presents a scenario over which the SWRCB does not have authority based on the Water Code or case law. Therefore, BBID still contends that it did not commit a trespass within the meaning of Water Code section 1052, as alleged by the SWRCB, and that the SWRCB does not have authority over the diversions at issue.

While BBID contends that the SWRCB should not have reached the issues discussed in Section 4 of the Draft Order, BBID agrees with the SWRCB Hearing Team's analysis regarding the Prosecution Team's failure to carry its burden of proof in the enforcement proceeding, and that the ACL Complaint should be dismissed.

Thank you for taking these comments into consideration.

Best regards,

Michael E. Vergara

MEV:mb