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June 3, 2016



Via Email: commentletters@waterboards.ca.gov

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
PO Box 100
Sacramento, CA 95812-0100

**Re: COMMENT LETTER – 6/07/16 BOARD MEETING:
BBID ACL and WSID CDO HEARINGS**

Dear Ms. Townsend:

The San Joaquin Tributaries Authority (SJTA) reviewed the 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 (Draft Order). The SJTA agrees with the State Water Resources Control Board's (State Water Board) finding that the burden of proof was not met and the dismissal of the actions is appropriate. In addition, the SJTA agrees with several findings made with regard to the water availability analysis. However, the legal section is somewhat contradictory to the findings and conclusion of the Draft Order, and the SJTA recommends amending this section with regard to two specific issues noted below.

(1) Regulation of Water Rights Through Water Availability Analyses

The Draft Order states that the enforcement action is not a regulation of pre-1914 water rights. Specifically, the Draft Order states it sees no distinction between enforcement based on a diversion that is not authorized because it is in excess of the quantity of the right and a diversion that is not authorized because water is not available under a diverter's priority of right. (Draft Order, at 10.) However, there is a distinction. The distinction arises because an enforcement action premised upon an alleged violation of priority is based on the determination that water is not available to an entire class or priority of water right holders, whereas an enforcement action premised upon a quantity violation is specific to the diverter being targeted. It is the determination that water is not available to an entire class or priority to which the SJTA objects. It is this determination which amounts to a regulation of those water right holders.

The determination of whether water is available to support a specific diversion cannot be made on a class or general priority basis. Rather, this determination can only be made after considering a myriad of factors, many of which are local and specific to the diversion. The Draft Order's dismissal of the action reflects this exact point.

The SJTA requests the State Water Board review and revise the Draft Order to remove any reference to approving or legitimizing the determination that water is not available to a general class or priority of rights. (See Draft Order, at 10:2-3; 10:9-11; 10:11-16.) The Draft Order determined that water availability determinations cannot be made using general information that does not reflect the specific supply and demand metrics that apply to each diversion. (Draft Order, at 14-16.) Yet, the Draft Order seems to contradict this finding by referring to the determination of availability for a priority class of rights as if that is an acceptable practice. It is not; general availability analyses are not sufficiently specific to determine whether a single diversion is unlawful. The SJTA requests the Draft Order be revised to make clear that the determination of water availability for purposes of enforcement actions must be made on each individual diversion and cannot be based on basin-wide availability estimates.

(2) Authority Under 1052

The Draft Order is correct in recognizing Water Code section 1052 authorizes the State Water Board to stop the unlawful diversion of water under Division 2. The Draft Order correctly recognizes diversions made pursuant to pre-1914 water rights are not subject to Division 2. (Draft Order, at 7.) However, the Draft Order then states that any diversion, even a pre-1914 diversion, is subject to Division 2 if it is alleged to be unlawful, because such a diversion would need to obtain a license or permit to become lawful. (*Id.*, at 10.) This is not correct for two reasons. First, if this logic were true, the "subject to Division 2" limitation would not be a limitation at all; instead, all alleged unlawful diversions would be subject to the State Water Board's authority under section 1052. Second, the legal "remedy" of applying for a new right is an assumption that is not supported in a curtailment situation. Pre-1914 curtailment arises when one pre-1914 water right holder is diverting water that a senior water right holder would have diverted (by definition either a pre-1914 water right holder or riparian diverter). None of these diversions are subject to Division 2. So, the remedy for pre-1914 and riparian water right holders in this situation is not to apply for Division 2 water (which would implicate Board authority) – it is to determine who has the priority amongst these senior water right holders and whether harm has occurred as a result of a diversion in the wrong order of priority (which would be a private dispute amongst senior water right holders and would not implicate Board authority under Division 2). In this situation, the State Water Board simply has no authority to step in on behalf of senior water right holders under section 1052, particularly where no senior water right holder has alleged injury, as was the case here.

The SJTA recommends the Draft Order be revised to consistently reflect that section 1052 does not provide the State Water Board with the authority to take enforcement action with regard to a priority dispute among non-Division 2 diversions.

(3) Next Steps – Stakeholder Developed Drought Mechanism

The SJTA agrees with the Draft Order that the water availability analyses are helpful for informing water right holders generally. However, as the Draft Order finds, these general planning tools cannot support enforcement actions. To the extent the State Water Board or State Water Board staff desire to develop a mechanism or tool that can implement the existing forecasting methods during dry or shortage years, the SJTA is willing to work with the State Water Board to explore such development. The SJTA recommends the State Water Board revise the Draft Order to include the direction to begin a stakeholder process for this purpose.

Very truly yours,



Valerie C. Kincaid

VCK/llw

cc: *Service List (Revised 5/25/2016)*

**SERVICE LIST OF PARTICIPANTS
THE WEST SIDE IRRIGATION DISTRICT
CEASE AND DESIST ORDER HEARING
(October 8, 2015, Revised 12/18/15, 05/25/16)**

| Parties | |
|---|---|
| THE FOLLOWING <u>MUST BE SERVED</u> WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (All have AGREED TO ACCEPT electronic service, pursuant to the rules specified in the hearing notice.) | |
| <p>DIVISION OF WATER RIGHTS Prosecution Team Andrew Tauriainen, Attorney III SWRCB Office of Enforcement 1001 I Street, 16th Floor Sacramento, CA 95814 Andrew.Tauriainen@waterboards.ca.gov</p> | <p>THE WEST SIDE IRRIGATION DISTRICT Jeanne M. Zolezzi Karna Harrigfeld Janelle Krattiger Herum\Crabtree\Suntag 5757 Pacific Ave., Suite 222 Stockton, CA 95207 jjolezzi@herumcrabtree.com kharrigfeld@herumcrabtree.com jkrattiger@herumcrabtree.com</p> |
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**SERVICE LIST OF PARTICIPANTS
BYRON-BETHANY IRRIGATION DISTRICT
ADMINISTRATIVE CIVIL LIABILITY HEARING**

(09/02/15; Revised: 09/10/15; Revised 10/06/15; Revised 10/22/15, 12/18/15, 05/25/16)

| PARTIES | |
|---|--|
| <p>THE FOLLOWING <u>MUST BE SERVED</u> WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (All have AGREED TO ACCEPT electronic service, pursuant to the rules specified in the hearing notice.)</p> | |
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