

DEPARTMENT OF WATER RESOURCES

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October 22, 2015

VIA E-MAIL

Division of Water Rights
State Water Resources Control Board
Attention: Jane Farwell-Jensen
P.O. Box 2000
Sacramento, California 95812-2000

Re: Concise Statement of Legal Issues in the Matter of Alleged Unauthorized Diversion by Byron-Bethany Irrigation District

Dear Ms. Farwell-Jensen:

This is in reply to Hearing Officer Tam Doduc's invitation in her October 2, 2015 letter to the parties to identify and submit concise statements of legal issues that they would like to address in prehearing briefs. The California Department of Water Resources (DWR) submits the following statement.

The issues the State Water Resources Control Board (Board) should consider at the hearing should be limited to those listed in the Administrative Civil Liability (ACL) Complaint and should not be enlarged. The Board issued the ACL Complaint to Byron-Bethany Irrigation District (BBID) pursuant to Division 2, sections 1052 and 1055 of the Water Code. The purposes of Division 2 of the Water Code are: (1) to further the constitutional policy in favor of beneficial use and against waste and unreasonable use of the waters of the state; and (2) to be for the welfare and benefit of the people of the state and for the improvement of their prosperity and their living conditions.¹ To carry out these purposes, the Board may investigate, take testimony, and determine whether water appropriations are legal.² Thus, the issues the Board should consider at a hearing should be limited to the alleged violation and how it relates to the purposes of Division 2 of the Water Code.

The nature of the alleged violation defines the scope of the hearing. The proper issues before the Board at this hearing are whether there was: (1) a trespass according to section 1052; and (2) the relevant circumstances regarding the amount of civil liability as described in section 1055.3. Enlarging the scope of the hearing to include water quality, priority of rights, and Delta hydrodynamics will include extensive discovery and the presentation of technical evidence. While these issues are appropriate for the Board to consider, they should be considered during a planning process where all of the

¹ Water Code, section 1050.

² Water Code, section 1051.

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affected parties can submit information instead of in an enforcement action against one party. Also, enlarging the scope of enforcement hearings such as this one may hinder the Board's ability to administer water rights in a timely manner. In ongoing litigation brought by BBID and The West Side Irrigation District (WSID), among others, against the Board,³ the Santa Clara County Superior Court issued an order denying motions to stay, explaining that

...both BBID and WSID will have the opportunity to present evidence at the administrative enforcement hearing regarding their respective rights to the water before a tribunal that is required to be impartial, fair and neutral, and has the specific expertise to adjudicate these issues.

(See Exhibit A, Order After Hearing on September 22, 2015.) Accordingly, the issues before the Board should be limited to enforcement.

DWR appreciates the opportunity to submit this statement. If you have any questions or need additional information, please contact me at (916) 657-5400 or robin.mcginnis@water.ca.gov. Thank you.

Sincerely,



Robin McGinnis, Attorney
Office of the Chief Counsel
Department of Water Resources

cc: Attached Service List (via e-mail)

³ California Water Curtailment Cases (JCCP 4838), Santa Clara County Superior Court Case Number 1-15-CV-285182.

**SERVICE LIST OF PARTICIPANTS
BYRON-BETHANY IRRIGATION DISTRICT
ADMINISTRATIVE CIVIL LIABILITY HEARING**

PARTIES	
<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>Byron Bethany Irrigation District Daniel Kelly Somach Simmons & Dunn 500 Capitol Mall, Suite 1000, Sacramento, CA 95814 dkelly@somachlaw.com</p>
<p>Patterson Irrigation District Banta-Carbona Irrigation District The West Side Irrigation District Jeanne M. Zolezzi Herum\Crabtree\Suntag 5757 Pacific Ave., Suite 222 Stockton, CA 95207 jzolezzi@herumcrabtree.com</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>Robert E. Donlan Ellison, Schneider & Harris L.L.P. 2600 Capitol Avenue, Suite 400 Sacramento, CA 95816 (916) 447-2166 red@eslawfirm.com</p>
<p>Central Delta Water Agency Jennifer Spaletta Spaletta Law PC PO Box 2660 Lodi, CA 95241 jennifer@spalettalaw.com</p> <p>Dante Nomellini and Dante Nomellini, Jr. Nomellini, Grilli & McDaniel ngmplcs@pacbell.net dantejr@pacbell.net</p>	<p>California Department of Water Resources Robin McGinnis, Attorney PO Box 942836 Sacramento, CA 94236-0001 robin.mcginis@water.ca.gov</p>
<p>Richard Morat 2821 Berkshire Way Sacramento, CA 95864 rjmorat@gmail.com</p>	<p>San Joaquin Tributaries Authority Valerie Kincaid O'Laughlin & Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95814 vkinaid@olaughlinparis.com lwood@olaughlinparis.com</p>

**SERVICE LIST OF PARTICIPANTS
BYRON-BETHANY IRRIGATION DISTRICT
ADMINISTRATIVE CIVIL LIABILITY HEARING**

<p>South Delta Water Agency John Herrick, Esq. Dean Ruiz, Esq. 4255 Pacific Ave., Suite 2 Stockton, CA 95207 jherrlaw@aol.com</p> <p>Dean Ruiz, Esq. Harris, Perisho & Ruiz 3439 Brookside Road, Suite 210 Stockton, CA 95219 dean@hprlaw.net</p>	<p>State Water Contractors Stefani Morris, Attorney 1121 L Street, Suite 1050 Sacramento, CA 95814 smorris@swc.org</p>
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Exhibit A

Sep 24, 2015 3:32 PM

David H. Yamasaki

Chief Executive Officer/Clerk

Superior Court of CA, County of Santa Clara

Case #1-15-CV-285182 Filing #3-76879

By R. Walker, Deputy

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

Coordination Proceeding
Special Title (Rule 3.550)

**CALIFORNIA WATER CURTAILMENT
CASES**

JUDICIAL COUNCIL
COORDINATION PROCEEDING
NO. 4838¹

**ORDER AFTER HEARING ON
SEPTEMBER 22, 2015**

**(1) Petition by The West Side
Irrigation District ("West Side") for
Stay of State Water Resources
Control Board (SWRCB)
Proceedings; (2) Motion by
Petitioner/Plaintiff Byron-Bethany
Irrigation District (BBID) to Stay or
Enjoin the SWRCB's Enforcement
Action Issued on July 20, 2015**

¹ Included Actions: (1) Byron-Bethany Irrigation District v. California State Water Resources Control Board, Superior Court of California, County of Contra Costa, Case No. N150967; (2) The West Side Irrigation District v. California State Water Resources Control Board, Superior Court of California, County of Sacramento, Case No. 34201580002121; (3) Banta-Carbona Irrigation District v. California State Water Resources Control Board, Superior Court of California, County of San Joaquin, Case No. 39201500326421 CU WMSTK; (4) Patterson Irrigation District v. California State Water Resources Control Board, Superior Court of California, County of Stanislaus, Case No. 2015307; (5) San Joaquin Tributaries Authority v. California State Water Resources Control Board, Superior Court of California, County of Stanislaus, Case No. 2015366.

1 The above-entitled matter came on for hearing on Tuesday, September 22, 2015 at 3:30
2 p.m. in Department 1, the Honorable Peter H. Kirwan presiding. The appearances are as stated
3 in the record. The Court, having read and considered the supporting and opposing papers, and
4 having heard and considered the arguments of counsel, and good cause appearing therefore,
5 makes the following order:

6 Plaintiff Byron Bethany Irrigation District ("BBID") moves to stay or enjoin the State
7 Water Resources Control Board's ("SWRCB") Enforcement Action. Similarly, West Side
8 Irrigation District ("WSID") moves to stay SWRCB's Enforcement Action brought separately
9 against WSID.

10 In their papers and at the above-referenced hearing, both WSID and BBID ("Plaintiffs")
11 argue that this Court has concurrent jurisdiction with SWRCB over water rights disputes and
12 the doctrine of primary jurisdiction yields to the rule of exclusive jurisdiction because the
13 current litigation was filed before SWRCB filed its Enforcement Actions. In addition,
14 Plaintiffs argue that under equitable principles, the Court should issue a stay because the
15 Enforcement Actions are infected by "fruits of the poisonous tree," since they are based on
16 information obtained from the improper Curtailment Notices and the SWRCB is continuing to
17 rely on the conclusions it prematurely reached about water availability. Plaintiffs further argue
18 that the Curtailment Notice was coercive because it led the recipient to believe they are no
19 longer allowed to divert, and that decision was made without any pre-deprivation hearing.
20 SWRCB's attempt to cure the Curtailment Notice did not cure the due process problems,
21 because it was still based upon SWRCB's prior finding of unavailability and that fines could be
22 imposed based upon this prior finding.

23 BBID and WSID also argue that because there is concurrent jurisdiction and their
24 actions were filed first, the Court actions have priority over the enforcement actions brought by
25 the SWRCB and therefore must be stayed pursuant to *People v. Garamendi v. American*
26 *Autoplan, Inc.* (1993) 20 Cal. App.4th 760. Plaintiffs argue that under this authority, the
27 remedy to enforce exclusive concurrent jurisdiction is a mandatory stay or injunction of the
28 second action (i.e. the SWRCB action).

1 In opposition, SWRCB argues that a stay is not available as CCP 1094.5(g) only
2 authorizes a stay of the operation of a final administrative order or decision and since there has
3 been no final decision on the enforcement actions, a stay is improper because Plaintiffs have
4 not exhausted their administrative remedies. SWRCB further argues that the Curtailment
5 Notices do not make a final determination regarding unavailability and that Plaintiffs will have
6 a full and fair opportunity to present evidence on this issue at the time of the Enforcement
7 Hearing. SWRCB argues that the primary authority relied upon by Plaintiffs' in their moving
8 papers (*National Audubon Society v. Superior Court (1983) 33 Cal.3rd 419*) was
9 distinguishable as it involved private parties as opposed to a case brought directly against the
10 State Agency. According to SWRCB, the rationale for the decision in *National Audubon*
11 finding concurrent jurisdiction was that there are statutory provisions allowing courts to seek
12 referee services in disputes involving private parties and that SWRCB cannot provide a referee
13 when it is an actual party to the dispute. SWRCB further argues that even if there was
14 concurrent jurisdiction, the doctrine of primary jurisdiction would compel the Court to defer to
15 the SWRCB enforcement proceedings because of the special competence of the SWRCB and
16 the need for resolution of these issues under a regulatory scheme².

17 **Analysis:** Addressing some of the points raised above, the Court finds that Plaintiffs'
18 reliance on *Garamendi* for a mandatory stay or injunction in the immediate case is misplaced.
19 In *Garamendi*, the Court of Appeal likened an exclusive concurrent jurisdiction defense to a
20 plea in abatement, which is codified in the demurrer statute at Cal. Code Civ. Proc. 430.10(c)
21 [another action pending]. A plea in abatement is a way to demur *to the second action* in order
22 to have it stayed *by the second court*. The demurring party tells the *second court*, "There is a
23 prior action pending, and thus, you must stay this action." Consistent with this, in *Garamendi*,
24 the issue of exclusive concurrent jurisdiction was presented *to the second court*.

25 In contrast, the immediate case does not involve a second court in a traditional plea
26 abatement setting. If BBID and WSID go to the SWRCB and ask it to stay the Enforcement
27

28 ² The arguments summarized above do not represent the entirety of those raised in the papers.

1 Actions, it will likely be denied. This matter is more tantamount to a motion for injunctive
2 relief because the Plaintiffs are asking the Court to enjoin a party from doing something, i.e.
3 the SWRCB's Enforcement Actions from going forward.

4 In their Reply papers and at the hearing, Plaintiffs' counsel argued that SWRCB was
5 seeking penalties during a time period which preceded the Revised Curtailment Notice
6 suggesting that a final determination of unauthorized diversion of water had already taken
7 place (by BBID). At the hearing, BBID's counsel cited *SJCBC LLC v. Horwedel*, a Sixth
8 Appellate District case involving nuisance abatement compliance orders by the City of San
9 Jose against medical marijuana facilities. The trial court held that the collectives should have
10 exhausted administrative remedies, but the Sixth Appellate District held that this was not
11 possible without risking penalties for noncompliance. "Under the Code provisions cited above,
12 a nuisance abatement compliance order issued by the director is not necessarily the final
13 administrative determination concerning whether there was a violation of the Code—i.e., a
14 nuisance—and whether the person charged with the violation failed to comply with the order
15 and correct it. Under certain circumstances, an administrative board will conduct a hearing,
16 review the compliance order, and make a determination on those issues that is final and
17 thereafter subject to judicial review. However, the person who receives a compliance notice
18 cannot challenge it immediately by seeking an administrative review hearing. Only the
19 director can initiate a hearing. Thus, if a person disagrees with the order, he or she cannot
20 comply under protest and then initiate an administrative review. The person must take a risk of
21 noncompliance and then wait for the director to initiate a hearing. Then, and only then, can the
22 person administratively challenge the order and seek to have it rescinded." (*SJCBC LLC v.*
23 *Horwedel* (2011) 201 Cal. App. 4th 339, 347-348.) "[W]e note that where, as here, an
24 administrative procedure to review compliance notices exists but cannot be initiated by a party
25 receiving such a notice, and where, as here, the person who can initiate the administrative
26 process does not do so, application of the Doctrine would not serve any of the policies it was
27 intended to promote: it would not bolster administrative autonomy; permit the administrative
28 review board to resolve factual issues, apply its expertise, and exercise statutorily delegated

1 remedies: mitigate damages; or promote judicial economy. [Citation.] On the other hand,
2 applying the Doctrine here would allow the director to issue nuisance abatement notices
3 prohibiting activity by a lessee and then insulate the notices from administrative and judicial
4 review by obtaining the lessor's compliance with the abatement order. We do not believe the
5 Doctrine was designed or intended to shield administrative actions from any review."
6 (*Horwedel, supra*. 201 Cal.App.4th at p. 350.)

7 In the immediate case, it is important to note that the motions before the Court are to
8 stay the Enforcement Actions, not to dismiss this Court action. *Horwedel* involved a case
9 where the trial court barred the association's petition for failing to exhaust administrative
10 remedies that were not available to the petitioners. In reversing, the Court of Appeal concluded
11 that nuisance abatement notices prohibiting activity should not be insulated from
12 administrative or judicial review by obtaining compliance with the notice. Here, there is no
13 request to dismiss or bar judicial review of the actions taken by SWRCB. The request is to
14 stay and/or enjoin an administrative hearing by a state agency. Clearly, this Court has
15 authority to review any final decisions made by the SWRCB once they are made. *Horwedel*
16 does not go as far as to mandate a stay of the administrative proceeding. In addition, it remains
17 somewhat unclear as to whether a private party can initiate an administrative proceeding in
18 response to a curtailment notice as opposed to the facts in *Horwedel* where only the Director of
19 City Planning could initiate the administrative review.


20 While the Court acknowledges the many points raised by Plaintiffs, there are sound
21 policy reasons for allowing the administrative process to proceed. The exhaustion doctrine is
22 principally grounded on concerns favoring administrative autonomy, administrative expertise
23 and judicial efficiency (i.e. overworked courts should decline to intervene in an administrative
24 dispute unless absolutely necessary.) *State Farm Fire and Casualty Co. v. Superior Court*
25 (1996) 45 Cal.App.4th 1093. The primary jurisdiction doctrine advances two related policies:
26 it enhances court decision-making and efficiency by allowing courts to take advantage of
27 administrative expertise, and it helps assure uniform application of regulatory laws. *State Farm*
28 *Fire and Casualty Co., supra*, 45 Cal. App.4th at Pg. 1111-1112. In the instant case, both

1 BBID and WSID will have the opportunity to present evidence at the administrative
2 enforcement hearing regarding their respective rights to the water before a tribunal that is
3 required to be impartial, fair and neutral, and has the specific expertise to adjudicate these
4 issues. "When, as here, an administrative agency conducts adjudicative proceedings, the
5 constitutional guarantee of due process of law requires a fair tribunal. [Citation.] A fair
6 tribunal is one in which the judge or other decision maker is free of bias for or against a party.
7 [Citations.] Violation of this due process guarantee can be demonstrated not only by proof of
8 actual bias, but also by showing a situation 'in which experience teaches that the probability of
9 actual bias on the part of the judge or decisionmaker is too high to be constitutionally
10 tolerable.' [Citation.] [¶] Unless they have a financial interest in the outcome [citation],
11 adjudicators are presumed to be impartial [citation]." (*Morongo Band of Mission Indians v.*
12 *State Water Resources Control Board* (2009) 45 Cal.4th 731, 737.) To the extent that the
13 Plaintiffs claim the process is procedurally deficient (i.e. biased or pre-determined), they will
14 have the opportunity to raise those issues to the Court, but there simply is not enough evidence
15 at this point for the Court to reach that conclusion.

16 For the reasons set forth above, the respective Motions to Stay and/or Enjoin the
17 Enforcement Actions are **DENIED**. The Court is mindful of the fact that special
18 considerations need to be made and careful coordination and management is necessary to avoid
19 duplicity, preserve resources and avoid inconsistent rulings. The Court is confident that this
20 can be accomplished while still allowing the issues before the SWRCB to be adjudicated.

21 SO ORDERED.

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23 Dated: September 24, 2015



24 Honorable Peter H. Kirwan
25 Judge of the Superior Court
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