SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

Coordination Proceeding
Special Title (Rule 3.550)

CALIFORNIA WATER CURTAILMENT CASES

JUDICIAL COUNCIL
COORDINATION PROCEEDING
NO. **4838**[1]

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 Costs, 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.

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

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

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

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

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

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

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

---

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

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

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

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

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

While the Court acknowledges the many points raised by Plaintiffs, there are sound policy reasons for allowing the administrative process to proceed. The exhaustion doctrine is principally grounded on concerns favoring administrative autonomy, administrative expertise and judicial efficiency (i.e. overworked courts should decline to intervene in an administrative dispute unless absolutely necessary.) *State Farm Fire and Casualty Co. v. Superior Court (1996) 45 Cal.App.4th 1093.* The primary jurisdiction doctrine advances two related policies: it enhances court decision-making and efficiency by allowing courts to take advantage of administrative expertise, and it helps assure uniform application of regulatory laws. *State Farm Fire and Casualty Co., supra, 45 Cal. App.4th at Pg. 1111-1112.* In the instant case, 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. "When, as here, an administrative agency conducts adjudicative proceedings, the constitutional guarantee of due process of law requires a fair tribunal. [Citation.] A fair tribunal is one in which the judge or other decision maker is free of bias for or against a party. [Citations.] Violation of this due process guarantee can be demonstrated not only by proof of actual bias, but also by showing a situation 'in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.' [Citation.] [¶] Unless they have a financial interest in the outcome [citation], adjudicators are presumed to be impartial [citation]." (*Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4th 731, 737.) To the extent that the Plaintiffs claim the process is procedurally deficient (i.e. biased or pre-determined), they will have the opportunity to raise those issues to the Court, but there simply is not enough evidence at this point for the Court to reach that conclusion.

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

SO ORDERED.

Dated: September 24, 2015

Honorable Peter H. Kirwan
Judge of the Superior Court