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7 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

8 In the Matter of the Administrative Civil)
Liability Complaint Against Byron)
9 Bethany Irrigation District)
10 In the Matter of the Draft Cease and)
Desist Order Against the West Side)
11 Irrigation District)

**PROSECUTION TEAM'S RESPONSE
TO SAN JOAQUIN TRIBUTARIES
AUTHORITY JANUARY 25, 2016,
LEGAL BRIEF**

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1 **I. INTRODUCTION**

2 On February 22, 2016, the Prosecution Team moved to strike the January 25 San
3 Joaquin Tributaries Authority (SJTA) Legal Brief as nonresponsive to the Hearing Officer's
4 direction for pre-hearing briefing of specific legal issues in the BBID matter. The Prosecution
5 Team alternatively requested that the Hearing Officer accept the brief as SJTA's written
6 opening statement. The Prosecution Team also requested leave to separately respond. On
7 February 29, SJTA submitted an Opening Brief, incorporating the Legal Brief by reference.
8 The January 25 SJTA Legal Brief is the last brief requiring Prosecution Team response
9 before the hearing, and SJTA's arguments relate to issues raised in other pre-hearing legal
10 briefs and motions to dismiss. In order to provide the Hearing Team with the opportunity to
11 consider these issues as soon as possible, and consistent with the Prosecution Team's
12 Motion to Strike, the Prosecution Team requests leave to submit this response.

13 **II. ARGUMENT**

14 **A. The Board has jurisdiction over BBID's unauthorized diversions**

15 SJTA argues that the "ACL Complaint is unlawful because it is based on the
16 unauthorized regulation of pre-1914 water rights." (SJTA Legal Brief, at p. 1:27-28.) SJTA
17 argues that the June 12 Unavailability Notice is an unlawful "regulation" of pre-1914
18 appropriative rights. (*Id.*, at p. 2:26-28 ["the ACL Complaint represents an enforcement
19 action an alleging BBID violated of the *Curtailment Notice regulation*" (grammar in original;
20 italics added)].) SJTA argues that the Board lacks continuing jurisdiction to regulate pre-
21 1914 rights. (*Id.*, at p. 6:14-20.) The Prosecution Team responded to substantially similar
22 arguments in its January 25 Pre-Hearing Brief of Legal Issues (at Parts III.D, and Part IV), in
23 its February 22 Response to Pre-Hearing Briefs of Legal Issues (at Part II.A-B), and in its
24 February 22 Opposition to BBID's Motions to Dismiss (at Part III.A), and incorporates those
25 responses here. The Board has enforcement jurisdiction over diversions in excess of the
26 water available for BBID's claimed pre-1914 right.

27 **B. The Board has jurisdiction to investigate water supplies and demands**

28 SJTA argues that the Board lacks jurisdiction to initiate the drought water availability

1 supply and demand analysis at issue in these proceedings. (SJTA Legal Brief, at p. 3:1-16.)
2 SJTA misconstrues what the Division of Water Rights did during 2014 and 2015. The Board
3 has broad authority to investigate water supply and demand, particularly during the drought
4 emergency. (*Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463,
5 1481-1482; *Young v. State Water Resources Control Board* (2013) 219 Cal.App.4th 397,
6 405; see also Water Code § 1051, 183.) Governor Brown's January 17, 2014, Drought State
7 of Emergency Proclamation and the April 1, 2015, Executive Order B-29-15, and the
8 Board's emergency drought regulations, strengthen and enhance this authority.

9 SJTA also misconstrues the term "water availability analysis" to mean only the
10 analyses prepared and reviewed by the Division's Permitting Unit for water right permits.
11 (SJTA Legal Brief, at p. 3:1-16.) What the Division did to analyze supply and demand to
12 determine drought water availability in 2014 and 2015 is different than the point-of-diversion
13 water availability analyses used in Permitting, and is well within the Division's authority.
14 (Prosecution Team Exhibits WR-7, pp. 3-4, and WR-9, p. 6, n. 3; see also Water Code §§
15 1275, subd. (a), 1375, subd. (d), 1243, 1243.5, and 23 Cal. Code Regs. § 782.)

16 **C. BBID's due process rights are protected by these proceedings**

17 SJTA argues that the ACL Complaint itself violates BBID's due process rights. (SJTA
18 Legal Brief, at pp. 3-4.) These arguments are essentially identical to the due process
19 argument in BBID's February 3 Motions to Dismiss (at Part III.B). The Prosecution Team
20 responded to those arguments in its February 22 Opposition to BBID's Motions to Dismiss
21 (at Part III.B), and incorporates that response here. The due process rights of the parties are
22 protected by these proceedings.

23 **D. Staff is authorized to issue the ACL Complaint**

24 SJTA argues that the Board lacks standing to issue the ACL Complaint against BBID.
25 (SJTA Legal Brief, at pp. 5-6.) SJTA argues that the Board cannot demonstrate injury to
26 itself because BBID only diverted water that was available to other pre-1914 claimants. (*Id.*
27 at p. 6.) This is substantially similar to arguments raised by CDWA and CCSF in their
28 January 25 Pre-Hearing Briefs of Legal Issues, and by BBID in its January 25 Motion to

1 Dismiss for Lack of Authority Under § 1052. (CDWA Brief, at Part II, CCSF Brief, at Part I.A,
2 and BBID's Motion to Dismiss for Lack of Authority Under § 1052, at Parts III.3-4.) The
3 Prosecution Team responded to those arguments in its February 22 Response to Pre-
4 Hearing Briefs of Legal Issues (at Parts III.A-C), and incorporates those responses here.
5 Water Code section 1052 applies to BBID's diversions in excess of water available to serve
6 its claimed right.

7 SJTA also argues that the Board cannot pursue this enforcement action because it
8 lacks ability to represent injured water users. (SJTA Legal Brief, at pp. 6.) SJTA is wrong,
9 because Water Code section 1052 does not require injury to water users in order to pursue
10 enforcement. Unauthorized diversion is a trespass, itself sufficient for administrative
11 enforcement. (Water Code § 1052, subds. (a), (c), (d)(2).)

12 **E. The water supply and demand analysis is the subject of this hearing**

13 SJTA argues that the staff determinations of unavailability are arbitrary and
14 capricious and lack evidentiary support. (SJTA Legal Brief, at pp. 6:22-7:4.) These
15 arguments involve contested issues of fact. (*Id.*, at pp. 7-9.) SJTA does not tie its arguments
16 to any evidence or exhibits submitted by the parties. These issues will be the subject of
17 Phase 1 of these proceedings, to which SJTA is a party, and the parties may address the
18 sufficiency of the evidence in closing briefs.

19 SJTA also argues that the Board has not taken an official position regarding the
20 extent to which stored water releases are available to Delta diverters. (SJTA Legal Brief, at
21 pp. 9-10.) That question is before the Board in these proceedings, with respect to the
22 availability of water to serve BBID and WSID during the violation periods. But the Board and
23 the courts have resolved the general question such that Delta diverters do not have any
24 right to divert stored water releases, at least not without compensating the owner. The
25 Prosecution Team briefed these issues in its February 22 Response to Pre-Hearing Briefs of
26 Legal Issues (at Parts III.C.1-3), and incorporates those responses here.

