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19 Additional counsel on following page

20 **BEFORE THE STATE WATER RESOURCES CONTROL BOARD**

21 ENFORCEMENT ACTION ENF01949
22 DRAFT CEASE AND DESIST ORDER
23 REGARDING UNAUTHORIZED
24 DIVERSIONS OR THREATENED
25 UNAUTHORIZED DIVERSIONS OF
26 WATER FROM OLD RIVER IN SAN
27 JOAQUIN COUNTY

28 ENFORCEMENT ACTION ENF01951
DRAFT ADMINISTRATIVE LIABILITY
COMPLAINT REGARDING
UNAUTHORIZED DIVERSIONS BY
BYRON-BETHANY IRRIGATION
DISTRICT

**CENTRAL DELTA WATER AGENCY and
SOUTH DELTA WATER AGENCY
OPENING STATEMENT**

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AGENCY

1 Central Delta Water Agency and South Delta Water Agency respectfully present
2 this Opening Statement for both enforcement proceedings.

3 **I. INTRODUCTION AND OVERVIEW OF THE HEARING**

4 The WSID/BBID enforcement actions have highlighted the complex disputes of
5 fact and law between the Delta stakeholders, but provide an insufficient forum to
6 address and resolve them. At the hearing, the hearing officers will watch a convoluted
7 story unfold.

8 The Prosecution Team will explain that Division staff did the “best they could”
9 under rushed circumstances to compile an enormous global excel database of all water
10 right demand and supply in the Sacramento-San Joaquin Basins gleaned from several
11 different years of annual water right reports and DWR “natural flow” calculations (the
12 “2015 Global Spreadsheet”). Division staff then used the excel database to generate
13 charts as a proxy to illustrate that water was unavailable - not at any particularly location,
14 but rather in entire watersheds simultaneously. This testimony will be presented to you
15 by lower level staff members, with no hydrology credentials, who admit making
16 absolutely no decisions about how to perform the water availability analysis and none of
17 the actual judgment calls about when to declare water unavailable during 2015.

18 Due to a complete lack of recognition of the vast reservoir of water contained in
19 the Delta channels in the 2015 Global Spreadsheet, the Delta parties (BBID, WSID,
20 CDWA, SDWA) will be forced to begin their presentation of evidence with the “Delta
21 101.” The evidence will illustrate the basic hydrology of the Delta that has provided
22 available and usable water for WSID and BBID for over one hundred years, including
23 pre-project drought years. The evidence will also show how the Division’s rushed,
24 conglomerated global database fails to accurately represent actual conditions in 2015,
25 ignores the basic hydrology of the Delta, and cannot serve as a legitimate method to
26 determine water availability at the WSID and BBID points of diversion. The Delta parties
27 will illustrate how the water rights for the largest diverters in the system were mishandled
28 in the database and additional available supplies were ignored, making the colorful
“charts” that Division staff generated from the excel database unreliable and misleading.

1 The Export interests (DWR, SWC) will retort that the Division’s database method
2 can essentially be ignored, because they agree that the Delta always has water, but in a
3 hypothetical 2015 no-project 2015 world, they predict salinity would have been too high
4 for irrigation (relying on purported new DSM2 modeling efforts undisclosed and
5 unavailable to both the Delta parties and the State Board). The exporters will urge a
6 new rule, declaring water unavailable for the Delta whenever there is doubt that the
7 water available under this hypothetical world could harm crops (without any actual
8 vetting of what standard would be used for this new rule).

9 The Prosecution Team will then join these Export interests, arguing that, *in*
10 *hindsight*, the Division properly ignored the vast amount of water actually present in the
11 Delta Channels from the “supply” side of the 2015 Global Spreadsheet because it was
12 probably too salty to use. The evidence will show, however, that the Prosecution Team
13 never actually performed any analysis to reach this conclusion, admit that they are
14 incapable of doing so in-house, and never previously informed BBID or WSID that they
15 were basing water unavailability determinations on an assumed quality problem, rather
16 than a quantity problem.

17 On this record, the Prosecution Team will proceed to ask the Hearing Officers to
18 impose a monetary fine in the millions of dollars against BBID - a pre-1914 right holder
19 which has diverted water from the Delta for over one hundred years, through multiple
20 droughts, without prior scrutiny. Similarly, the Prosecution Team will seek a cease and
21 desist order against WSID, holder of another century old Delta diversion right, to punish
22 WSID for meager diversions of 8 cfs during the summer of 2015 necessary to keep the
23 permanent crops in the district alive. All in the name - as Delta Watermaster Michael
24 George has testified - of making a good “test case” to set precedent for the future of the
25 Delta.

26 We urge the hearing officers to consider the ramifications of using this circus to
27 resolve one of the most critically important water law issues of our time. Instead of
28 repeating legal matters already briefed, we take this opportunity to identify key issues we
hope the Hearing Officers focus on should they choose to continue on this tortured path.

1 **II. Making New Rules Regarding Water Availability in the Delta Deserves**
2 **a Thorough Public Process.**

3 After promising a fair, public process to address the difficult issue of drought water
4 availability in the Delta during the 2014 workshops, the State Board instead developed
5 its 2015 water availability determinations internally at the staff level, without holding a
6 public workshop to solicit comments on how to perform the methodology or conducting a
7 formal hearing to approve the methodology. Then, after the fact, the Board chose to
8 pursue two “test case” enforcement proceedings to establish precedent it can rely on in
9 the future to essentially threaten diverters into foregoing their water rights.

10 This choice is constitutionally untenable and breeds distrust.

11 As was explained in the SJTA Legal Brief, the State Board knows how to hold
12 public hearings to deal with difficult water availability issues in the Delta - the Term 91
13 proceedings, culminating in WR Order 81-15, provide an example. The State Board only
14 sought enforcement of Term 91 (a curtailment methodology) after it had been (1)
15 developed in a formal public process, and (2) imposed on specific water rights in
16 conformance with due process.

17 It is not too late for the Hearing Officers to turn this ship around. The 2015 Global
18 Spreadsheet method is an invalid underground regulation that cannot be used as the
19 foundation for these enforcement actions. Rather than spending months of time on
20 hearings, briefing, decisions and subsequent litigation over these two improper
21 enforcement proceedings - we should be attacking the disputed issues regarding water
22 availability in the Delta head-on in a properly notice public hearing for that specific
23 purpose.

23 **III. When a Party Has the Power to Produce Stronger Evidence, and Does**
24 **Not Do So, the Weaker Evidence Should be Viewed with Distrust**

25 *If weaker and less satisfactory evidence is offered when it was within the power of*
26 *the party to produce stronger and more satisfactory evidence, the evidence offered*
27 *should be viewed with distrust. Evid. C. §412.*

1 The key decision makers behind the Division’s 2015 Global Spreadsheet water
2 availability method – John O’Hagan and Tom Howard – will not take the stand to explain
3 to you what they did and why they did it. Rather, lower level staff have been tasked with
4 describing what their supervisors did and why, and then self-qualifying themselves as
5 “experts” to opine as to why it was appropriate - despite absolutely no public, or even
6 peer review process, let alone State Board approval.

7 The members of the Prosecution Team will not testify that they personally
8 obtained evidence regarding the effect of WSID’s diversions of City of Tracy wastewater
9 or the sources of drainage actually flowing in WSID’s diversion canals - despite their
10 clear investigatory authority to do so. Rather, they will rely on unsupported conclusions
11 and outdated hearsay to conclude that certain facts exist and therefore conduct is illegal.

12 The Export interests, SWC and DWR, will not present expert testimony in their
13 respective cases-in-chief regarding why they believe water was unavailable to WSID and
14 BBID in 2015 due to quality degradation and will not present any testimony in support of
15 the Division’s 2015 Global Spreadsheet method. Rather, they will seek to admit as
16 improper and untimely rebuttal, expert opinions that rely on substantial modeling work
17 that has been undisclosed and unavailable to the State Board and to the Delta parties.

18 We ask the Hearing Officers to critically consider - do they have the right evidence
19 in front of them to make the decision they are being asked to make?

20 **IV. The Rules of Evidence are Important to the Integrity of this Process.**

21 Assuming this proceeding is legally tenable, it is the role of the Hearing Officers to
22 decide whether the Prosecution Team’s water availability determination was done
23 properly, complies with the law and meets the required burden of proof. However,
24 instead of providing proper factual testimony of what the Prosecution Team staff did to
25 determine water availability for WSID and BBID for purposes of these enforcement
26 hearings, which would have allowed the Hearing Officers to then perform their function,
27 the Prosecution Team witnesses summarized the work performed and decisions *made*
28 *by other higher ranking staff members* of the Division and then litter their testimony with

1 *conclusory statements* about how appropriate this analysis was and why they believe
2 it complies with the law.

3 Unfortunately this disrespect for the rules of Evidence requires the Hearing
4 Officers to undertake a more difficult job. First, the Hearing Officers must sift through the
5 improper testimony of the PT witnesses to try and discern what is truly factual and based
6 on the actual perceptions of the testifying witnesses. Then, the Hearing Officers must
7 decide if this limited factual testimony satisfies the Prosecution Team’s burden of proof.

8 These tasks are made more difficult by the effort to classify Mr. Coats, Ms.
9 Mrowka and Mr. Yeazell as “experts” on matters which they clearly have insufficient or
10 no prior experience, skill or specialized training. The motions in limine detail why these
11 individuals are not “experts” on water availability determinations for the Delta in the eyes
12 of the law. This does not mean that these individuals are not highly qualified to perform
13 their normal duties at the State Board, or do not possess other forms of expertise – but it
14 is clear that they are not experts on the hydrology of the Delta and how one would
15 determine water availability to WSID and BBID at their respective points of diversion.

16 Again, if we are going to undertake to make lasting policy decisions about
17 important issues, we urge the Hearing Officers to think about the quality of the evidence
18 that should be used to make these decisions.

19 We also urge the Hearing Officers to properly limit the rebuttal testimony in these
20 hearings, especially from previously undisclosed experts, to avoid unsubstantiated
21 findings and undue prejudice. If these hearings conclude with a finding that water was
22 unavailable for WSID and BBID due to predicted salinity in a “no-project” world, relying
23 on the SWC undisclosed DSM2 model runs or DWR’s hypothetical conjecture, all trust in
24 the Board will be lost.

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1 **V. The Delta Interests Legal Arguments Represent a Century of Actual**
2 **History and Water Rights Development that Should Not Be Summarily**
3 **Dismissed for Convenience.**

4 The Delta Agencies have consistently and properly made many of the same legal
5 arguments for years. While these arguments, and the laws upon which they are based,
6 may be inconvenient to Export interests, and even to the State Board, they remain valid
7 and provide protections for the Delta which cannot be ignored.

8 While the Prosecution Team and Export interests have argued that, in the
9 hypothetical “no-project world,” salinity levels in the Delta Channels may have been too
10 saline for irrigation in 2015, **no party** has provided case-in-chief evidence to support this
11 theory. Thus, it cannot form the basis of a finding by the Hearing Officers that water was
12 unavailable for WSID or BBID due to quality.

13 Further, even assuming this factual case could be made, it is not the end of the
14 inquiry. The various legal doctrines described in the CDWA/SDWA pre-trial briefing
15 provide special protection to Delta diverters which must be analyzed and applied.

16 The Prosecution Team and Exporters argue that the Delta Protection Act, for
17 example, does not require the Projects to provide salinity control or adequate water
18 supplies for Delta diverters who do not have a sufficient independent water right - which
19 they then circularly argue was insufficient in 2015 due to quality problems.

20 One must ask: *How can an otherwise valid Delta water right become invalid due*
21 *to degradation of the quality of water present in the Delta channel if the Projects have an*
22 *on-going legal obligation to maintain the quality of the water in that channel?* If the
23 answer is as the Export interests advance - that the water right disappears whenever
24 water quality would degrade under hypothetical “no-project” conditions - then what
25 rationale supports imposing water quality standards on the Projects which require the
26 release of stored water to maintain agricultural salinity standards in the Delta? The
27 answer is of course - none. And there is the rub.

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1 These water quality obligations were imposed on the Projects by the Legislature
2 and the State Board because senior Delta diversion rights do not disappear when the
3 Delta channels get saltier, they are merely impacted to differing degrees in different
4 locations. One of the express purposes of both the SWP and CVP was to reduce this
5 impact. Also, the construction and operation of the Projects further impairs the Delta
6 ecosystem and the Delta diversion rights by depriving the Delta of winter flushing flows
7 that would otherwise make the channels more resistant to saline intrusion in the summer
8 months of drought years. The Projects' obligation to maintain salinity control for the
9 Delta to lessen the impact of saline intrusion in the summer was part of the overall
10 bargain to balance what is otherwise a continual removal of fresh water supplies from
11 the Delta year in and year out.

12 The Export interests obviously want to protect stored water for their own use and
13 do not want to be burdened with the sometimes large obligation to provide Delta salinity
14 control - in short - they want to change the rules by focusing this Board's attention on
15 only those time periods when the Projects provide a benefit to the Delta (late summers of
16 dry years) - ignoring all of the other time periods when the Projects impair the Delta.

17 This reality will be driven home when the evidence shows that not only did the
18 Division's 2015 Global Spreadsheet method ignore the vast reservoir of water available
19 as a source of supply in Delta Channels (regardless of contemporaneous tributary
20 inflows), the Division's method also delayed curtailing the water rights for the Projects
21 long after the Division's own methodology showed there was no water available for the
22 Projects to divert under their own priorities. This delay caused significant quantities of
23 fresh water to be stored by the Projects that otherwise would have flowed into and
24 stayed in the Delta channels for months - providing available supplies to WSID and BBID
25 and further warding off salinity intrusion.

26 It is easy for the Exporters and Prosecution Team to argue: "Delta diverters have
27 no right to stored water" - but this oversimplification masks a much more nuanced factual
28 and legal relationship. Delta diverters are not arguing that the Projects must release
certain quantities of water earmarked for diversion at specific pumps in the Delta, without

1 compensation. Rather, Delta diverters are arguing that the Projects have an obligation
2 to release water to meet the salinity standards. These standards were designed to help
3 avoid impairment of valid Delta water rights due to saline intrusion - to help keep the
4 Delta fresh - in recognition of the fact that the Projects storage and export operations
5 generally remove from the Delta the fresh water that would otherwise serve this purpose.
6 This is an indirect benefit - improved quality in some months of some years - that offsets
7 the indirect harm - reduced quality in some months of some years - caused by the
8 Projects. In other words - ***this is a complex symbiotic relationship that cannot be
9 unwound for one isolated set of circumstances without addressing all others.***

10 After four years of drought, and on the cusp of the California "Water Fix" effort - it
11 is understandable that DWR, the Export interests and even the State Board, are
12 motivated to question whether the price the Projects are paying is too high; whether it is
13 time to change the rules.

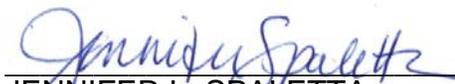
14 But if this question needs to be answered - a rushed enforcement proceeding
15 against two isolated Delta diverters, with shoddy evidentiary support - is not the place to
16 do it.

17 Dated: February 29, 2016

Respectfully submitted,

SPALETTA LAW PC

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19 By:


JENNIFER L. SPALETTA
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20
21 Dated: February 29, 2016

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