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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
CONSOLIDATED WRITTEN OPENING
STATEMENT**

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1 **I. SUMMARY**

2 These proceedings address: (1) whether Byron-Bethany Irrigation District (BBID)
3 should receive an Administrative Civil Liability (ACL) for unauthorized diversions from June
4 13 through June 24, 2015, and, if so, in what amount; and (2) whether the West Side
5 Irrigation District (WSID) should receive a Cease and Desist Order (CDO) for actual or
6 threatened unauthorized diversions beginning on May 1, 2015, and, if so, on what terms.

7 The consolidated Phase 1 addresses whether there was water available for diversion
8 under BBID's or WSID's claimed rights during the relevant periods. Evidence will show that
9 during the extreme drought conditions of 2015, Division of Water Rights staff closely
10 monitored available water supplies and demands using the best available information and,
11 wherever possible, made assumptions regarding projected supplies and demands in favor
12 of availability for diverters. Yet drought conditions were so severe that staff determined that
13 there was no water to serve post-1914 water rights, including WSID's License 1381, as of
14 May 1, 2015, and that there was no water to serve pre-1914 water right claims from 1903
15 and later, including BBID's pre-1914 claim, as of June 12, 2015. Actual supply and demand
16 information available since those dates shows that the Division's determinations were
17 correct. BBID and WSID critique the Division's drought water availability supply and demand
18 methodology, but do not expose any significant flaws. BBID and WSID offer an alternate
19 theory of water availability in the Delta, but that theory fails to account for the actual
20 conditions in 2015, and cannot demonstrate availability to either BBID or WSID.

21 Evidence will show in the BBID Phase 2 proceeding that BBID diverted up to 1,887
22 acre-feet (af) from June 13 through June 24, 2015, without any claim of right other than
23 BBID's pre-1914 claim. Applying the penalties available during drought emergencies under
24 Water Code section 1052, and considering the relevant circumstances under Water Code
25 section 1055.3, BBID should receive an ACL in an amount of at least \$1,418,250.

26 Evidence will show in the WSID Phase 2 proceeding that WSID admits to diverting
27 735.51 af under License 1381, or under no claim, from May 1 through May 13, 2015, and
28 85.08 af pursuant to an agreement to use Banta-Carbona Irrigation District's pre-1914 claim

1 (which was subject to the June 12 unavailability determination), from June 17 through June
2 27, 2015. WSID also diverted and threatens to divert tailwater in excess of any valid claim.
3 WSID also threatens, based on similar diversions in 2014, to divert wastewater discharged
4 by the City of Tracy under an agreement that required, but did not have, approval of a
5 wastewater change petition under Water Code section 1210. Any of these actual or
6 threatened unauthorized diversions are sufficient for a CDO under Water Code section
7 1831, subdivision (d)(1). WSID should receive a CDO prohibiting diversions under any of
8 these sources during periods of unavailability unless WSID takes steps to ensure that any
9 diversions are within its rights.

10 **II. PROCEDURAL BACKGROUND**

11 The Prosecution Team issued the Draft CDO to WSID on July 16, 2015. (WR-1.)
12 WSID requested a hearing on August 7, 2015. (WR-3.) The State Water Board issued a
13 Hearing Notice on September 1, 2015. The Prosecution Team issued the ACL Complaint to
14 BBID on July 20, 2015. (WR-4.) BBID requested a hearing on August 6, 2015. (WR-6.) The
15 Board issued a Hearing Notice on August 19, 2015. The Hearing Teams phased and
16 partially consolidated the BBID and WSID proceedings to address common issues of water
17 availability. (Notice of Revised Schedule, dated January 8, 2016.)

18 **III. LEGAL STANDARDS**

19 **A. Administrative Civil Liability**

20 “The diversion or use of water subject to [Division 2 of the Water Code] other than as
21 authorized in [Division 2] is a trespass.” (Water Code § 1052, subd. (a).) “Any person or
22 entity committing a trespass ... may be liable [for civil liabilities].” (*Id.*, subd. (c).) The State
23 Water Board may administratively impose civil liability for unauthorized diversions. (*Id.*,
24 subd. (d)(2).) During drought emergencies, section 1052 authorizes civil liability of up to
25 \$1,000 for each day of trespass, plus \$2,500 for each acre-foot of water diverted in excess
26 of right, although the Board must consider relevant circumstances in setting the actual
27 liability amount. (*Id.*, subd. (c)(1), § 1055.3.) Water Code section 1052 applies to
28 unauthorized diversions made under claim of a pre-1914 right. (*Young v. State Water*

1 *Resources Control Board* (2013) 219 Cal.App.4th 397, 406, *Millview County Water District v.*
2 *State Water Resources Control Board* (2014) 229 Cal.App.4th 879, 895.)

3 **B. Cease and Desist Order**

4 The State Water Board may issue a cease and desist order to “any person ...
5 violating, or threatening to violate ... the prohibition set forth in Section 1052 against the
6 unauthorized diversion or use of water subject to this division.” (Water Code § 1831, subd.
7 (a), (d)(1).) Water Code sections 1052 and 1831 apply to post-1914 appropriative permits
8 and licenses, and to unauthorized diversions made under pre-1914 claims. (*Young, supra*,
9 219 Cal.App.4th at 406, *Millview, supra*, 229 Cal.App.4th at 895.)

10 **C. Burden of Proof**

11 “Except as otherwise provided by law, a party has the burden of proof as to each fact
12 the existence or nonexistence of which is essential to the claim for relief or defense that he
13 is asserting.” (Cal. Evid. Code § 500.) The preponderance of the evidence standard applies
14 in all proceedings except where otherwise provided by law. (Cal. Evid. Code § 115.) Under
15 this standard, “a party must persuade...by the evidence presented...that what he or she is
16 required to prove is more likely to be true than not true.” (Judicial Council of California, Civil
17 Jury Instructions, No. 200.¹) Where parties submit conflicting evidence, “preponderance of
18 the evidence’ means evidence that has more convincing force than that opposed to it.”
19 (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 324 [internal citations omitted].)

20 Although a higher standard sometimes applies in cases involving fundamental vested
21 rights, usufructuary water rights generally do not trigger a higher standard. (Water Right
22 Order 87-2, p. 25² [citing *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419,
23 445, and *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853].)

24 There is no need for a higher standard in these enforcement proceedings, as no water right
25 claimant holds a vested right to divert water that is not available to serve the claimed right.
26 (*United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 100-101,

27
28 ¹ <http://www.courts.ca.gov/partners/documents/caci-2016-complete-edition.pdf>

² http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/1987/wro87-02.pdf

1 104 ["Unlike real property rights, usufructuary water rights are limited and uncertain. The
2 available supply of water is largely determined by natural forces."].)

3 **IV. PHASE 1: WATER AVAILABILITY**

4 **A. Drought water availability determinations and notices**

5 **1. The purpose of the drought water availability determinations and related 6 notices is to protect the priority system**

7 The State Water Board is authorized to prevent unauthorized diversion of water and
8 to supervise the water rights priority system. (See, e.g., Wat. Code §§ 174, 186, 275, 1050,
9 1051, 1051.5, 1052, 1825; see also *Light v. State Water Resources Control Board* (2014)
10 226 Cal.App.4th 1463, 1481-1482.) Governor Brown's January 17, 2014, Drought
11 Emergency Proclamation (WR-23) and April 1, 2015, Executive Order B-29-15 (WR-31),
12 and the Board's drought emergency regulations adopted under Water Code section 1058.5
13 (e.g., 23 Cal. Code Regs. § 879, subd. (c)), strengthen this authority and remain in effect.

14 In times of drought, it is important to ensure that water to which senior water right
15 holders are entitled is actually available to them, which requires that some water remain in
16 most streams to satisfy senior demands at the furthest downstream point of diversion of
17 these senior water rights. (WR-7, p. 2, WR-9, pp. 2-3.) The failure of junior diverters to
18 cease diversion when no water is available under their priority of right has a direct,
19 immediate impact on other diverters. (*Id.*) In accordance with the water right priority system,
20 staff notifies diverters of a water shortage when natural flows in a watershed are insufficient
21 for a water user's needs, based on their priority of right. (WR-9, p. 3.)

22 Using an earlier version of the methodology at issue here, staff on May 27, 2014,
23 issued notices of unavailability of water to serve all Sacramento and San Joaquin River
24 watershed post-1914 water right holders. (WR-9, p. 4, WR-26.) These were the first such
25 notices since 1977. (WR-7, p. 2.) The relevant 2015 notices are discussed below.

26 **2. Supply and demand methodology**

27 In 2014 and 2015, Division of Water Rights staff determined the availability of water
28 for water rights of varying priorities in various watersheds by comparing the current and

1 projected available water supplies with the total water right diversion demand by month for
2 given watersheds. (WR-9, p. 6.) This concept was originally developed in response to the
3 1977 drought, and memorialized in the 1977 Dry Year Report (WR-152) and the Dry Year
4 Report Appendix (WR-79). (WR-9, pp. 6-7.) Staff adapted the 1977 supply-demand analysis
5 to current conditions, and incorporated the best available information regarding supply and
6 demand. (*Id.*, p. 7.) The methodology is appropriate for this drought, and consistent with the
7 Board's February, 2015, Recommendations for Improving the Administration of the Water
8 Rights Priority System in Dry Years. (WR-7, p. 2, WR-9, p. 7, WR-154.)

9 Staff's drought supply and demand analysis is sometimes referred to as a "water
10 availability analysis," and may be referred to in that way at times in these proceedings. But
11 the drought supply and demand analysis drought is fundamentally different from the site-
12 specific "water availability analysis" prepared and reviewed by the Division's Permitting Unit
13 for water right permit applications. (WR-7, pp. 3-4, WR-9, p. 6, n. 3; see Wat. Code §§ 1275,
14 subd. (a), 1375, subd. (d), 1243, 1243.5, and 23 Cal. Code Regs. § 782.) The Permitting
15 Unit regularly conducts and reviews those water availability analyses for permitting
16 purposes, and Division staff and outside consultants are familiar with them. (*Id.*) Prior to
17 2014, no Division staff or outside consultant attempted to conduct a drought water
18 availability analysis using the supply and demand methodology since at least 1977. (*Id.*)

19 **a) Watershed selection**

20 After utilizing the watershed boundaries as defined in the 1977 Report for the 2014
21 determinations, staff refined the boundaries to allocate Delta supply and demand for 2015.
22 (WR-9, p. 8.) For analytical purposes, staff included the Delta in both the Sacramento and
23 San Joaquin watersheds, but the associated Delta water use demands were parsed
24 according to how much monthly supply came from the Sacramento or San Joaquin
25 watershed. (*Id.*) This "pro-rated" allocation of Delta demand allowed staff to apportion the
26 Delta's fresh water demands based on the percentage of fresh water entering the Delta in
27 any given month. (*Id.*) The "pro-rated" allocation of demand favors diverters in the southern
28 Delta, as it allows them to continue diversion well after San Joaquin River flows by

1 themselves would have allowed. (*Id.*) Division staff does not believe that southern Delta
2 water users would be able to divert Sacramento River water absent Project operations, but
3 staff chose this allocation method to allow more Delta water users to divert for a longer
4 period of time during extreme conditions in 2015. (WR-210, p. 2.)

5 **b) Supply information and assumptions**

6 Staff determined available supplies based on full natural flow (FNF) in rivers using
7 data obtained from the Department of Water Resources (DWR) FNF forecasts and daily full
8 natural flow reporting. (WR-9, pp. 9-11, WR-11, pp. 8-11.) FNF represents the natural water
9 production of a river basin, unaltered by upstream diversions, storage, or by export or import
10 of water to or from other watersheds. (WR-17, pp. 1, 13.) DWR prepares monthly FNF
11 forecasts from February to May each year as part of its Bulletin 120 (B120) reports to assist
12 water managers in making decisions based on water year type. (*Id.*, pp. 1-7.) DWR
13 develops FNF forecasts using specialized statistical analysis within DWR's expertise, and
14 the forecasts are peer reviewed. (*Id.*, pp. 7-13.) DWR calculates daily FNF based on actual
15 river monitoring at various locations. (*Id.*, pp. 13-14.)

16 Staff used DWR's B120 50%, 90% and 99% FNF exceedance forecasts, together
17 with DWR's daily FNF data, for the supply analyses. (WR-9, pp. 9-14, WR-11, pp. 8-11.)
18 Staff used daily FNF as a tracking tool to verify the monthly B120 supply forecasts, and also
19 as a backup supply in the event that the daily-averaged monthly B120 forecast was less
20 than daily FNF. (WR-9, pp. 12-13, WR-11, pp. 9-10) Staff made every assumption
21 conservatively to estimate supply in favor of diverters. For example, if daily FNF values were
22 higher than forecasted FNF values, staff used daily FNF values. (WR-9, p. 10.) When DWR
23 posted negative daily FNF values, staff replaced these with zero, which increased the
24 calculated amount of available supply. (WR-11, p. 10.) Staff used DWR's 50% exceedance
25 forecasts, which more generously estimate supply, in all cases except where the daily FNF
26 tracked very close to the 90% forecast. (WR-9, p. 11.) Staff checked the DWR forecasts and
27 river flows against unimpaired flow forecasts provided by the California-Nevada River
28 Forecast Center, and real-time flow conditions from USGS gages. (*Id.*, p. 12.)

1 Staff adjusted the DWR supply information in key ways that conservatively estimate
2 supply in favor of diverters, for example, staff included supplemental San Joaquin River and
3 Delta supplies with return flows and valley floor sources identified in the 1977 Report and in
4 a 2007 DWR report. (WR-9, p. 13.) At the request of Delta stakeholders, staff applied a 40%
5 reduction to the reported irrigation demand for Delta users to account for return flows within
6 the Delta. (*Id.*) Although this adjustment is to the demand side of the calculation, the effect
7 increased supply for the analysis. (*Id.*)

8 **c) Demand information and assumptions**

9 Staff projected demand based on the actual diversion and use information regularly
10 reported to the Division by water right permittees, licensees and other diverters and
11 collected in the Division's publicly-accessible databases. (WR-9, p. 14, WR-11, pp. 2-3.)
12 Diverters must submit diversion and use information accurately and to the best of their
13 knowledge, so this represents the best available demand data. (WR-9, p. 14.) For the 2015
14 analyses, staff used a four-year average (years 2010 to 2013) to best represent projected
15 demand. (*Id.*, p. 15.) In 2015, staff also included 2014 demand information obtained from an
16 Information Order issued in February, 2015, which provided actual 2014 and projected 2015
17 demand data from the top 90% of riparian and pre-1914 claimants in the Sacramento-San
18 Joaquin and Delta watersheds. (*Id.*, WR-11, pp. 7-8, WR-30.)

19 Staff performed significant quality control on the demand information, again
20 conservatively estimating demand in favor of diverters. For example, where diverters claim
21 pre-1914 and riparian rights, staff assigned all of the demand to the riparian right. (WR-9, p.
22 16.) Staff corrected for excess reporting, beyond a generous 8 af/acre use estimation, which
23 is the worst case water duty for rice. (*Id.*, WR-11, pp. 5-6.) Staff removed non-consumptive
24 demand such as power generation and aquaculture. (WR-9, p. 16, WR-11, p. 6.) Staff
25 removed duplicate diversion reports and made other, case-by-case demand adjustments.
26 (WR-11, pp. 6-7.) The "pro-rated" allocation of Delta demand is also a demand adjustment,
27 favoring southern Delta diverters and approved by Delta stakeholders. (WR-9, p. 17.)

1 **B. Drought water availability determinations relevant to WSID and BBID**

2 **1. There was no water available for diversion under WSID's License 1381**
3 **from May 1, 2015, through November 2, 2015**

4 Using the supply and demand methodology, and including the pro-rated Delta
5 demand allocation to the Sacramento River watershed, staff determined that there was no
6 water to serve post-1914 water rights in the Sacramento River Watershed and the
7 Sacramento-San Joaquin Delta by May 1, 2015. (WR-9, p. 8, WR-11, pp. 11-14, WR-34,
8 WR-47.) Staff issued a notice of unavailability to these water right holders on May 1, 2015
9 (May 1 Notice). (WR-34.) The May 1 Notice applied to WSID's License 1381. (WR-35.) The
10 May 1 Notice reflects staff's determination that the existing water supplies in the
11 Sacramento River Watershed and Delta were insufficient to meet the demands of diverters
12 with appropriative water right permits or licenses with a priority date of 1914 and later. (WR-
13 9, p. 5, WR-11, p. 14.) Exhibit WR-47 is the April 29, 2015, graph of conditions at the time of
14 the May 1 Notice, and shows that there is insufficient supply to serve all post-1914 water
15 rights between the 90% and 99% forecast points, and that the daily FNF trended closer to
16 the 99% forecast line at this time. (WR-9, p. 18, WR-47.) Conditions of unavailability for
17 License 1381 lasted until November 2, 2015. (WR-44.)

18 **2. There was no water available for BBID's diversions which took place**
19 **from June 13 through June 24, 2015**

20 Using the supply and demand methodology, staff determined that the available water
21 supplies in the Sacramento-San Joaquin River Watersheds and Delta were insufficient to
22 meet the demands of diverters with claims of pre-1914 appropriative rights with a priority
23 date of 1903 and later as of June 12, 2015. (WR-9, p. 5.) Staff issued a notice of
24 unavailability to these water right holders on June 12, 2015 (June 12 Notice). (WR-36.) The
25 June 12 Notice applied to BBID's claimed pre-1914 right (WR-38) and to a pre-1914 right
26 claimed by Banta-Carbona Irrigation District, which WSID had agreed to use in 2015 (WR-
27 39).

28 The June 12 Notice is based on staff's analysis of the combined Sacramento and
San Joaquin watershed. (WR-9, p. 8.) Ahead of the June 12 Notice, staff prepared a

1 separate San Joaquin River watershed-only pre-1914 analysis, but that analysis was
2 rejected as it would have resulted in much deeper and earlier cuts for pre-1914 claimaints.
3 (*Id.*, pp. 8-9.) At that time, staff also prepared a separate Sacramento River pre-1914
4 analysis using both a pro-rated and North Delta method. (*Id.*) This analysis resulted in the
5 same determination as the combined Sacramento and San Joaquin watershed analysis
6 ultimately used for the June 12 Notice. (*Id.*) Exhibit WR-48 is the June 10, 2015, graph of
7 conditions in the combined Sacramento/San Joaquin watersheds at the time of the June 12
8 Unavailability Notice. This graph shows that the combined daily FNF trended downward at
9 ~11,000 cfs and the B120 monthly forecast total was even lower at ~9,000 cfs. (*Id.*, p. 18.)
10 Because the daily FNF was higher, staff used the daily FNF supply trend; using the B120
11 monthly forecast would have resulted in even deeper unavailability. (*Id.*) Conditions of
12 unavailability under the June 12 Notice lasted until September 17, 2015. (WR-44.)

13 **C. The evidence validates the drought water availability determinations**
14 **relevant to WSID and BBID**

15 **1. Actual supply and demand data available since May 1 and June 12, 2015,**
16 **show that the determinations were correct**

17 Exhibit WR-52 shows the combined Sacramento/San Joaquin River basin supply and
18 demand, including daily FNF values as of August 19, 2015. (WR-9, p. 18.) This graph shows
19 that, after the June 12 Unavailability Notice, daily FNF values dropped precipitously,
20 reaching into riparian demand levels before July 1. (*Id.*) Exhibit WR-54 is a graph of the
21 2015 Sacramento River watershed with proportional Delta demand, showing daily FNF
22 supply levels in the pre-1914 demand levels from May through August, 2015. (*Id.*, p. 18.)
23 Exhibit WR-81 is a graph of a supply and demand analysis conducted on October 7, 2015,
24 showing that mean flows at Vernalis were insufficient to meet either BBID's or WSID's water
25 right priorities using the favorable pro-rated Delta demand methodology. (*Id.*, p. 19.) These
26 analyses demonstrate that no water was available for BBID's diversions under its claimed
27 pre-1914 right from June 13 through June 24, 2015, and for WSID's actual or threatened
28 diversions under License 1381 from May 1 through November 2, 2015. (*Id.*)

1 **2. WSID and BBID critique the supply and demand methodology, but do not**
2 **identify any significant flaws**

3 Some of the witnesses shared by WSID and BBID critique aspects of the Division's
4 supply and demand methodology, but do not expose any significant flaws with that
5 methodology, and do not provide a basis for concluding that water was available to WSID or
6 BBID during the relevant periods. For example, contrary to Mr. Bonsignore's suggestion
7 (WSID-121, ¶7), it is not possible for the Division to conduct site-specific water availability
8 analyses for each diverter during periods of unavailability, but such an analysis is not
9 necessary. (WR-210, p. 11.) The Division's watershed and sub-watershed analyses provide
10 a more comprehensive evaluation of drought availability than does a localized stream scale
11 analysis. (*Id.*) Similarly, Mr. Bonsignore's suggestion that wastewater treatment plant
12 discharges would alter the unavailability determinations is unfounded, as the sources for
13 such discharges are difficult, if not impossible, to quantify. (*Id.*) Mr. Bonsignore
14 mischaracterizes the availability of reservoir releases downstream; reservoir releases made
15 for specific purposes pursuant to the water rights that allowed storage are not available for
16 downstream appropriation while those releases serve those purposes. (*Id.*, at 12-13.)

17 Mr. Bonsignore also fundamentally misunderstands the watershed and sub-
18 watershed boundaries used in the Division's analyses, and implies that WSID, BBID and
19 other southern Delta diverters should be counted within the San Joaquin River watershed.
20 (WSID-122, ¶1.) As explained above, due to extremely low flows in the San Joaquin River
21 during 2015, counting southern Delta diverters in that watershed would have resulted in
22 earlier and deeper findings of unavailability. (WR-210, p. 2.) Mr. Bonsignore is correct in that
23 the Division's FNF methodology does not account for downstream contributions into
24 streams, but neither does that methodology account for downstream depletions from
25 streams, e.g., seepage, evaporation, and riparian evapotranspiration, which staff assumed
26 roughly balances with contributions. (*Id.*, pp. 3-4.) Mr. Bonsignore argues that staff should
27 have counted return flows which do not appear to exist. (*Id.*, pp. 6, 8-9.)

28 Mr. Young mischaracterizes the Division's use of the 25 percent "voluntary cutback
program for delta riparian water rights;" the demand changes resulting from that program

1 were accounted for in the Informational Order demand amounts. (WR-209, p. 13.) Including
2 the Informational Order demand information as argued by Mr. Young would not have
3 changed the unavailability identified in the May 1 or June 12 Notices. (WR-211, pp. 3-5.) Mr.
4 Young's application of a 5 percent reduction for total Delta demand based on
5 misrepresentations in water user reports is arbitrary and baseless. (*Id.*, p. 5.) Similarly, Mr.
6 Young's allegations of data entry errors is without basis, and even if correct, would not alter
7 the unavailability determinations for WSID and BBID. (*Id.*) Finally, Mr. Young ignores the
8 Division's significant demand data quality control, and argues for demand adjustments that
9 would not alter the unavailability determinations for WSID and BBID. (*Id.*, p. 7.)

10 **3. The alternate theory of Delta water availability does not account for the**
11 **actual conditions present in 2015, and does not support availability for**
12 **WSID or BBID in June 2015 and later**

13 Other witnesses shared by WSID and BBID put forth an alternate theory of water
14 availability for Delta users which, though not mentioned by name, is the theory of the Delta
15 Pool. (WR-213, p. 2.) This theory requires: (1) Delta channels always have water because
16 they are below sea level; and (2) Delta channels are "primed" with water from prior months
17 such that water of a usable quality is available to Delta diverters for some time after fresh
18 flows into the Delta. (*Id.*) The Prosecution Team agrees that Delta channels open to the
19 ocean and below sea level likely always have water, but these channels do not always have
20 fresh water available for diversion and use. Moreover, tidal flows of ocean water are not
21 available for appropriation.

22 Mr. Burke argues that 1931 and 1939 were drier than 2015, and water was available
23 to WSID in those years, ignoring the actual conditions present in 2015, which were drier
24 than any year on record for the relevant runoff and availability period. (WR-213, p. 5.)
25 Similarly, Dr. Paulsen wrongly relies on water year indices, which place undue weight on
26 stored water. (*Id.*, p. 6.) Simply put, 2015 was the driest year on record for the critical April
27 through July runoff period, and 1931 and 1939 are not comparable to 2015. (*Id.*, pp. 6-16.)
28 Mr. Burke and Dr. Paulsen both ignore 1977, which was more comparable, yet also does

1 not support availability for WSID or BBID in 2015. (*Id.*, p. 30)

2 Dr. Paulsen's assertions that residence time in the Delta is sufficiently large to allow
3 availability for WSID and BBID even months after the last freshwater inflows ignores the
4 effects of the tides within the Delta, which tend to reduce the water quality below that
5 necessary for beneficial uses in much shorter timeframes. (WR-213, pp. 18-30.) Given the
6 extreme drought conditions in 2015, absent State Water Project and Central Valley Project
7 storage releases and diversions during April, May, and June, there would not have been
8 water of suitable quality for diversion at WSID and BBID's points of diversion beginning in at
9 least early June, 2015. (*Id.*, p. 31.)

10 **V. BBID PHASE 2: UNAUTHORIZED DIVERSIONS JUNE 13 THROUGH 24, 2015**

11 **A. ACL Complaint and BBID Subpoena response**

12 The Prosecution Team issued the ACL Complaint based on the information available
13 on July 20, 2015, which was developed during an investigation initiated following public
14 statements by BBID representatives indicating that BBID had not and possibly would not
15 cease diversions following the June 12 Notice. (WR-7, p. 16, WR-9, p. 20, WR-15, WR-90,
16 WR-103.) The Prosecution Team issued a subpoena *duces tecum* (Subpoena) on October
17 29, 2015, seeking, among other things, BBID's records of any claimed alternative rights or
18 supplies to which the diversions following June 12 could be attributed. (WR-170) BBID
19 responded to the Subpoena on December 15, 2015. In reviewing the Subpoena responses,
20 the Prosecution Team found no alternative right or other basis for BBID's June 13 through
21 24 diversions, and on that basis does not propose a reduction in the amount or days of
22 unauthorized diversion. (WR-15, pp. 4-7.)

23 **B. BBID's claimed water rights**

24 BBID diverts from what is now the Intake Channel to the State Water Project's Banks
25 Pumping Plant (formerly Italian Slough). (WR-7, p. 17, WR-15, pp. 1-2.) BBID's sole water
26 right is a pre-1914 claim designated as Statement 021256 (S021256). (*Id.*) S021256 claims
27 recent annual water use ranging from 30,000 af to 50,000 af per year for municipal,
28 industrial and agricultural use. (*Id.*) BBID regularly sells water to other entities, and did so in

1 2015, and BBID regularly purchases water from other entities. (WR-7, pp. 17-18, WR-209
2 pp. 5-6.) The priority date for S021256 is May 18, 1914. (WR-9, p. 20.) S021256 is therefore
3 within the scope of the June 12 Unavailability Notice. (*Id.*) BBID was served with the June
4 12 Unavailability Notice. (*Id.*, WR-38.)

5 BBID self-reports its diversions to DWR, which posts the daily diversion amounts to
6 the publicly-available California Data Exchange Center (CDEC) website. (WR-15, p. 3.)
7 Although the ACL Complaint alleges unlawful diversions from June 13 through June 25,
8 2015, the Prosecution Team has since learned that CDEC posts diversion amounts a day
9 after the actual diversions, therefore, BBID's unlawful diversions took place from June 13
10 through June 24, 2015. (*Id.*, pp. 3-4.)

11 **C. BBID diverted water unlawfully from June 13 through June 24, 2015**

12 According to the CDEC website, BBID diverted 1,887 af from June 13 through June
13 24, 2015. (WR-15, pp. 3-4.) The CDEC data should be considered reliable, given that the
14 information is provided directly by BBID. (*Id.*, p. 2.) However, BBID's Subpoena response
15 includes information indicating that BBID's actual diversions during that period may be
16 1,829.1 af. (*Id.*, p. 4.) The difference appears to be due to a typographical error, either at the
17 CDEC website or within BBID's Subpoena response, regarding the total diversions on June
18 24, 2015. (*Id.*) Based on BBID's record of diversions in recent years, BBID would be
19 expected to divert approximately 1,920 af during any 12-day period in June, and thus the
20 Division's calculated diversion amount of 1,887 af is reasonable. (*Id.*, p. 8.)

21 BBID has not provided any evidence indicating that any of the diversions from June
22 13 through June 24 were under any claim of right other than BBID's pre-1914 claim. (WR-7,
23 pp. 19-20, WR-15, pp. 5-7.) On rebuttal, BBID claims to have diverted 161.22 af from June
24 13 through June 24, 2015, pursuant to an agreement with the Carmichael Water District.
25 (BBID-394.) However, it appears that BBID did not report any of the Carmichael Water
26 District diversions to DWR for posting to CDEC (see WR-90), so those diversion days and
27 amounts should not be subtracted from the amount used to calculate any ACL.

1 **D. BBID should receive an Administrative Civil Liability**

2 Based on the evidence, BBID unlawfully diverted up to 1,887 af over 12 days, from
3 June 13 through June 24, 2015. Water Code section 1052 provides that, during drought
4 emergencies, civil liabilities for unlawful diversions are up to \$1,000 per day of trespass plus
5 \$2,500 per acre-foot. BBID's maximum potential liability is \$4,729,500. (WR-9, p. 21.)

6 In considering the appropriate ACL amount, Water Code section 1055.3 requires
7 consideration of all relevant circumstances, including, but not limited to, the extent of harm
8 caused by the violation, the nature and persistence of the violation, the length of time over
9 which the violation occurs, and any corrective action taken by the violator. In this case, BBID
10 made unauthorized diversions of water from the Intake Channel to the Banks Pumping Plant
11 during the most extreme drought in decades, when there was insufficient water supply
12 available for BBID's claimed water right. (WR-9, p. 21.) BBID was aware that Board staff
13 had determined that there was insufficient water supply available for BBID's claimed water
14 right. (*Id.*) These unauthorized diversions likely reduced or threatened to reduce the amount
15 of water available for downstream water right holders during an extreme drought
16 emergency. (*Id.*) Moreover, BBID's diversions likely reduced the water available for instream
17 resources and riparian habitat within the Delta during an extreme drought emergency. (*Id.*)

18 While it is difficult to quantify for purposes of Water Code section 1055.3 the harm
19 caused by BBID's unauthorized diversions in terms of actual or threatened reductions in
20 water available for downstream water right holders, and it is similarly difficult to quantify any
21 harm caused by the reduction of water available for instream resources and riparian habitat,
22 it is possible to quantify BBID's economic advantage gained through its unlawful diversions.
23 (WR-9, pp. 21-22.) BBID received an economic advantage over other legitimate water
24 diverters in the area by foregoing the costs of buying replacement water during the violation
25 period. In this case, the cost of replacement water can be estimated using a June 10, 2015
26 statement by Mountain House CSD's General Manager as between \$250 and \$1,000 per
27 acre-foot. (*Id.*, WR-100) At 1,887 af unlawfully diverted, and using the most conservative
28 estimate of replacement cost of water (\$250/af), BBID's total avoided cost of purchased

1 water is \$471,750. (*Id.*)

2 The cost of replacement water alone is not a sufficient basis for setting an ACL under
3 Water Code section 1055.3, because penalties would not be higher than the cost of doing
4 business and violators would have no incentive to comply with the law. (WR-9, p. 21.)

5 Therefore, the Prosecution Team recommends using a factor of 3 times the estimated
6 economic benefit here, given the severity of the drought, the duration and public nature of
7 BBID's violation, and the Division's goal of deterrence. (*Id.*) Applying a disincentive factor of
8 three to the replacement cost of water and adding in staff costs in preparing the ACL of
9 \$3,000 brings the recommended ACL amount to \$1,418,250. (*Id.*, WR-7, p. 20.)

10 BBID should receive an ACL in an amount of at least \$1,418,250, to provide a strong
11 disincentive to others who may be tempted to disregard State Water Board staff notices of
12 water unavailability. (WR-7, p. 19.)

13 **VI. WSID PHASE 2: ACTUAL AND THREATENED UNAUTHORIZED DIVERSIONS**
14 **BEGINNING MAY 1, 2015**

15 **A. Draft CDO and WSID Subpoena response**

16 Following investigation of a public complaint, the Prosecution Team issued the Draft
17 CDO based on the information available on July 16, 2015, alleging that WSID was diverting
18 or threatening to unlawfully divert Bethany Drain tailwater discharges, and was threatening
19 to divert wastewater from the City of Tracy under an agreement that required, but did not
20 have, approval of a wastewater change petition. (WR-1; WR-7, p. 4, WR-13, pp. 1-2.)

21 Further supporting the need for the Draft CDO was a July 7, 2015, letter from WSID's
22 attorney to the State Water Board's Executive Director rejecting the unavailability notices
23 and indicating that WSID might resume diversions at any time. (WR-7, p. 4, WR-125.)

24 On July 17, 2015, the Division issued an Information Order seeking additional
25 information regarding WSID's 2015 diversions. (Order DWR-2015-0024.³) WSID's petition
26 for reconsideration was denied on November 5, 2015. (Order WR 2015-0041-EXEC.⁴) While

27 ³

28 http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/infomational_order/dwr_2015_0024.pdf

⁴ http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2015/wro2015_0041_exec.pdf

1 WSID's petition was pending, the Prosecution Team issued a subpoena *duces tecum*
2 (Subpoena) for the same information on October 29, 2015. (WR-169.) WSID responded to
3 the Subpoena beginning on November 30, 2015. In reviewing the Subpoena responses, the
4 Prosecution Team identified additional bases for a CDO.

5 **B. WSID's claimed water rights**

6 WSID holds water right License 1381, originally issued on September 28, 1933, and
7 amended on August 19, 2010. (WR-7, p. 7, WR-13, p. 2, WR-112.) License 1381 has a
8 priority date of April 17, 1916, and authorizes the direct diversion of 82.5 cubic feet per
9 second (cfs) from Old River in San Joaquin County from (1) about April 1 to October 31 of
10 each year for irrigation, and (2) from April 1 to October 31 of each year for municipal,
11 domestic and industrial uses. (*Id.*) The maximum amount diverted shall not exceed 27,000
12 acre-feet per annum (afa). (*Id.*) WSID's annual Report of Licensee for the years 2007
13 through 2013 indicate that it diverted an average of 22,543 afa during that period. (WR-115
14 through WR-121.) WSID's diversions under License 1381 are often hampered by low water
15 levels and poor water quality. (WR-7, pp. 7-10, 12, WR-159, pp. 11, 13, 14.) WSID's
16 License 1381 is within the area covered by the May 1 Notice, and was covered by a similar
17 notice issued in 2014. (WR-13, pp. 2-3, WR-26, WR-34.) WSID was served with the May 1
18 Notice. (WR-9, p. 5, WR-35.) On April 10, 2015, WSID entered into an agreement with
19 Banta-Carbona Irrigation District to allow WSID to pump from the San Joaquin River under
20 Banta-Carbon's pre-1914 right, S000495, which has a claimed priority date of 1912. (WR-
21 13, p. 5, WR-141, WR-142.) The June 12 Notice applies to S000495, and water remained
22 unavailable for that claim until September 17, 2015. (WR-13, p. 5, WR-39, WR-43.)

23 WSID does not hold or claim any other water rights on file with the Division. (WR-7,
24 p. 7.) WSID claims the right to divert wastewater discharged by the City of Tracy into Old
25 River pursuant to agreements entered in 2014 and 2015. (WR-13, pp. 3-5, WR-136, WR-
26 139.) WSID also claims the right to divert tailwater discharged into WSID's unregulated
27 intake channel (sometimes called the Wicklund Cut) from the Bethany Drain. (WR-13, p. 6,
28 WR-123, WR-125.) Until the current drought, however, WSID expressly relied on treated

1 wastewater flows and Bethany Drain tailwater discharges as part of the water available for
2 diversion under License 1381. (WR-209, pp. 14-15, WR-226, p. 3, Att. C, Att. E, WR-227.)

3 **C. WSID diverted and threatened to divert water unlawfully during the 2015**
4 **unavailability period**

5 **1. WSID admits to diverting water unlawfully in May and June 2015**

6 In the Subpoena response, WSID admits to diverting 735.51 af from May 1 through
7 May 13, 2015, under claim of License 1381, or perhaps no claim at all, when no water was
8 available to serve License 1381. (WR-7, p. 5, WR-13, p. 4-5, WR-135.) WSID was aware of
9 the May 1 Notice, and appears to have timed its submittal of the Certification Statement
10 required under the May 1 Notice for immediately after WSID ceased diversions on May 13.
11 (WR-13, p. 4, WR-35, WR-124,⁵ WR-125.)

12 WSID also admits to diverting 85.08 af pursuant to an agreement to use Banta-
13 Carbona Irrigation District's pre-1914 claim over 11 days, from June 17 through June 27,
14 2015, when no water was available under Banta-Carbona's pre-1914 right. (WR-7, p. 5,
15 WR-13, pp. 5-6; WR-135.) WSID diverted Banta-Carbona water until June 12, then ceased
16 diversions for four days before resuming on June 17. (WR-13, p. 6, WR-135; see also WR-
17 140.) This implies that WSID was aware of the June 12 Notice and, at least initially,
18 considered that Notice applicable to its diversions under the Banta-Carbona agreement.

19 These unauthorized diversions during periods of unavailability indicate that WSID
20 remains a threat to continue unauthorized diversions during future periods of unavailability,
21 and are a sufficient basis to issue a CDO under Water Code section 1831, subdivision (d).

22 **2. WSID threatened to divert tailwater in excess of any claim of right**

23 WSID claims to divert "accretion and tile drain return flows" at its pumping station.
24 (WR-7, pp. 6, 10-11, WR-13, p. 6, WR-19, WR-123, WR-125, WR-134.) WSID admits to
25 diverting 2,459.1 af of these flows during May through October, 2015. (WR-13, p. 6, WR-
26 135, p. 8.) These flows come from Bethany Drain, which discharges into WSID's

27 _____
28 ⁵ WR-124 is the Certification Statement referenced in the July 7 letter. The July 7 letter claims that this statement was submitted on May 13, 2015, although the statement itself notes that it was updated by WSID on May 14. WR-124 is submitted only to verify the submittal date, an issue raised in the July 7 letter, and does not form a basis for this action.

1 unregulated intake channel (aka Wicklund Cut) on the Old River just upstream from WSID's
2 pumping station. (WR-7, pp. 6, 10-11, WR-13, p. 6, WR-19, WR-134, WR-150.) Evidence
3 indicates that the Bethany Drain collects water from multiple sources, including from WSID's
4 tile drains, and from lands outside of WSID's boundaries. (WR-7, pp. 6, 10-11, WR-13, WR-
5 159, WR-165, WR-192.) WSID installed a permanent weir in 2015, after installing a
6 temporary weir in 2014, and apparently estimates the Bethany Drain outflow by visual
7 observation once per day. (WR-13, p. 6, WSID-174.)

8 Although WSID claims to balance water pumping with the Bethany Drain discharges,
9 the evidence indicates that on at least 22 days during the 2015 unavailability period, WSID
10 diverted more water than was discharged from Bethany Drain, and another 55 days are
11 missing records from this period. (WR-216, WR-217, WR-234.) In addition, WSID does not
12 balance the diversion of Bethany Drain discharges with WSID's own pumping, but rather
13 with WSID's deliveries to landowners, ignoring conveyance losses. (WR-7, pp. 10-11, WR-
14 13, p. 6; WSID-174.) Evidence indicates that WSID claims diversions of return flows far in
15 excess of return flows generated within the District. (WR-7, pp. 10-11, WR-122.)

16 Even assuming, for the sake of argument, that WSID has the right to divert all of the
17 Bethany Drain discharges, WSID's methods of measuring the discharges and related
18 pumping do not ensure that diversion is balanced to the discharges. Therefore, WSID's
19 diversion of Bethany Drain discharges remains a threatened unauthorized diversion.

20 Moreover, WSID has not presented any documentation of right to divert wastewater
21 discharged from Bethany Drain which originated off of WSID's lands during periods of
22 unavailability for License 1381. (WR-7, pp. 10-11, WR-13, WR-216.) During periods of
23 availability for License 1381, WSID may divert such discharges as abandoned flows, but
24 those diversions must count against WSID's License 1381. (See, e.g., Water Code § 1202,
25 subd. (d).) During periods of unavailability for License 1381, WSID may not divert such
26 discharges without another valid right. WSID's diversion of these flows during the 2015
27 unavailability period demonstrates that WSID may continue such diversions in future periods
28 of unavailability. Moreover, WSID's refusal to count any portion of the tailwater flows against

1 License 1381 indicates that WSID threatens to divert such flows in excess of right even
2 when water is available for diversion under License 1381. These are sufficient bases to
3 issue a CDO under Water Code section 1831, subdivision (d).

4 **3. WSID threatened to divert wastewater from the City of Tracy under an**
5 **agreement that required, but did not have, approval of a wastewater**
6 **change petition under Water Code section 1210**

7 The City of Tracy and WSID entered into a Wastewater Revocable License
8 Agreement in early 2015 to allow WSID to divert the City of Tracy's wastewater discharges
9 (understood to be approximately 14 cfs) from the Old River. (WR-13, p. 5, WR-139.) The
10 City and WSID had entered a similar agreement in 2014, under which WSID diverted
11 1,287.39 af of Tracy wastewater discharges during a period in which water was not
12 available to serve WSID's License 1381. (WR-13, p. 3-4, WR-129, WR-136, WR-137, WR-
13 138, WR-143, WR-184.) The 2014 and 2015 wastewater agreements represent a change in
14 the place of use and/or the purpose of use of the City's treated wastewater, because the
15 City previously abandoned its wastewater discharges into the Old River. (WR-7, pp. 13-15,
16 WR-13, p. 3.) Under the wastewater agreements, the City continued to discharge into the
17 Old River, but WSID purchased the wastewater and diverted the water from Old River
18 downstream at WSID's pumping plant. (WR-13, p. 3.) The City of Tracy did not seek or
19 obtain approval of a wastewater change petition under Water Code section 1210 for either
20 the 2014 or 2015 wastewater agreements, although such approval is required. (*Id.*, WR-7,
21 p. 15.) In addition, neither the City nor WSID hold a valid right to divert the Tracy wastewater
22 from the Old River at WSID's pumping plant, though such a right is required. (WR-7, p. 15,
23 WR-13, p. 3.) Lack of an approved wastewater change petition, and lack of a valid water
24 right permit allowing diversion of the wastewater from the Old River, renders WSID's
25 diversions under the wastewater agreements illegal. The Prosecution Team and WSID
26 generally agree as to the operative facts regarding the Tracy wastewater agreements, and
27 each have requested summary adjudication regarding the applicability of Water Code
28 section 1210 and the need for a valid right under those agreements.

Although WSID apparently did not divert wastewater from the City of Tracy in 2015

1 (WR-13, p. 5, WR-144), the fact that WSID did unlawfully divert City of Tracy wastewater in
2 2014, coupled with the fact that WSID and the City Tracy executed a similar agreement in
3 2015, suggests that WSID and perhaps the City of Tracy may attempt to enter into similar
4 agreements during future periods of unavailability for License 1381, or WSID may attempt to
5 enter into a similar agreement with another wastewater discharger during such periods. This
6 is a sufficient basis to issue a CDO under Water Code section 1831, subdivision (d).

7 **D. WSID should receive a Cease and Desist Order**

8 Based on the facts understood today, and in order to send a strong message to
9 potentially similarly-situated parties, WSID should receive a CDO prohibiting diversions
10 under any of these sources during periods of unavailability unless WSID takes steps to
11 ensure that any diversions are within its rights. (WR-7, pages 6-7 [proposed CDO terms].)

12 **VII. CONCLUSION**

13 For the consolidated Phase 1 proceeding, the Prosecution Team recommends that
14 the Board find that no water was available to serve BBID's diversions under the claimed pre-
15 1914 appropriative water right from June 13 through 24, 2015, and to serve WSID's License
16 1381 and other claimed rights beginning May 1, 2015. For the BBID Phase 2 proceeding,
17 the Prosecution Team recommends that the Board issue an ACL against BBID in an amount
18 of at least \$1,418,250. For the WSID Phase 2 proceeding, the Prosecution Team
19 recommends that the Board issue a CDO against WSID under the terms described above.

20 Date: February 29, 2016

Respectfully Submitted,

21 

22 Andrew Tauriainen
23 **OFFICE OF ENFORCEMENT**
24 Attorney for the Prosecution Team