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BETHANY IRRIGATION DISTRICT  
7

8  
9 BEFORE THE  
10 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

11 In the Matter of ENFORCEMENT ACTION  
12 ENF01951 – ADMINISTRATIVE CIVIL  
LIABILITY COMPLAINT REGARDING  
13 UNAUTHORIZED DIVERSION OF WATER  
FROM THE INTAKE CHANNEL TO THE  
14 BANKS PUMPING PLANT (FORMERLY  
ITALIAN SLOUGH) IN CONTRA COSTA  
15 COUNTY

SWRCB Enforcement Action ENF01951  
WRITTEN TESTIMONY OF RICK  
GILMORE

16  
17 I, Rick Gilmore, declare:

18 My name is Rick Gilmore. I currently serve as the General Manager for the Byron-  
19 Bethany Irrigation District (BBID), a multi-county special district serving portions of Alameda,  
20 Contra Costa, and San Joaquin Counties. BBID provides agricultural and municipal-industrial  
21 (M&I) water throughout seven service areas to over 30,000 acres over 47 miles, including serving  
22 as a wholesaler to the City of Tracy; providing raw water to Mountain House, a community of  
23 15,000 residents in San Joaquin County; providing raw untreated water to two energy plants,  
24 AltaGas San Joaquin Energy Inc. in San Joaquin County and Mariposa Energy, LLC in Alameda  
25 County; providing water to municipal entities such as G3 Enterprises (Gallo), Costco, Safeway,  
26 and Prologis International, LLC, to name just a few; and providing fire suppression water to the  
27 eastern portion of Contra Costa County including the airport in Byron. I have been with BBID  
28 for over 33 years and have been the General Manager for nearly 24 years, since 1993. Prior to

1 serving as BBID's General Manager, I worked in BBID's water operations department, and then  
2 as Superintendent.

3 In addition to serving as the General Manager for BBID, I also serve on the Association of  
4 California Water Agencies' (ACWA) State Legislative and Federal Affairs Committees. I am a  
5 board member on the National Water Resources Association and also serve as Director on the San  
6 Luis & Delta-Mendota Water Authority, a joint powers authority established in 1992 comprised  
7 of 29 member agencies representing approximately 2,100,000 acres within the western San  
8 Joaquin Valley, in San Benito and Santa Clara counties. Additionally, I serve on the East County  
9 Water Management Association.

10 I am a current Board member and past President of California Utility Executive  
11 Management Association. I am past President of ACWA / Health Benefits Authority, a joint  
12 powers authority providing health benefits to approximately 350 member agencies with  
13 approximately 10,000 plan participants, which has recently merged with the ACWA Joint Powers  
14 Insurance Authority. In addition to serving on numerous ACWA committees, I served on the  
15 Board of Directors of ACWA, a consortium of 450 member agencies, from 2008-2011. I  
16 formerly served on Power Water Resources Pooling Authority and am a former Commissioner of  
17 the San Joaquin County Water Advisory Commission.

18 I served as General Manager of the Plain View Water District (PVWD), a position in  
19 which I guided the consolidation of PVWD with BBID in 2004. I serve as General Manager of  
20 the Byron Sanitary District and as Executive Director of the Byron-Bethany Joint Powers  
21 Authority and the Byron-Bethany Public Finance Authority.

22 In my various roles, including my more than 33 years with BBID, I am familiar with the  
23 history of water operations in the Delta region and with water availability as it relates to BBID. As  
24 part of more than three decades of involvement in water operations in the Delta, I have read many  
25 volumes of materials related to the use of Delta water, including use and availability in dry years.  
26 My review of materials over the years has included review of Department of Water Resources  
27 (DWR) publications from the 1920s and 1930s, including DWR's Bulletin 23-29 through Bulletin  
28 23-35; Bulletin 21-1929; many of the documents from the litigation DWR initiated against BBID

1 from the 1976-77 drought, including the deposition of Harvey O. Banks (Exhibit BBID294); and  
2 others. In 2014, with the ongoing drought conditions and the threat of curtailments, I  
3 commissioned the District's Consulting Engineer, CH2M, to study water availability in the Delta  
4 as it relates to BBID. CH2M served as BBID's consulting engineer since 1964, and represented  
5 BBID in litigation brought by DWR against BBID and others resulting from water use during the  
6 1976-77 drought. (Exhibit BBID336.) My experience and study of the historical water use along  
7 with the information from our engineers helped inform my decisions in 2015.

8 I believed the State Water Resources Control Board's (SWRCB) June 12 directive to  
9 cease diversions was inappropriate because water has always been available to BBID during the  
10 month of June, and the SWRCB's analysis ignored the presence of water in the Delta that exists  
11 even when flows into the Delta subside. Heading into the spring and summer of 2015, I referred  
12 back to the historical use of water by BBID, specifically in 1931, which of course was pre-  
13 project. In 1931, BBID diverted water present in the Delta channels through October. BBID has  
14 always diverted throughout the summer months, even when flows dropped to near zero and  
15 salinity was high. With the work done in 2014 and 2015 by the District's Consulting Engineer, all  
16 this information confirmed that BBID had water available. To my knowledge, BBID has never  
17 been part of any proceeding before the SWRCB or the courts that would have altered the scope of  
18 BBID's water rights or otherwise deprive BBID of its right to the use of water as established in  
19 the early 1900s. Even in the litigation brought by DWR against BBID in the 1970s, the dispute  
20 was not on the availability of water. The SWRCB's attempt to redefine the availability of water  
21 in the Delta through this enforcement proceeding is a threat to BBID's established rights.

## 22 A. GENERAL BACKGROUND OF BBID

### 23 1. **History of the District**

#### 24 1.1. Formation

25 BBID was formed on December 22, 1919, and succeeded to all of the works of the old  
26 Byron-Bethany Irrigation Company on March 5, 1921.

#### 27 1.2. Water Rights

28 BBID's water rights date back to 1914, by virtue of a Notice of Appropriation of Water

1 dated May 18, 1914 (Notice of Appropriation), filed by the Byron-Bethany Irrigation Company.  
2 A copy of the Notice of Appropriation is Exhibit BBID202. The original Notice of Appropriation  
3 claimed 40,000 miner inches of water measured under four-inch pressure from “water flowing in  
4 Old River[.]”

5 1.3. Consolidation with Plain View Water District

6 In 2004, PVWD was consolidated with BBID. PVWD’s Central Valley Project (CVP)  
7 Water Service Contract was assigned to BBID. The Water Service Contract provides an  
8 entitlement of 20,600 acre-feet of CVP water for irrigation and M&I purposes. A copy of the  
9 District’s boundary map is Exhibit BBID203.

10 **2. BBID’s Point of Diversion**

11 2.1. Original Location – Italian Slough

12 BBID’s original point of diversion was located 41 miles upstream from Antioch on Old  
13 River at the end of Italian Slough, not far from the Southern Pacific Railroad tracks, which still  
14 exist today. A copy of the Bethany Quadrangle map from 1911, showing the location of Italian  
15 Slough in relation to the railroad tracks, is Exhibit BBID204. Pictures of BBID’s original intake  
16 structure and pumps are Exhibit BBID205. In Exhibit BBID205, you can see the railroad tracks  
17 behind the original pump house. The photos are dated February 17, 1918.

18 2.2. Current Location - Milepost (MP) 1.83 on the Intake Channel to the Harvey O. Banks  
19 Pumping Plant (see Exhibit BBID211)

20 2.2.1. Construction of the State Water Project (SWP) necessitated the relocation of  
21 BBID’s original point of diversion. In 1963, the State commenced construction of the Clifton  
22 Court facilities, which included Clifton Court Forebay, the Harvey O. Banks Pumping Plant, and  
23 the intake channel connecting Clifton Court Forebay to the Harvey O. Banks Pumping Plant.  
24 BBID’s pumping facilities were constructed on the intake channel under an agreement with DWR  
25 executed in 1964. A copy of the 1964 Agreement between BBID and the State of California,  
26 acting by and through its Department of Water Resources (1964 Agreement), is Exhibit  
27 BBID206.

28 The 1964 Agreement provided for, among other things, the relocation of BBID’s pumping

1 plants and points of diversion to the SWP intake channel. (1964 Agreement, ¶4.) Through the  
2 1964 Agreement, the State of California also consented to the “permanent and perpetual use by  
3 [BBID], without cost, of State’s facilities and of that portion of its right of way required for the  
4 construction, operation, and maintenance of [BBID’s] permanent facilities . . .” (1964  
5 Agreement, ¶7.) Pursuant to the 1964 Agreement, BBID relocated its pumping facilities to their  
6 current location and has operated those facilities since that time. (Exhibit BBID336.)

7 2.2.2. Pursuant to the 1964 Agreement, BBID operates two pumping plants off the Intake  
8 Channel to the Harvey O. Banks Pumping Plant. The location of the BBID and DWR pumping  
9 facilities are Exhibit BBID211. Pictures of the relocated pumping facilities (Pump Station 1-  
10 North and Pump Station 1-South) are Exhibit BBID214. Pumping Plant 1-North (Exhibit  
11 BBID215), with a pumping capacity of 100 cubic feet per second (cfs), provides water for  
12 agricultural and M&I uses to lands within eastern Contra Costa County. The original portion of  
13 Pumping Plant 1-South (Exhibit BBID216) has a capacity of 100 cfs and provides water for  
14 agricultural and M&I uses to the eastern portions of Contra Costa and Alameda Counties. In  
15 2000, Pumping Plant 1-South was expanded to include pumping and conveyance facilities, with a  
16 pumping capacity of 30 cfs, in order to provide water to the new community of Mountain House.  
17 The pumping plants are operated remotely via supervisory controls at the BBID Headquarters.  
18 The Mountain House water treatment plant operator controls the Mountain House pumping  
19 facilities at Pumping Plant 1-South via remote flow selection.

20 2.2.3. Clifton Court Forebay Operations

21 Clifton Court Forebay acts as a regulating reservoir for both the State Water Project and  
22 for BBID’s pumping facilities. The gates at Clifton Court Forebay are operated on schedules set  
23 by DWR, and BBID has no control over the gate operation schedule. However, BBID pumps  
24 water from MP 1.83 at the Intake Channel to the Harvey O. Banks Pumping Plant, irrespective of  
25 whether the gates are in the open or closed position.

26 At times, the gates of Clifton Court Forebay are closed for extended periods of time.  
27 During those times, BBID continues to divert from the water stored in Clifton Court Forebay. It  
28 is BBID’s position that the 1964 Agreement with DWR allows BBID to use those facilities.

1           2.2.4. Other DWR Agreements

2           2.2.4.1.     In 1993, BBID and DWR entered into another agreement (1993  
3 Agreement) for the purpose of facilitating an exchange of water with DWR that would have  
4 provided, among other things, that DWR would divert some of BBID's pre-1914 water during the  
5 summer months and that BBID would divert some of DWR's water during the winter months.  
6 The 1993 Agreement is Exhibit BBID207. The purpose of the 1993 Agreement was to  
7 supplement BBID's water rights in order to provide year-round water in anticipation of the  
8 development of the community of Mountain House.

9           The exchange contemplated by the 1993 Agreement never happened and DWR and  
10 BBID instead entered into another Agreement in 2003 (2003 Agreement).

11           2.2.4.2.     The 2003 Agreement is Exhibit BBID208. Through the 2003 Agreement,  
12 DWR and BBID agreed that BBID had the right to up to 50,000 acre-feet of water in each year,  
13 which could be diverted year-round, for agricultural, municipal, and industrial purposes. (Exhibit  
14 BBID208, ¶ 9.) The 2003 Agreement recognized and supplanted the 1993 Agreement. In  
15 BBID's view, the 2003 Agreement provides for the continued diversion of water by BBID, up to  
16 50,000 acre-feet, year round. In a September 23, 2014 letter to the SWRCB, DWR confirmed  
17 that under the 2003 Agreement, DWR provides BBID with up to 50,000 acre-feet per year of  
18 water. A copy of that letter is Exhibit BBID217. DWR agreed not to challenge BBID's year-  
19 round use of up to 50,000 acre-feet of water for agricultural, municipal, and industrial uses.

20 **3. Uses of Water**

21           Water diverted by BBID is used for agricultural and M&I purposes. BBID provides M&I  
22 water to the 15,000 residents of Mountain House. In addition to residential use, a portion of that  
23 water goes to schools and fire suppression throughout the community. BBID also provides water  
24 to the Mariposa Energy Plant (MEP) and the Contra Costa County "Byron" airport. Cal Fire and  
25 local fire agencies in the tri-county region rely on BBID's water system for water supplies for fire  
26 suppression.

1 B. WATER AVAILABILITY

2 1. **Water Availability**

3 My understanding, as General Manager of BBID, of water availability in the Delta is what  
4 I understand to be a universally held concept in the Delta. Water availability in the Delta is never  
5 a question of quantity, it is only a question of quality for its intended use. (Exhibit BBID336.)  
6 That definition of water availability as it relates to the Delta is on page 27 of DWR Bulletin 76  
7 (1978), which states:

8 Because the Delta is open to the San Francisco Bay complex and Pacific Ocean  
9 and its channels are below sea level, *it never has a shortage of water*. If the inflow  
10 from the Central Valley is insufficient to meet the consumptive needs of the  
11 Delta, saline water from the bay fills the Delta from the west. *Thus, the local  
12 water supply problem in the Delta becomes one of poor water quality, not  
13 insufficient quantity*. Today degradation by agricultural, municipal, and industrial  
14 waste discharges in the San Francisco-Bay Delta area compounds the  
15 problem.....During the 24-year period from 1920 to 1944, there were 7 years of  
16 severe salinity intrusion in the interior Delta. As the use of water upstream and  
17 export from the Delta increased, average annual Delta outflow has been steadily  
18 reduced... (Exhibit BBID209 (emphasis added).)

15 The North Delta Water Agency (NDWA) has a contract with DWR, which I have  
16 frequently reviewed and am familiar with. That contract is Exhibit BBID229. Recital (e) of that  
17 contract provides:

18 Water problems within the Delta are unique within the State of California. As a  
19 result of the geographical location of the lands of the Delta and tidal influences,  
20 *there is no physical shortage of water*. Intrusion of saline ocean water and  
21 municipal, industrial and agricultural discharges and return flows, tend, however,  
22 to deteriorate the quality. (Exhibit BBID229 (emphasis added).)

21 East Contra Costa Irrigation District (ECCID) also has a “water quality” contract with  
22 DWR that guarantees the maintenance of water quality at ECCID’s point of diversion. (Exhibit  
23 BBID278.)

24 Even the Opinion and Order of the SWRCB’s Division of Water Rights, Decision No.  
25 1462, 1477, 1478, 1479, 1480, 1481, 1482, 1938, 1964, 2099, 2408, 2409, 2410, 2534, 2535,  
26 2997, 3348, 3469, 4228, 4229, 4737, 4768, D-100, Decided April 17, 1926, explains that “the  
27 [D]elta channels form a vast reservoir[.]” (Exhibit WSID0097, p. 11.)  
28

1 DWR's repeated reference to unlimited quantities of water in the Delta and the DWR  
2 contracts with NDWA and ECCID establish the universally understood concept of the constant  
3 availability of water in the Delta, the sole issue being water quality for its intended purpose.  
4 Accordingly, water has been, and always is "available" for BBID to divert when it is of sufficient  
5 quality for the uses within BBID.

6 **2. Water Availability in June 2015**

7 As I explained above, my understanding of water availability in the Delta is that there is  
8 always water available, and it is only a question of quality for its intended use. In the history of  
9 operations at BBID, BBID has never experienced poor water quality where we could not divert  
10 water for beneficial purposes anytime during the summer. If ever water quality degraded to the  
11 level that it impaired crop production, it was only in late August or parts of the fall, and that was  
12 only in one or two years since the early 1900s.

13 Although BBID diverted water during the month of June of every year since 1920, as part  
14 of BBID's effort to understand if water of sufficient quality would be available for BBID this  
15 year, BBID again directed CH2M to review water quality at BBID's diversion. With the  
16 restrictions being placed on the CVP's ability to release water from Shasta and move water to  
17 Jones Pumping Plant, water quality in the Delta might be a factor as we got into the late summer  
18 of 2015. To that end, CH2M began looking at cropping within BBID to model what kind of  
19 water quality BBID might expect given possibility of water quality degradation. As we moved  
20 into June 2015, CH2M's work evolved from simply looking at water quality, to looking at full  
21 natural flow and other water availability issues. Shortly thereafter, the State Water Contractors  
22 (SWC) filed their complaint against Delta diverters and CH2M's work for BBID focused on  
23 examining the allegations and modeling in the SWC complaint.

24 CH2M's preliminary work for BBID in this regard revealed that, even with the very  
25 conservative information used in the modeling behind the SWC complaint, there would be water  
26 of sufficient quality for BBID to divert for at least the entire month of June 2015. This modeling  
27 was conducted in a "without project" condition, removing any effects the SWP and CVP would  
28 have in improving Delta water quality in 2015. A copy of the SWC complaint is Exhibit



1 BBID218.

2 While, as General Manager of BBID, I dispute the assumptions contained in the inputs  
3 used by the SWC, I thought it was fine to use these overly-restrictive values, including cutting off  
4 Delta inflows early every year, as they still resulted in water of sufficient quality being available  
5 to BBID for the entire month of June 2015 – the only time period at issue in this enforcement  
6 proceeding. At my direction, CH2M then conducted a fingerprinting analysis to track the various  
7 sources of water that contributed to the water supply near BBID’s point of diversion throughout  
8 the year. CH2M ran the fingerprinting model not just for 2015, but also for 1931 to see whether  
9 the model could reasonably replicate what happened in 1931. We determined that 1931 would be  
10 an appropriate year to examine as it was at the end of a multi-year drought. CH2M’s preliminary  
11 findings confirmed that water of sufficient quality was available to BBID for the entire period  
12 covered by the Administrative Civil Liability (ACL) Complaint.

13 As BBID prepared its Notice of Intent to Appear in the enforcement proceeding, BBID  
14 intended on identifying CH2M as an expert witness to present the water quality and other  
15 modeling work and findings to the SWRCB. My understanding is, because of a supposed conflict  
16 with the SWC, CH2M informed BBID that it would no longer assist BBID with this effort.

17 **3. June 12, 2015 Curtailment Notice**

18 BBID received the Curtailment Notice via certified mail on June 15, 2015. (Exhibit  
19 BBID219.) I, along with other managers, understood that the 7-day certification period contained  
20 in the Curtailment Notice meant that all diversions had to cease by the end of that certification  
21 period. This 7-day timeframe to cease diversions was also noted in one of the region’s local  
22 newspapers, the Stockton Record. (Exhibit BBID212.) With this 7-day period widely discussed  
23 and understood by water managers and noted in the press, with no clarification or public  
24 disagreement by the SWRCB, I understood it to be correct. I later learned that the SWRCB knew  
25 of the understanding that there were 7 days to wind down diversions. (Exhibit BBID213.) As  
26 such, and because many growers within BBID had truck crops planted and near ready for harvest,  
27 BBID used the 7-day wind-down period to get the last irrigation to those crops and to get the soil  
28 profile of permanent crops saturated as BBID continued to search for alternate water supplies.

1 C. WHAT DID BBID DO THIS YEAR IN ANTICIPATION THAT WATER QUALITY  
2 COULD DEGRADE?

3 **1. CVP Service Area**

4 BBID received a 0% allocation from the Bureau of Reclamation for agricultural water.  
5 For M&I uses, BBID received an allocation equal to 50% of its historical use, approximately 500  
6 acre-feet.

7 BBID participated as a member of the San Luis & Delta-Mendota Water Authority's 2015  
8 North of Delta Water Transfer Program. BBID and other Authority member agencies were  
9 concerned that water being backed up in Shasta would be held in Shasta by the Bureau of  
10 Reclamation throughout the summer as a result of issues related to temperature on the  
11 Sacramento River and SWRCB cold water pool mandates. Because of these restrictions, and  
12 other restrictions related to pumping at Jones Pumping Plant, BBID and other CVP contractors  
13 lying between the Delta and San Luis Reservoir agreed to a "Pump Back Project," whereby  
14 pumps would be installed at various locations in the Delta Mendota Canal, and water that was in  
15 the San Luis Reservoir would be pumped up the Delta-Mendota Canal to those districts. (Exhibit  
16 BBID210, BBID335.)

17 **2. Pre-1914 Service Area**

18 2.1. Talks with DWR

19 As summer 2015 approached, and while BBID disagreed with the SWRCB's  
20 planned/proposed curtailments of pre-1914 water rights, BBID went to great lengths to try to find  
21 alternate water supplies in order to avoid legal conflicts over curtailments.

22 Because of BBID's long relationship with DWR, and because BBID's point of diversion  
23 is on the intake channel to the SWP, I started with DWR. I had occasion to talk with Laura King  
24 Moon at the ACWA Conference in Sacramento on May 6, 2015. Laura and I briefly discussed  
25 trying to find a backup water supply for BBID to avoid litigation over curtailments. We set up a  
26 meeting for the next day at DWR's offices and I met with Laura and Jerry Johns to see if there  
27 was a way to work out a back up water supply. A copy of the email exchanges setting up the  
28 meeting is Exhibit BBID220. We met the afternoon of May 7, 2015 at Laura's office and Laura

1 expressed interest in trying to help avoid a complete cutoff in supplies to BBID and assured me  
2 that she would talk with others at DWR and see what she could do.

3 We picked up our discussions a week or so later and began providing crop data to DWR to  
4 demonstrate the need and minimal supplies that would get BBID through the summer. A copy of  
5 the email exchange with the crop data is Exhibit BBID221. At one point, BBID proposed to cut  
6 back its own water use and allow DWR to pick up the conserved water under BBID's pre-1914  
7 water right. This would have acted as an exchange of sorts. A copy of the email showing this  
8 proposal is Exhibit BBID222. Jerry Johns responded that, given his discussions with SWRCB  
9 staff, that curtailments might be imposed sooner, which would prevent DWR from being able to  
10 take advantage of the earlier proposal. BBID agreed to keep working on trying to find a creative  
11 solution that would still avoid litigation. The email exchange is Exhibit BBID223.

12 DWR initially expressed continued interest in a short-term exchange by which DWR  
13 would pump some of BBID's pre-1914 water to "buy" BBID a couple of weeks of additional  
14 water in order to get some truck crops to harvest. A copy of that email exchange is Exhibit  
15 BBID224.

16 BBID followed up with a formal proposal to DWR for the exchange we had discussed  
17 earlier. My May 23, 2015 letter to DWR with that proposal is Exhibit BBID225. I discussed this  
18 proposal with Laura and Jerry, and I decided it was appropriate to modify the proposal to DWR.  
19 To that end, on May 29, 2015, I sent a revised proposal to DWR that would have provided for an  
20 exchange for the remainder of the irrigation season with a "payback" through conservation and  
21 fallowing in 2016. The email exchange and a copy of the new proposal sent to DWR is Exhibit  
22 BBID226.

23 Subsequent to sending the May 29, 2015 proposal, we had discussions with various staff  
24 at DWR and concluded DWR was unlikely to agree to the proposal. Via letter dated June 3, 2015  
25 from Laura King Moon, DWR conveyed its conclusion that it could not agree to the proposed  
26 exchange. A copy of the email and letter from DWR is Exhibit BBID227.

27 2.2. Talks with Zone 7 Water Agency

28 With the proposal to DWR meeting resistance, I turned my focus to other possible short-

1 term solutions to get BBID through the irrigation season. BBID has a long and good relationship  
2 with the Zone 7 Water Agency (Zone 7). BBID had transferred water to Zone 7 in years past.

3 On June 10, 2015, Zone 7 submitted a Proposal for Water Exchange between Zone 7 and  
4 BBID to DWR's State Water Project Analysis Office (SWPAO). (Exhibit BBID230.) Under the  
5 exchange, Zone 7 would provide BBID with 3,000 acre-feet of its Table A allocation. BBID  
6 would then return the water, plus an additional 1,500 acre-feet, within three years, depending on  
7 hydrologic and water supply conditions. (Exhibit BBID231.)

8 DWR responded that the water could not be sold to BBID, that any water BBID would  
9 repay would be "through DWR's Settlement Agreement [2003 Agreement] with BBID" and that  
10 conservation would need to be consistent with the "Water Transfer White Paper." (Exhibit  
11 BBID232.) DWR required a "letter of support" from the SWC to allow Zone 7 to do the  
12 exchange. (Exhibit BBID232.) Notwithstanding the fact that Zone 7 was willing to assume the  
13 risk of the fallowing/conservation transfer, DWR then requested additional information on the  
14 crops grown within BBID "to estimate the capacity of BBID to complete the exchange in future  
15 years." (Exhibit BBID232.) Zone 7 questioned the need for that information given the short time  
16 frames and critical need for the water, asking whether DWR was also mandating the same  
17 information from others proposing transfers in 2015. Nonetheless, I sent DWR the requested  
18 crop data and questioned the need to hold up this critical transfer over crops approved in the draft  
19 White Paper. On June 17, 2015, Rob Cooke, at DWR, informed me that the transfer was rejected  
20 by certain SWC and that they would not allow Zone 7 to do an exchange with BBID. The  
21 exchange of correspondence regarding these issues is Exhibit BBID232.

22 That same day, Zone 7 submitted a Modified Letter Agreement to SWPAO suggesting an  
23 exchange of non-SWP water that Zone 7 had stored in Del Valle Reservoir. (Exhibit BBID233.)  
24 BBID tried to work through that transfer as well, but it required DWR approval because the  
25 "exchange" would require BBID repayment water to move through SWP facilities to get back to  
26 Zone 7. DWR made that transfer so onerous by adding administrative charges and other  
27 substantive mandates that the transfer would have been impossible. The last straw was when  
28 DWR mandated that BBID make concessions regarding the interpretation of the 2003 Agreement

1 in the transfer agreement. DWR refused to complete the transfer agreements unless BBID was  
2 willing to make those concessions on a disputed interpretation of the 2003 Agreement. As a  
3 result, the transfer was never finalized. On August 13, 2015, BBID advised Zone 7 that BBID  
4 was withdrawing its request for a water exchange. (Exhibit BBID234.)

5 2.3. Talks Regarding Yuba Water (State Water Contractors)

6 As part of BBID's discussion with DWR, staff at DWR suggested that BBID might be  
7 able to purchase some water that was part of the Yuba transfer to the SWC. BBID inquired about  
8 the possibility, but the SWC declined to allow BBID to participate.

9 2.4. Transfer from Contra Costa Water District

10 On May 12, 2015, BBID and the Contra Costa Water District executed Amendment No. 2  
11 to the Cooperative Agreement for the Use of Los Vaqueros Reservoir for a One-Time Storage and  
12 Exchange Demonstration Project providing for the transfer of 500 acre-feet. (Exhibit BBID235.)

13 The SWRCB approved the Transfer Petition on June 22, 2015 and the Bureau of  
14 Reclamation approved the transfer on July 16, 2015. BBID began taking delivery of the water on  
15 or about July 30, 2015. (Exhibit BBID236.)

16 2.5. Transfer from Carmichael Water District

17 BBID was successful in negotiating a water transfer with the Carmichael Water District.  
18 Carmichael purchases treated groundwater discharges from Aerojet. Carmichael, in turn, sells all  
19 groundwater it does not need to BBID. That water is transferred to BBID pursuant to Water Code  
20 section 7075 after being discharged to the American River. A copy of the Carmichael / BBID  
21 Agreement is attached as Exhibit BBID237.

22 2.6. Local Groundwater Transfers

23 Landowners in and around BBID scrambled to develop groundwater for their own use.  
24 Some of these landowners had more than they needed for their crops and agreed to sell the excess  
25 to BBID. A copy of a sample groundwater purchase agreement is Exhibit BBID238.

26 **3. Attempt to Develop 25% Voluntary Reduction Program with South Delta Diverters**

27 BBID proposed to the SWRCB and Delta Watermaster a voluntary reduction program  
28 whereby BBID would voluntarily cutback on diversions and use of water ahead of curtailments in

1 exchange for some regulatory certainty of no curtailments later in the season. The SWRCB  
2 rejected the proposal. The exchange of communications regarding this attempt is Exhibit  
3 BBID239.

4 **4. Attempt to Appropriate Mountain House Community Services District Discharges**

5 BBID initiated discussions with the SWRCB regarding BBID's appropriation of  
6 wastewater discharges by the community of Mountain House. The SWRCB informed BBID that  
7 it would not process an application to allow BBID to appropriate those discharges. The email  
8 exchange with the SWRCB regarding this issue is Exhibit BBID240.

9 **5. Attempt to Purchase Sacramento Regional County Sanitation District Discharges**

10 BBID reached out to the Sacramento Regional County Sanitation District (SRCSD) in an  
11 attempt to purchase portions of SRCSD's discharges. SRCSD declined to consummate such an  
12 agreement this year. The letter exchange is Exhibit BBID241.

13 **6. Administrative Civil Liability Amount**

14 BBID believes an ACL should not be issued and no fine should be imposed because,  
15 among other things, BBID did not commit a trespass. To the extent the SWRCB determines that  
16 BBID did commit a trespass, BBID believes the financial penalty should be substantially smaller  
17 than that proposed by the prosecution team. First, BBID believed, as did many other water  
18 managers, that it had 7 days to wind down diversions under the June 12, 2015 curtailment notice.  
19 Second, when I met with Tom Howard and Kathy Mrowka on June 1, 2015 to discuss Mountain  
20 House and the MEP, Tom Howard assured me that, given the need to continue to get water to the  
21 community of Mountain House and the MEP, the SWRCB would not issue an enforcement action  
22 related to the provision of water for those uses. Notwithstanding that assurance, water diverted  
23 for Mountain House and MEP is included in the proposed fine.

24 The ACL proposes an amount of fine based upon BBID's receipt of the June 12, 2015  
25 Curtailment Notice. (Exhibit BBID277, ¶¶ 25, 26, 28, & 33.) However, the SWRCB has taken  
26 the position in and made representations to the Courts of this State that:

27 [The curtailment] notice has nothing to do with the amount of time that's going to  
28 be found in violation for illegal diversions. If there were a future enforcement

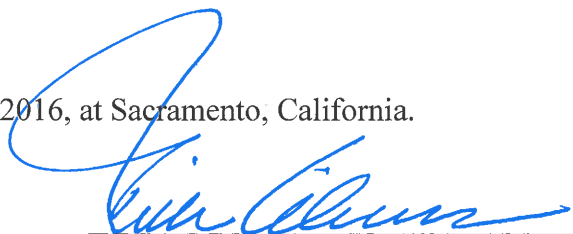
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proceeding, *the notice would in no way be evidence of anything regarding the violation for illegal diversion . . . [i]t doesn't start any type of clock.* (Exhibit BBID276, p. 37:10-18 (emphasis added).)

While BBID disagrees that the July 15, 2015 "Rescission and Clarification" cured any due process violations contained in the June 12, 2015 Curtailment Notice, at a minimum, penalties should not accrue any time prior to July 15, 2015, the date the SWRCB attempted to cure the due process violations in the June 12, 2015 Curtailment Notice. (Exhibit BBID277, ¶ 29.)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 17th day of January 2016, at Sacramento, California.



\_\_\_\_\_  
Rick Gilmore