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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SACRAMENTO  
HON. JUDGE SHELLYANNE W. L. CHANG, DEPARTMENT 24

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THE WEST SIDE IRRIGATION DISTRICT;  
CENTRAL DELTA WATER AGENCY; SOUTH DELTA  
WATER AGENCY; WOODS IRRIGATION COMPANY,  
Petitioners and Plaintiffs,  
VERSUS  
CALIFORNIA STATE WATER RESOURCES CONTROL  
BOARD; et al.,  
Respondents and Defendants.

CASE NO.  
34-2015-80002121

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COPY

REPORTER'S TRANSCRIPT OF  
PROCEEDINGS

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WEDNESDAY, JULY 8, 2015

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APPEARANCES

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FOR PETITIONER AND PLAINTIFFS:

WEST SIDE IRRIGATION DISTRICT

BY: STEVE HERUM, Attorney at Law

FOR PETITIONER AND PLAINTIFFS:

CENTRAL DELTA WATER AGENCY

BY: JENNIFER SPALETTA, Attorney at Law

FOR PETITIONER AND PLAINTIFFS:

WOODS IRRIGATION COMPANY AND

SOUTH DELTA WATER AGENCY

BY: DEAN RUIZ, Attorney at Law

FOR RESPONDENTS AND DEFENDANTS:

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

BY: CLIFFORD T. LEE, DEPUTY ATTORNEY GENERAL

BY: MATTHEW G. BULLOCK, DEPUTY ATTORNEY GENERAL

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1 WEDNESDAY, JULY 8, 2015

2 --oOo--

3 The matter of the West Side Irrigation District;  
4 Central Delta Water Agency; South Delta Water Agency; Woods  
5 Irrigation Company, Petitioners and Plaintiffs, versus  
6 California State Water Resources Control Board; Thomas  
7 Howard, Executive Director of California State Water  
8 Resources Control Board and DOES 1 Through 100, inclusive,  
9 Respondents and Defendants, Case Number 34-2015-80002121,  
10 came on for hearing this day in the Superior Court, for the  
11 County of Sacramento, State of California, before Honorable  
12 Shelleyanne W. L. Chang, Judge, Department No. 24.

13 --oOo--

14 Petitioners and Plaintiffs: West Side Irrigation  
15 District, et al., were represented by Steve Herum, Attorney  
16 at Law.

17 Petitioners and Plaintiffs: Central Delta Water  
18 Agency, was represented by Jennifer Spaletta, Attorney at  
19 Law.

20 Petitioners and Plaintiffs: Woods Irrigation Company  
21 and South Delta Water Agency, was represented by Dean Ruiz,  
22 Attorney at Law.

23 Respondents and Defendants: California State Water  
24 Resources Control Board, was represented by Clifford T. Lee  
25 and Matthew G. Bullock, Deputy Attorney Generals.

26 The following proceedings were then had:

27 --oOo--

28 THE COURT: Good morning. We're on the record in

1 the matter of the West Side Irrigation District versus the  
2 State Water Resources Control Board.

3 May I have the appearances of counsel, please,  
4 starting from the left.

5 MS. SPALETTA: Jennifer Spaletta, appearing on  
6 behalf of Central Delta Water Agency today.

7 MR. HERUM: If it please the court, Steve Herum,  
8 representing the West Side Irrigation District.

9 MR. RUIZ: Your Honor, Dean Ruiz for Woods  
10 Irrigation Company and South Delta Water Agency.

11 MR. LEE: Your Honor, Deputy Attorney General  
12 Clifford Lee here on behalf of the State Water Resources  
13 Control Board.

14 MR. BULLOCK: Mathew Bullock, Deputy Attorney  
15 General, also on behalf of the California State Water  
16 Resources Control Board.

17 --oOo--

18 THE COURT: Good morning, counsel. Let me first  
19 start by thanking you all for accommodating the court's  
20 schedule. I know the court was required to reschedule this  
21 hearing several times, and so I do appreciate counsels'  
22 courtesies and accommodation.

23 The other thing that I did want to bring to  
24 counsels' attention is the fact that court noticed on  
25 the -- counsel for the Water Resources Control Board's  
26 letterhead that one of the counsel is Deborah Barnes, and I  
27 believe that I worked with Miss Barnes approximately 15  
28 years ago, when I was the Chief Deputy Legal Affairs

1 secretary for Governor Gray Davis, and I believe she was  
2 the chief counsel for the Department of Water Resources.  
3 I believe I can be fair and impartial, notwithstanding that  
4 prior working relationship. All right.

5 MR. LEE: Thank you, your Honor.

6 THE COURT: All right. And I have, in fact, read  
7 all of the papers. I appreciate the briefing by both  
8 parties.

9 Mr. Herum, would you like to go first?

10 MR. HERUM: Yes. Thank you.

11 First of all, your Honor, thank you for giving us  
12 this opportunity to address you on this issue. What I'd  
13 like to do in my presentation is give you some general  
14 background, given that some of the procedural issues and  
15 then get into the two, what I believe, are substantive  
16 issues there are relating to this stay.

17 By way of background the State Board, without first  
18 holding a public hearing, issued individualized curtailment  
19 letters addressed to the West Side Irrigation District to  
20 immediately cease water from the District's right that they  
21 have to pump from the Delta.

22 The District had no other source of water, and  
23 according to the Alvarez Declaration eight, if those lands  
24 are not irrigated, then permanent crops will die and be  
25 permanently lost.

26 The Martinez declaration, in paragraph five, tells  
27 that the estimated cost of the loss of those permanent  
28 crops is approximately twenty-five million dollars.

1 After the May curtailment letter, West Side arranged  
2 to receive Pre-1914 water rights from the Banta-Carbona  
3 District.

4 Thereafter, the State Board sent a curtailment  
5 letter to Banta-Carbona, ordering them to curtail their  
6 discharge of water on or before July one for their Pre-1914  
7 right that cut off all water to the West Side Irrigation  
8 District, both rights under their permit and the rights  
9 that they had obtained from Banta-Carbona. And therefore,  
10 they filed suit on June 26th and immediately sought this  
11 stay hearing.

12 For the permanent tree and vine crops, it could take  
13 a substantial number of years of capital, a waiting period  
14 of five or eight years, according to the declaration,  
15 before those crops were once again producing fruits and  
16 nuts.

17 So you have a catastrophic affair to these farmers,  
18 many of which are heritage farmers who have been farming in  
19 this area for hundreds of years and is part of a family  
20 tradition.

21 I'd point out to this court as a condition of  
22 issuing this stay, the district is prepared to voluntarily  
23 reduce its diversions by seven percent, and that's found in  
24 the Alvarez declaration at twelve.

25 Now, to put this into context, the State, during  
26 this period, set up several months ago, in a highly  
27 publicized manner, agreed not to be enforce against other  
28 Delta water users who voluntarily agreed to a reduction of

1 25 percent. Nevertheless, this district is prepared to  
2 reduce its -- the right to take by seven percent in order  
3 to do that.

4 Now the State is requested by West Side and certain  
5 land owners in the other districts. And having read the  
6 Attorney General's papers, there may be a little bit of  
7 confusion about that. And if there is confusion, it's  
8 entirely my fault. So let me try to cure that, if I can,  
9 early in this hearing.

10 West Side Irrigation District has a Post-1914  
11 license to divert water from the Delta. It received a  
12 curtailment letter on May one. The other two districts,  
13 under their charters, have the right to enforce water  
14 rights on behalf of their land owners.

15 Land owners in those districts have received  
16 curtailment letters, and at least one of them -- and  
17 there's a declaration to that effect from the Zuckerman  
18 farming operation -- have Pre-1914 rights, but they are  
19 also subject to curtailment.

20 So as we define it in our papers, you have the May  
21 curtailment letter to West Side for Post-1914 water rights.  
22 Then you have the June curtailment letter, which goes to  
23 Pre-1914. And together, we call them the 2015 curtailment  
24 letters, and it is those 2015 curtailment letters that are  
25 the issue today.

26 And then finally, I would point out that Woods, who  
27 is a private land owner, not a government agency in the  
28 petitioner group, has not yet received a curtailment

1 letter. So I'm sorry if that caused any confusion. I  
2 apologize to the court.

3 I apologize to opposing counsel if I confused them  
4 with that, and I hope for purposes of the hearing, that  
5 clarifies that particular issue. And, again, I apologize  
6 to all concerned.

7 There appears to be two major issues with respect to  
8 this stay request. The first issue is this: Are the  
9 curtailment letters mere courtesy notices, as the Attorney  
10 General has referred to them, or are they coercive in  
11 nature, akin to the letter issued by the Corp of Engineers  
12 in the Duarte Nursery matter.

13 If the letter is coercive in nature, then due  
14 process rights attach and a pre-divestment hearing is  
15 required and the letter goes too far in violation of the  
16 due process requirements.

17 Second, did the State Board materially miscalculate  
18 the amount of water available by wrongly omitting water  
19 entering the Delta west by tidal flows?

20 The evidence presented by the Burke Declaration a  
21 substantial source of district water derives from tidal  
22 flows from the west and agriculture runoff. Yet if you  
23 look at the O'Hagan declaration, the O'Hagan declaration  
24 omits those waters when determining the amount of water  
25 available.

26 And it is our basic premise that at this point, we  
27 should be allowed to continue to divert, while those  
28 competing issues are determined, which we properly think



1 should be performed administrative body, and it simply is a  
2 wrong conclusion by the agency by omitting those.

3 So with that in mind, let me turn first to the issue  
4 of why it's appropriate to issue a stay for dealing with  
5 these two topics. Water Code section 10495(c) provides a  
6 judicial proceedings of the State Board are conducted under  
7 1094.5, that section 1126 of the Water Code. And the  
8 relief should be granted unless the stay is against the  
9 public interest.

10 The way it is worded in the negative leads to a  
11 presumption that the stay should be issued unless the  
12 government agency demonstrates to the court that the public  
13 interest is harmed by doing that. And we believe in this  
14 case, the violation of the constitutional rights of the  
15 land owners far exceeds any public interest that the State  
16 may argue in this particular case.

17 And, of course, the standard is more relaxed than  
18 the TRO standard, but if this court decides that a stay is  
19 unavailable, we believe we've met the standard for the TRO  
20 anyway.

21 This may be a difference without a meeting that only  
22 lawyers love, inasmuch as the violation of due process is  
23 so substantial that the TRO should issue in this particular  
24 case since the practical economic result of not granting  
25 the stay is at approximately twenty-five million dollars of  
26 permanent crops in the district will be lost, and that has  
27 a huge public implication to it, not only to those farmers  
28 and not only to those crops because of the economic chain

1 of events that occurs.

2 In an agriculture county, such as San Joaquin  
3 County, according to many studies a majority of the people  
4 earn their money directly or indirectly through farming  
5 operations.

6 These farmers are going to have to lay off their  
7 workers. They're not going to be using their vendors. Now  
8 as simple as the John Hancock fellow who goes out and fixes  
9 the machinery, here in the season will not have jobs.  
10 Those people, in turn, will be harmed. They will not have  
11 income.

12 They will not be able to buy the sorts of good and  
13 services that they're used to, and indeed these farmers may  
14 then be unable to re-pay crop loans and may be unable to  
15 repay land loans, and it's just going to have a catastroic  
16 economic effect to the entire region as those trees and  
17 vines die. And that's why I think the public interest  
18 strongly supports granting the stay in this particular  
19 instance.

20 So with that in mind, let me turn, if I may, to the  
21 first issue, which is whether the curtailment notice  
22 is coercive in nature.

23 The State Board defense is characterized as a  
24 rightness issue, and we'll get to that. But it really  
25 depends upon the curtailment notice as being, quote,  
26 "merely an advisory notice or a courtesy notice and not  
27 being individualized."

28 So if a determination is made that's coercive in

1 nature, that simply takes away the rightness issue  
2 whatsoever. So I want to deal with that, and we'll talk  
3 about those cases subsequently because I don't think  
4 they're meaningful. But I don't think you would ever have  
5 to reach that if you determine that it's coercive in  
6 nature.

7           And to a great extent I think this question is  
8 answered and presented in the curtailment letters  
9 themselves, which are found at Exhibit A of the petition.  
10 And it is individually addressed to West Side Irrigation  
11 District.

12           It's not some general notice on the web site. It is  
13 to my client personally, and it discusses what happens,  
14 quote, "if you continue to divert," end quote, and the  
15 coercive language continues throughout the letter.

16           The second full paragraph of page one, the  
17 curtailment letter noticed by its West Side of, quote, "the  
18 need to immediately stop diverting" end quote.

19           In the fourth paragraph, at the bottom of page one,  
20 it demands that West Side is, quote, "Required to document  
21 receipt of this notice by completing an on-line curtailment  
22 notice form within seven days," end quote.

23           The third sentence states that, quote, "Completing  
24 the form is mandatory to avoid unnecessary potential  
25 enforcement proceedings" end quote. So it's pretty clear  
26 that the language of that is not a courtesy notice. And I  
27 think if we submitted it to Emily Post, she wouldn't call  
28 it that. It's something that goes far beyond that.

1 THE COURT: Mr. Herum, the court was similarly  
2 concerned with that -- that language.

3 MR. HERUM: Okay.

4 THE COURT: And, you know, I saw the language in  
5 there, and it indicates that the recipient of the notice is  
6 supposed to go on line and sign some sort of  
7 acknowledgment. Nowhere in the papers from either side was  
8 their a copy of what that acknowledgment indicates. I  
9 don't know what it says.

10 Do you have any idea what it says?

11 MR. HERUM: Yes, we do.

12 MS. SPALETTA: Your Honor, I'd be happy to provide  
13 a copy to the court today, but I have assisted clients in  
14 filling out numerous of them.

15 And basically what they say is, it's a  
16 certification, under penalty of perjury, that the diverter  
17 has stopped diverting, or if they are continuing to divert,  
18 they're doing so pursuant to a different water right that  
19 has not been curtailed, and they have to provide  
20 specificity as to what that alternate water supply is.

21 THE COURT: So it's not simply sort of a certified  
22 meal receipt and not a notice of acknowledgment of receipt  
23 of this -- this courtesy notice.

24 MS. SPALETTA: That's correct.

25 MR. HERUM: It's acceding to the demand.

26 THE COURT: Okay. All right.

27 MR. HERUM: Well, to the extent -- I mean, you  
28 understand the coercive nature, but I would point out to

1 you, if you have any doubts -- and I won't go through it --  
2 we've attached as Exhibit A to the stay order the  
3 contemporaneous press release issued by the State of  
4 California, where they acknowledge and, in fact, proudly  
5 crow that the notices add to the number of the, quote, "The  
6 growing number of water rights restricted", end quote.

7 So if you look at their contemporaneous  
8 interpretation to the press release, they are indicating to  
9 the public that they are restricting water by the issuances  
10 of these licenses.

11 And the letter is intended to place the district and  
12 the farmers in an untenable position because the district  
13 can either one, curtail the diversions of water entirely,  
14 in which case the annual crops will be lost. You'll have  
15 the loss of twenty-five million dollars.

16 You'll be jeopardizing your ability to re-pay loans,  
17 and you'll have a chain of effects economically to the  
18 community, or in the alternative they can disregard the  
19 order, be subject to penalties, which will relate back to  
20 the date of the curtailment letter and finally get their  
21 due process rights.

22 But the curtailment letters themselves and the  
23 O'Hagan Declaration makes clear that the agency has already  
24 made a finding that it's a violation of the law.

25 So now the question is whether you have a fair  
26 hearing, inasmuch as the agency has pre-determined that in  
27 fact it is a violation to divert water, and now you're  
28 simply looking at the calculation of penalties.

1           And as the Alvarez declaration points out, the  
2 penalty suffered by the district will basically bankrupt  
3 the district, or if they were spread to the individual  
4 farmers, the penalties are greater than the value of the  
5 crops.

6           And it seems to me this is clearly a coercive  
7 situation, and that is the dilemma that my clients are  
8 unfortunately placed in at this particular time.

9           And we do believe that the situation is akin to the  
10 Duarte Nursery case, which we cite in our papers.  
11 Strangely, we had an earlier hearing on Banta-Carbona,  
12 where ultimately the court decided San Joaquin County did  
13 not have venue. But we spent a great deal of time  
14 discussing Duarte Nursery.

15           It is cited in our brief, and yet I point out to you  
16 that the State Board is silent on Duarte Nursery, and it's  
17 no response to us in their papers with respect to that.  
18 And look what happens there?

19           At page 1020 of that opinion, the court writes:  
20 "Even assuming the CDO does not impose any legal  
21 obligations and liabilities, the court's argument  
22 underestimates the force of a command from the United  
23 States Government or its agency, the Corp of Engineers and  
24 the injury it can cause."

25           Having been commanded by the United States  
26 Government to stop their activities, Plaintiffs reasonably  
27 believe they were required -- and the word "required" is  
28 italicized in the opinion -- to stop their farming

1 activities, and thereby lose their crops.

2 "Plaintiffs reasonably interpret the CDO as an order  
3 issued by the United States Government, not merely a  
4 suggested course of conduct, not a request for voluntary  
5 cessation of activities" end quote. And I think Duarte  
6 Nursery provides important guidance.

7 Now I anticipate the State Board is going to say  
8 yes, but that was a cease and desist order. This is just a  
9 letter. But that's not meaningful in this context because  
10 if you read the first couple of paragraphs of Duarte, it  
11 was a letter.

12 The court then points out that the petitioners, the  
13 plaintiffs in that case, Duarte Nursery, characterized it  
14 as a cease and desist order, and the court adopted that  
15 label for it. Even though the letter itself does not say  
16 it's a cease and desist order, the letter itself says it's  
17 merely a letter.

18 So the mere characterization of it by the court as a  
19 CDO was their way of looking at it. The federal government  
20 did not call it, so you can't distinguish the case on that  
21 basis. I think Duarte applies with equal dignity here.

22 This curtailment letter has even more coercive  
23 language than the Duarte Nursery letter did. And I point  
24 out that Duarte Nursery court writes at 1023, quote, "The  
25 Corp suggests the plaintiffs can wait until the Corp files  
26 an enforcement action.

27 This is entirely inadequate as plaintiffs are being  
28 deprived now of the right to farm their land for an

1 indefinite period, with no assurance of an enforcement act  
2 will ever be filed, thus completely depriving them of the  
3 opportunity to challenge a CDO."

4 And it concludes at the very bottom of page 23,  
5 quote: "Forcing the plaintiffs to wait ideally about while  
6 the Corp decides whether to bring an enforcement action has  
7 the effect of continuing to deprive the plaintiffs of the  
8 use of their property, without end; plaintiffs stake a  
9 claim under the due process clause."

10 So to the extent this letter is equally coercive and  
11 places the property owner in an equally difficult position,  
12 due process must apply. These letters are not good and  
13 fail in relationship to the due process claim.

14 I would also point out that I think the Duarte  
15 Nursery also fully answers the rightness issue, and it does  
16 so at 1021 and 1022.

17 In that instance, the Corp argued that the matter  
18 was not right because the court had not yet initiated  
19 enforcement, and until it initiated enforcement, the matter  
20 was not right.

21 And there the court said no, the threat was there,  
22 the take was there at that point, and therefore this case  
23 was right; that the petitioners did not have to sit by and  
24 just wait for something to happen.

25 The same is true here. We're put in a position  
26 where our rights are lost. We don't have a hearing. We  
27 have to wait until what the State does again, and  
28 therefore, I think Duarte answers the question squarely on



1 the issue of rightness.

2 With that in mind, just quickly looking at the  
3 rightness cases that they cite, they go to cite three. The  
4 Pacific Legal Foundation, I think, is answered by page 172  
5 of that decision.

6 There the court writes that it believes, quote:  
7 "The abstract nature of the proceedings make it difficult  
8 to evaluate what even the issue related to the consistency  
9 of the guidelines with the Postal Commission Act."

10 And the court also points out, quote: "We are  
11 asked, quote, in essence, inviting us to speculate as to  
12 the type of development for which access conditions might  
13 be imposed, and then express an opinion on the validity and  
14 proper scope of such hypothetical actions," end quote, that  
15 was a case where general guidelines were adopted, and  
16 specific legal foundation said that was the taking of real  
17 property, but the agency had not yet applied those  
18 guidelines to specific coastline access permits.

19 And the court said, We're just not ready to look at  
20 that. That is to right. That's not out situation here.  
21 We're being told to quit curtailment. It's completely  
22 different than the specific legal foundation.

23 The second case of Stonehouse Homes, the same sort  
24 of problem there. The City decided to look at changing its  
25 hillside development standards, and it hadn't done it yet.  
26 It was just looking at it. Stonehouse soon saying, you  
27 know, this is a violation of law of the Government Code.

28 The court says no, it's not a violation of law

1 because all the agency has done is adopted an interim  
2 ordinance to look at adopting permanent ordinances, and  
3 that's not right. That's not our situation here.

4 And then finally, in Wilson and Wilson, that's  
5 just an -- if you look at pages 1575 and 76, the court says  
6 it's deciding the case on mootness and not rightness, and  
7 the reason being, that in that case the City's proposed  
8 redevelopment agency and said they might have to condemn  
9 properties, and among the properties that might be  
10 condemned are Wilson and Wilson's. Wilson and Wilson sued.

11 In the course of the litigation and redevelopment  
12 project that's filled out, Wilson and Wilson's property is  
13 not taken by imminent domain. The project was fully built  
14 out, and the court said, you're moot. The project got  
15 built out, and they didn't condemn your property. So  
16 Wilson and Wilson is just mis-cited.

17 And again, I think the whole rightness issue  
18 dovetails to whether or not the notices are coercive. We  
19 don't really need to spend much time on that.

20 My second issue is that the curtailment letter  
21 wrongly admits all sources of water and therefore  
22 understates the amount that's available.

23 Now the petition, at paragraph 27 through 35,  
24 explains that the water available for West Side diversion  
25 at the established point of diversion includes tidally  
26 influenced water from west of the Delta. This makes inflow  
27 from the San Joaquin River, relied on entirely by O'Hagan,  
28 simply irrelevant to the exercise of the water rights.

1           Indeed, the State earlier, in saying Decision 100,  
2           which we cite in our stay papers, indicates that Delta  
3           water does not depend on San Joaquin River flows. So the  
4           O'Hagan declaration and the methodology is inconsistent  
5           with previous standards by the State Board.

6           And so the Burke Declaration, particularly at  
7           paragraphs 13, 14, 15, are especially important because  
8           Burke determines that the ability to divert water at the  
9           established point on Old River does not depend upon the San  
10          Joaquin River. And therefore, the O'Hagan analysis and  
11          basis for the curtailment letter is simply factually wrong.

12          Now in response to that, we now receive the Grover  
13          Declaration, which is very fascinating. And without  
14          getting into too much hydrology, let me say that -- keep in  
15          mind, I think from a big picture point of view, the Grover  
16          Declaration proves exactly what we're trying to say here  
17          today.

18          A curtailment letter went out from the State Board,  
19          and it mentioned nothing of salinity and water quality. It  
20          said enough water isn't available. Now suddenly yesterday,  
21          for the first time, the State provides my client with an  
22          entirely new theory of why they should be curtailed. And  
23          that new theory is well, the water quality isn't good  
24          enough.

25          And, you know, I don't want to be in a punster mood,  
26          but it seems like the State's position's extremely liquid  
27          and ambulatory what they're doing. They are not keeping a  
28          consistent position of why a curtailment should take place,

1 which is precisely the reason that a pre-divestment due  
2 process hearing is required so that all these issues can be  
3 ventilated and figured out by the administrative body, and  
4 my client has a fair opportunity to confront, test and  
5 challenge the evidence, which is missing right now.

6           The State should not be taking away my property  
7 rights without giving me a hearing and an opportunity to  
8 respond to it, especially since we now know, as of  
9 yesterday, the State's position, to be polite about is, is  
10 evolving. But looking at the Grober Declaration, I don't  
11 think it's very helpful.

12           Number One: There is no theory in California water  
13 law that the right to divert can be cut off because of the  
14 quality of water you're diverting. So Grober may say what  
15 he says, but it doesn't fit into the legal scheme of  
16 California water. The fact that it's high in salinity is  
17 irrelevant.

18           Again, number two, as I pointed out, is the  
19 curtailment letter, does not talk about salinity or water  
20 quality. This is a new theory from the May one letter.  
21 The Grober declaration's completely emancipated from the  
22 May one curtailment letter.

23           Number Three: Grober is not a qualified hydronimus  
24 He bluntly states, well, these crops will die if this water  
25 gets pumped to it. He has no qualifications to do that.  
26 He has no right to make those opinions as a professional  
27 expert. We don't know that. That's not before this court  
28 because Grober is not a qualified hydronimus to answer

1 those particular questions. And therefore, that portion of  
2 his expert opinion, should be disregarded.

3         Number Four: The Grober declaration is really based  
4 on absurd signs. It depends upon the notion that the  
5 molecule of water, which has higher salinity, is traveling  
6 in an easterly direction from San Pablo Bay, and there's  
7 water with higher -- with lower salinity coming from other  
8 sources into the Delta, and somehow West Side has a Deed of  
9 Trust, so to say, over the molecule from San Pablo. It is  
10 the water that will pump, but it won't pump the other  
11 water.

12         Well, the hydrology and physical nature of the Delta  
13 doesn't work that way, obviously. You have multiple  
14 sources of water going into the Delta, and they're all  
15 mixing. And so the whole theory of Grober depends upon you  
16 being able to identify whose molecule of water is whose,  
17 for purposes of pumping. And we just know that's  
18 impossible.

19         And then finally, the State Board relies on two  
20 cases to support Grober, and those cases are Wright and  
21 Crum, and that's for the principle that you are not  
22 entitled to bad water. That's how I would say it, and I  
23 apologize. That's not a good way to say it, but to me that  
24 makes sense.

25         But keep in mind that each of those cases deal with  
26 a single source; one was a stream, one was a river. And  
27 certainly that makes sense where you have a single stream  
28 or single river, but the Delta is different. The Delta

1 gets water from a variety of sources, and they're all mixed  
2 together.

3 So the single stream cases on water quality simply  
4 can't apply to a situation where you've got this huge  
5 kettle called the Delta, and all sorts of water's going in  
6 there. So we just don't think that's relevant.

7 And I planned to talk -- and I appreciate your  
8 patience with me today -- about the issue of the statute of  
9 limitations and the form of the stay. The statute of  
10 limitations issue raised by the State Board only goes to  
11 the question of whether this should be decided as a stay or  
12 decided as a temporary restraining order.

13 We believe that's ultimately without meaning because  
14 the deprivation of the constitutional right for taking a  
15 property right is so substantial, due process is going to  
16 prevail under either of those standards. So it really  
17 doesn't matter.

18 But I would go a step further and say, we do not  
19 have a statute of limitations problem. The issue is  
20 presented and explained by the petitioners on page 21 of  
21 the petition. And I suspect, your Honor, that -- at least  
22 the time I've been doing this for 33 years -- you always  
23 hear a term -- you're sort of making it up as they go and  
24 support the petition they didn't think about.

25 And I want you to know that this is an issue we  
26 thought through very carefully. You go to paragraph 21,  
27 and we set forth with authorities of why it is appropriate  
28 for a court to grant injunctive relief. Even if an

1 administrative process is not yet complete, if there's  
2 going to be injury to that party, that we anticipated this  
3 particular argument.

4           If you go to the Water Code 1126, it basically  
5 indicates that if there is an order from an authorized  
6 officer of the State Board, there was a requirement to file  
7 for reconsideration. West Side filed for reconsideration  
8 on May 11.

9           That reconsideration petition was received by the  
10 State Board. We have not received any response from them  
11 at all. If I were cynical, I would -- would say they're  
12 trying to run out the growing season crop with respect to  
13 the request for reconsideration.

14           Number Two: Even though there was an obligation to  
15 file the request for reconsideration, the State Board is  
16 not obliged to hear it. They can reject it without a  
17 hearing whatsoever.

18           So at this point, we sort of have a position  
19 where -- and I don't want to be in that position, either  
20 we're too early or too late -- if it's a final order, the  
21 State's saying we're too late because the 30 days has  
22 passed. But indeed our time to sue doesn't occur until the  
23 reconsideration's completed.

24           So we are now in court because we need the stay at  
25 this particular case, at this particular time because of  
26 the immediate injuries pointed out by the Martinez and  
27 Alvarez declarations. And we explain that to the court in  
28 paragraph 21 of the petition, and that's why we're here.

1 There's not a statute of limitations problem in this  
2 particular case, and it should go forward as a stay.

3 And then finally, with respect to the form of the  
4 stay, at the end of the hearing we saw that the proposed  
5 stay that I presented to the court at page three had some  
6 things that weren't just quite right, and I've already  
7 presented a copy to the Attorney General. And at the end  
8 of the hearing, I'd like to provide you with a copy of the  
9 revised one.

10 All it does is, we only put in that no enforcement  
11 of Pre-1914 rights. West Side has a Post-1914 right. So  
12 we clarified that it should be 2015 curtailment letters.  
13 And at such time as the court wishes, we can provide you  
14 with that revised proposed stay.

15 So in conclusion, your Honor, again, thank you for  
16 this opportunity. This is a serious economic issue to  
17 these folks. It's going to ruin their businesses. They're  
18 going to go out of business, many of them. They've been  
19 deprived of their property rights. It is coercive.  
20 There's no other way to read that.

21 Duarte makes it clear that there's not a rightness  
22 issue. Duarte makes it clear that it's equivalent of a  
23 coercive action and that due process attaches, and that we  
24 should be entitled to a hearing. And therefore, there  
25 should be no enforcement of these stays during the  
26 tendencies of communication.

27 And the really proper situation in this instance is  
28 that the State should withdraw the letters and go back, and



1 the State should hold pre-depravation hearings before  
2 issuing curtailment letters. That is what we want in this  
3 case. We want to have our proper forum in front of that  
4 State agency.

5 Your Honor, I know my other counsel may want to  
6 address you, as well. But if you have any questions.

7 THE COURT: I think at this point I'll reserve my  
8 questions until I hear from the A.G. Let me hear from the  
9 other petitioners, counsel.

10 MR. RUIZ: Your Honor, on behalf of Lindsay or South  
11 Delta Water Agency, I don't have any comments at this  
12 point. I'll reserve any opportunity that's needed at the  
13 end.

14 THE COURT: Well, let me make sure I understand.

15 So your client has not received any of these  
16 curtailment letters?

17 MR. RUIZ: Woods has not received any of the  
18 curtailment letters, which is why we're not -- as part of  
19 this stay request, we are the petitioner in litigation.  
20 The South Delta Water Agency has members or been in --  
21 South Delta Water Agency has received, such as West Side is  
22 in the South Water Agency.

23 THE COURT: Right. But your client has not received  
24 any of these letters.

25 So how does your client have standing in this case?

26 MR. RUIZ: Well, we have standing in this case in  
27 the sense that we have been told clearly that all Pre-1914  
28 water right holders will receive them, the curtailment

1 letters at some point. It is imminent, and based on that  
2 Woods has standing in that regard. Woods is not a part of  
3 the stay request.

4 South Delta Water Agency; as part of its enabling  
5 legislation, has the ability to bring litigation, pursue  
6 and protect its members water rights, as well as the  
7 members' ability to maintain usable water quality. So that  
8 is where our standing exists.

9 THE COURT: Okay. All right.

10 MR. RUIZ: Thank you, your Honor.

11 MS. SPALETTA: Thank you, your Honor. Jennifer  
12 Spaletta for Central Delta Water Agency. I will be very  
13 brief.

14 Just one technical matter. Exhibit C to the  
15 petition is a copy of the curtailment letter that was sent  
16 to Zuckerman Mandeville, Incorporated, which is a land  
17 owner within Central Delta Water Agency.

18 But I believe Mr. Herum mentioned that there was a  
19 declaration from Zuckerman Mandeville. It's actually this  
20 exhibit, which was attached to the petition as evidence of  
21 an example of one of the landowners within Central Delta  
22 Water Agency who received the letter.

23 Central and South Delta Water Agency cover hundreds  
24 of thousands of acres, and so there are numerous landowners  
25 owners who have received similar letters. We didn't feel  
26 it necessary to attach them all.

27 But as Mr. Ruiz explained, the petition did clearly  
28 state the standing of both Central and South Delta in

1 five -- excuse me, paragraphs 13 and 14 on pages five and  
2 six, which is a special statutory standing that was  
3 provided to these agencies for this very purpose.

4 They have numerous landowners over a large  
5 geographic area, and the Legislature found it wise to allow  
6 these agencies to have standing to defend the water rights  
7 at this dispersed community. So that standing issue is  
8 addressed squarely in both the petition and the example of  
9 Exhibit C, which was the specific curtailment letter to one  
10 of those land owners.

11 I also wanted to just briefly explain what the real  
12 threat is to this individual land owner and why this notice  
13 is so coercive. The letter says, "We will either come  
14 after you with a cease and desist order or an  
15 administrative civil liability complaint.

16 If it were just a cease and desist order, we may not  
17 have to be here because in that instance, the State would  
18 have to hold a hearing, and any monetary penalties would  
19 only accrue after the hearing, when the Board issued an  
20 order telling someone, you have to stop diverting.

21 So any monetary liability would only be prospective  
22 after the hearing and after the determination, but that's  
23 not what the State is saying. They're saying we are also  
24 going to be going after people with an administrative civil  
25 liability complaint after the facts.

26 What that means is that the State could wait until  
27 next June of 2016 to file administrative civil liability  
28 complaints against numerous land owners or West Side

1 Irrigation District, or all of the above, alleging that the  
2 diversions that those farmers made in May, June and July of  
3 2015, were unlawful, and therefore those land owners owe  
4 the state millions of dollars in monetary penalties.

5 The problem, of course, is that because there is  
6 water available in the Delta channels, and we see this  
7 evolving theory of the State that that water use is somehow  
8 unreasonable under the law, which is a new creation, these  
9 land owners haven't had the opportunity to address head on  
10 that new contention before they have to make the decision  
11 whether or not to stop diverting and accrue the monetary  
12 penalties that will be assessed after the fact.

13 So that is the dilemma. It's the administrative  
14 civil liability threat. Yes, you'll have a hearing a year  
15 from now, but the monetary penalties that would be assessed  
16 in the future are based on the conduct today, the conduct  
17 today. So that is the practical problem for all of these  
18 land owners.

19 And again, as Mr. Herum explained, if we were  
20 talking about a stream, where there was clearly no water in  
21 the stream for these people to divert, it would be a  
22 different story. But we're not. We're in the Delta  
23 channels, where there's definitely water.

24 So the O'Hagan declaration and all of the charts he  
25 put in which ignore that water supply, ignore what the land  
26 owners are seeing in reality.

27 And we have this new theory that somehow diverting  
28 water in a hypothetical world would be unreasonable under

1 the constitution, a theory that has never appeared in any  
2 precedent in the State of California, or any other state  
3 that we're aware of, and would have to be tested at some  
4 future hearing. But it has to control conduct today and  
5 that's the dilemma.

6 So if there's no questions, I have nothing further.

7 THE COURT: All right. Thank you.

8 MR. BULLOCK: Thank you, your Honor.

9 We're not going to cover everything in our brief.  
10 It sounds like you've had a chance to read them. But if  
11 the court has any questions about things we don't cover,  
12 please feel free to ask.

13 So I'm going to cover the kind of more procedural  
14 issues, the rightness, the limited remedies, and then I'm  
15 going to hand it over to Mr. Lee to discuss the more  
16 specific of water-related issues.

17 But first I want to start with the Duarte case and  
18 point out why it's distinguishable. In that case, the  
19 court determining that specifically that individual  
20 discharger had violated the requirements.

21 And in this case that -- in our situation, that's  
22 not the case. So you look -- you have a confused look on  
23 your face.

24 THE COURT: Well, I guess I would beg to differ with  
25 you.

26 MR. BULLOCK: Okay.

27 THE COURT: These letters aren't obviously directed  
28 to specific individuals. They have been given specific

1 water rights by giving pass words, so it's not simply a  
2 general notice.

3 MR. BULLOCK: So I think there's two points in  
4 there. The first one is, there's been no claim that any of  
5 these water diverters are in violation at this point. It's  
6 stating what the situation is. There's no claim in these  
7 notices that there has been a violation or there's been an  
8 illegal use of water.

9 There's a notice that use of water is potentially --  
10 would be a violation, but it's very different than the  
11 Duarte case, where the notice of violation was actually  
12 that. As I said, you are in violation of the law in the  
13 Duarte case.

14 THE COURT: So what's the purpose of the language in  
15 the curtailment notice that says: Completion of the form  
16 is mandatory to avoid unnecessary potential enforcement  
17 proceedings?

18 Doesn't that imply that someone is violating, or  
19 could be violating, without voluntarily conceding their  
20 diversion, that they would be in violation?

21 MR. BULLOCK: So the Water Board has the authority  
22 under the Water Code to investigate water diversion. So  
23 it's not an issue -- I believe that's in section 1051 of  
24 the Water Code.

25 THE COURT: In violation of section 1051 of the  
26 Water Code.

27 MR. BULLOCK: And so the Water Board certainly has  
28 the authority to investigate, and that's exactly what

1 they're attempting to do. They're trying to determine  
2 whether there are people that are potential future  
3 diverters, that may be in violation of the requirement.  
4 They're not saying that they're in violation now.

5 And the Water Board has the authority bring an  
6 enforcement action under 1052 or 1831 of the Water Code,  
7 regardless of these notices.

8 And so, your Honor, it's really -- these notices  
9 aren't what's creating the violation, and they're not  
10 saying that there is a violation. And the request for  
11 further information are -- I like to think of it as an off  
12 ramp for folks out there in the water diverting community.

13 They have the ability to say, there is no reason to  
14 look into us further because we are not going to be  
15 diverting. And regardless of whether they do that or not,  
16 the Water Board has the authority to go and bring an  
17 enforcement action, separate from these notices.

18 And so if folks fail to comply with the request in  
19 the notice, they're not in any worse situation than they  
20 were beforehand. Because before this notice went out,  
21 before they were asked to go on line and make this  
22 statement, the Water Board had full authority to bring an  
23 enforcement action. And if they fail to do that, if they  
24 fail to go on line and sign this statement, the same set of  
25 facts is apparent.

26 THE COURT: So then what's the purpose of having  
27 these recipients sign that acknowledgment?

28 MR. BULLOCK: Because the Water Board has the

1 authority and the requirement to investigate across the  
2 state, and there is a drought across the state. And so the  
3 Water Board is trying to limit the number of people that  
4 it's looking at.

5 It's trying to say, okay. We don't have to worry  
6 about these people because they -- there is no question  
7 that they are going to be in compliance with the law.  
8 There's no question about whether they're going to be  
9 violating or not. So we can stop investigations regarding  
10 those people.

11 THE COURT: So this is just a -- an administrative  
12 fishing scheme venture?

13 MR. BULLOCK: I would say yes, your Honor.

14 THE COURT: Based on an honor system.

15 MR. BULLOCK: It is. It is. And it's a little bit  
16 more than an honor system, I suppose, because it is being  
17 signed under penalty of perjury. But the fact that you're  
18 signing it isn't -- all it does is say like yes, we agree  
19 with your interpretation of -- of the water situation in  
20 the state, and we have no intention of diverting.

21 So yeah, potentially, I guess, the diverter could  
22 sign that and dissuade the Water Board from looking further  
23 into their water rights, whether or not they were actually  
24 diverting. There is a possibility for that.

25 THE COURT: So if someone signs this that's -- that  
26 means that the Water Board's not going to go after them.

27 MR. BULLOCK: I probably can't go far and say  
28 they're not going to, but they are much less likely to.



1 But whether they sign it or not has no impact on the  
2 Water Board's ability to go after them. And that ability  
3 is completely separate from these notices.

4 It's under Water Code section 1052 and Water Code  
5 section 1831, allowing the Water Board to issue civil  
6 liability or a cease and desist order without the need for  
7 a prior notice being issued.

8 THE COURT: If this were really just a courtesy  
9 notice, as your papers characterize it, why do you need  
10 this compliance certificate at all?

11 It clearly isn't just simply a certified mail  
12 receipt acknowledging that the recipient has received this  
13 courtesy notice and you, yourself, have said that it  
14 requires them to sign it under penalty of perjury.

15 MR. BULLOCK: It's informational, your Honor.

16 As the Petitioners have noted, it's not always clear  
17 from the local situation right at your diversion point  
18 whether there's actually water available under your water  
19 right, and the Water Board -- and Mr. Lee will get into  
20 this more -- but the Water Board is a State agency tasked  
21 with compiling that information and determining the  
22 availability of water. And so it's informational. It  
23 allows people to know what the state of affairs is in their  
24 watershed.

25 THE COURT: Well, but that's not all that the letter  
26 says. It does say that you're required to identify the  
27 alternative -- alternate water supply you will use in light  
28 of the curtailed water right, but it also says completion

1 of the performance mandatory to avoid unnecessary potential  
2 enforcement proceedings.

3 MR. BULLOCK: And I think that that unnecessary  
4 potential is the important part of that.

5 The Water Board has the authority to investigate and  
6 to bring enforcement actions. If you're not diverting and  
7 you decided you're not going to divert, it would be  
8 unnecessary to go through that investigation process, and  
9 it would be a burden on the state and it would also be a  
10 burden on the person who's not diverting.

11 THE COURT: So someone who doesn't fill out this  
12 form is more likely to be investigated or their rights will  
13 be reviewed, more likely to be reviewed by the Water Board.

14 Is that what you're saying?

15 MR. BULLOCK: I think that's -- probably is fair to  
16 say. As a purely investigatory matter, the Water Board is  
17 likely, under its investigatory powers, to focus its  
18 attention on people who are going to be diverting water, as  
19 opposed to people who are not going to be diverting water.

20 THE COURT: So isn't the letter then, in effect,  
21 coercive in nature? You're telling people, cease your  
22 diversion or else you are more likely to be investigated.

23 MR. BULLOCK: Well, those are two separate things,  
24 your Honor.

25 THE COURT: Well, no. I don't think so.

26 MR. BULLOCK: It's saying -- you said that it's  
27 ordering them to cease their diversions and that they're  
28 more likely to be investigated.

1 THE COURT: You, yourself, acknowledged that.

2 MR. BULLOCK: And it's -- I think this is a really  
3 important distinction that the petitioners would like to  
4 gloss over. It's not the notice that's requiring them to  
5 cease diversion. It's the state of affairs in California.  
6 It's the lack of water, and that exists with the notice or  
7 without the notice.

8 And we're here today talking about whether there  
9 should be a stay to the notice. And I think, therefore,  
10 it's a really important distinction because regardless of  
11 the notice, there is -- they're still liable for violations  
12 and for trespasses for illegal use of water.

13 THE COURT: Right. And I think your point would  
14 carry a little more weight, but for this language in the  
15 letter that says it confirms your cessation of diversion  
16 and also says, completion of the form is mandatory to avoid  
17 unnecessary potential enforcement proceedings.

18 I think if it were simply, like you say, a courtesy  
19 notice, what then is the purpose of the certification?  
20 Other than -- and I get what you're saying. It's some sort  
21 of informational thing for the Board to figure out, find  
22 out what their alternative water sources are. But it's  
23 more than just, tell us what other water sources you have,  
24 according to the way counsel has characterized it.

25 MR. BULLOCK: Well, in the -- the argument of  
26 counsel, I think of -- their petition is that somehow  
27 making that request requires full due process. And it's a  
28 very separate issue of whether we're going to investigate

1 people or not and whether we have the ability to  
2 investigate people.

3 First is, whether the issuance of this notice is  
4 itself an enforcement action, and that's what we're talking  
5 about here is, the difference between not where in that  
6 process we are of investigation, which then leads to  
7 enforcement, and at which point do they get due process?

8 And there has been no actual deprivation of rights  
9 yet because all it's saying is, this is the way we see  
10 things: Provide us more information. If you can help us  
11 to provide us more information showing that you're not in  
12 violation or that if you're not intending to be in  
13 violation, then we won't bring an enforcement action  
14 because there won't be a need.

15 If we don't have that information, or if you can  
16 provide us with information showing that you are in  
17 violation, then an enforcement action will come afterwards  
18 under 1052 of the Water Code or 1831, which they could do  
19 again with or without these notices. And both sections,  
20 1052 and 1831, are carried out under the auspices of the  
21 administrative procedure act requiring full due process.

22 And so really what we're talking about here is when  
23 do they get that process, and do they get that process  
24 simply because we're asking for information and saying, if  
25 you don't provide us with information, we're going to  
26 investigate further.

27 And again, I think the time that that's Duarte, it's  
28 a very big difference because in Duarte, there was an

1 affirmative determination already; that there had been a  
2 violation by a specific person, as opposed to here, where  
3 we're simply saying there is potential for everyone in the  
4 water shed to receive this letter.

5 It wasn't just the Petitioners. It was hundreds of  
6 people. It was the entire water district community that  
7 received this letter. So their name is on it, but it  
8 was -- you know, there's a database that prints out  
9 everybody, and it's to make sure that all of the water  
10 interests get a copy of this. It's a form letter.

11 THE COURT: Does it -- I mean, I denied myself to  
12 hear from Mr. Herum on this point, but I'm not sure  
13 that what he says makes a difference as to whether or not  
14 there's been some adjudication of a violation, or in this  
15 case the Board has already made some sort of determination  
16 of someone's rights saying, stop diverting.

17 MR. BULLOCK: We haven't, your Honor. There has  
18 been no determination of anyone's rights. There has not  
19 been a determination that anyone is in violation.

20 THE COURT: Well, but it -- let's get away from the  
21 word "violation." It says the State Water Board is  
22 notifying all holders of Post-1914 appropriative water  
23 rights within the Sacramento water shed of the need to  
24 immediately stop diverting under the Post-1914 water  
25 rights, with the exceptions discussed below.

26 There has been some determination of someone's  
27 rights. They have told these percipients, stop diverting.  
28 Now maybe there's been no final adjudication as to whether

1 or not they're properly violating their common rights or  
2 whatever, but there's been some adjudication by the Water  
3 Board. They're telling these recipients, stop diverting  
4 your water.

5 MR. BULLOCK: Well, I think that -- and not to split  
6 hairs -- but I don't think that there has been an  
7 adjudication.

8 THE COURT: Well, there's been a determination.

9 MR. BULLOCK: There's been a -- I would say a  
10 preliminary determination, but that's the process that has  
11 happen in enforcement before you actually have an  
12 adjudication and the opportunity for due process.

13 The Water Board can't go out and bring an  
14 enforcement action against any particular diverter until  
15 it's figured out some basic facts of what it thinks is  
16 going on. That doesn't mean, adjudicated those facts. So  
17 it's a very imperfect analogy, your Honor. But I think  
18 that it would be vaguely similar to the district attorney  
19 bringing a case against someone, some criminal case.

20 Again, this is a very imperfect analogy. But the  
21 district attorney and the police have to make some initial  
22 determination that there's some evidence there before they  
23 arrest a person, and/or -- maybe a better analogy would be  
24 a speed limit. The police have to know what the speed  
25 limit is before they can actually go out and cite someone  
26 for speeding. And no one gets due process simply because  
27 you put up a speed limit sign.

28 The time that you get due process is after the

1 police stop you, cite you and say, we think you  
2 specifically are speeding. And that hasn't happened here.  
3 And when it does happen, if it does happen, there will be  
4 full due process as required from the D.A. today.

5 And this actually ties back into something that Mr.  
6 Herum said that -- it's just simply incorrect, and I think  
7 this is the second time he's done it at some of these  
8 proceedings, saying that these penalties will date back to  
9 the date of the notice.

10 If there were a future enforcement action -- and  
11 that's simply not true. The notice has nothing to do with  
12 the amount of time that's going to be found in violation  
13 for illegal diversions.

14 If there were a future enforcement proceeding, the  
15 notice would in no way be evidence of anything regarding  
16 the violation for illegal diversion. It really is simply  
17 that. It's a notice. It's not evidentiary in any way. It  
18 doesn't start any type of a clock.

19 It's simply stating that these are the facts as we  
20 see them, and it doesn't in any way change what would have  
21 to be proved by the Water Board at a future proceeding,  
22 either in front of the Water Board or in front of the  
23 Superior Court that was done under 1052 or 1831.

24 I wanted to touch briefly on the Wilson case. Mr.  
25 Herum made a big deal that this case is only about  
26 mootness. It doesn't have anything to do with rightness,  
27 and that is certainly true if you don't read past the first  
28 page.

1           But the entire second half of the case is about  
2 rightness, particularly if you look at page 1581 and  
3 sequential. So the idea that somehow that case is not  
4 relevant simply isn't true. You just have to read  
5 the whole case.

6           THE COURT: Mr. Bullock, if you don't mind, can I  
7 ask you a question on the rightness issue?

8           You cited in your brief the Phelps versus State  
9 Water Resources Control Board case, and obviously that's a  
10 Third District Court of Appeal case, but it appears in that  
11 case that the Third District Court of Appeal found that  
12 these curtailment notices could, in fact -- well, it dealt  
13 with the rightness issue and whether or not the issuance of  
14 the curtailment notice is and the receipt by the  
15 recipients, then caused the dispute to become right once  
16 they challenged it.

17           And in that case, the Court of Appeal said, should  
18 have challenged it when you got the curtailment notice. It  
19 was right at that point because the petitioner in that case  
20 waited too long. I know you didn't cite it for that  
21 purpose, but I read the case. And it appears to the court  
22 that the Court of Appeal did address the rightness doctrine  
23 in the context of a curtailment notice.

24           MR. BULLOCK: If it's okay with you, your Honor, I  
25 believe Mr. Lee actually worked on that case. He would be  
26 in a better position.

27           THE COURT: Well, all right. I'll hear from the  
28 attorney who worked on the case.



1 MR. LEE: Your Honor, Deputy Attorney General  
2 Clifford Lee on behalf of Respondents, State Water  
3 Resources Control Board.

4 In the Phelps case, which involved Delta diverters,  
5 there was a notice to terminate diversion that was tailored  
6 to a specific diverter in the Delta. It was not sent to a  
7 category of diverters, but it was sent to a specific  
8 individual diverter, based upon an investigation of that  
9 specific diverter's use of water.

10 That is completely different from this situation,  
11 where there has been no tailored, specialized review of any  
12 diverter.

13 What has been reviewed under the curtailment notice  
14 at issue here is simply a hydrologic assessment of how much  
15 water is in the system and the priority dates of users.  
16 There has been no assessment as to whether the users fall  
17 within any of the exceptions.

18 There has been no assessment whether the users have  
19 alternate water rights, as is the case in Central Delta and  
20 the South Delta Water Agency, where they have both Riparian  
21 and Pre-1914 rights. That was not at issue in Phelps.

22 What was at issue in Phelps was one individual  
23 diverter with one tailored notice, with a statement, as I  
24 recall, in bold capital letters: You have to immediately  
25 stop diverting. There wasn't a but or maybe. It was bold  
26 letters. "You have to immediately stop diverting."

27 We don't have that situation here. This is not a  
28 specially tailored curtailment notice. It is a generalized

1 notice sent to a category of diverters, and it provides for  
2 the parties to provide the Board with additional  
3 information to indicate that no enforcement is appropriate.

4 That determination was already made in Phelps when  
5 the notice was issued. So they could have challenged that  
6 individualized determination, and that would have been  
7 appropriate. But that tells us nothing about the  
8 generalized notice in the present case.

9 As to why would the Board do this in terms of the  
10 generalized notice, as you might anticipate, the Board has  
11 only a limited amount of staff. There are thousands of  
12 diverters in the system.

13 If parties can come to the Board who have Pre-1914  
14 appropriative rights and say, we have an alternate source  
15 of water and we want to tell you about it, then the Board,  
16 I think, logically could say, we're going to have to go and  
17 prosecute you because you have an alternate source of  
18 water, and you can continue diverting.

19 I might add, among the petitioners in this case, are  
20 Central Delta Water Agency and South Delta Water Agency,  
21 but under the allegations claim not only Pre-14 rights, but  
22 Riparian water rights. All right?

23 A legitimate response to anyone who may have  
24 received the notice, who are within those districts is  
25 well, we may not be diverting under Pre-1914 rights, but we  
26 have Riparian water rights.

27 And the curtailment notice did not affect Riparian  
28 water rights, and if they have Riparian water rights, as

1 they allege, then there would be no logical reason for the  
2 Board to expend its administrative time and energy to take  
3 an enforcement action based upon the information gathering  
4 that the certification you've discussed provided.

5 So Phelps is different from the present case because  
6 the Board had gone the last mile in determining that these  
7 parties had no Pre-1914 rights, and the Board also  
8 determined that they had no legitimate Riparian claims.

9 If you read through the entire Phelps' decision,  
10 there is a ruling, not just simply that they had no  
11 Pre-1914 rights, but they had no Riparian rights at all.  
12 And the Board had made that determination at the time it  
13 had issued that curtailment notification to the Phelps'  
14 petitioners.

15 We're nowhere near that here, and the evidence of  
16 that is the Board said in the curtailment letter, that  
17 Mr. Bullock talked about, if you've got some other rights,  
18 tell us about them. In Phelps, they knew they had no  
19 additional rights. That's the difference between the two.

20 THE COURT: Mr. Bullock.

21 MR. BULLOCK: Thank you. And this actually ties  
22 back with what Mr. Lee has been saying and ties back to --  
23 into what Miss Spaletta was saying earlier.

24 They agree that there is still a lot of hypothetical  
25 issues here about what an enforcement action would look  
26 like, and that really plays into the first prong, under a  
27 specific legal foundation case of what is and is not a  
28 right.

1           This case really isn't fit for a judicial decision  
2 at this point because we don't know what's being questioned  
3 here, and there hasn't been any claimed violation. There  
4 hasn't been any actual enforcement against the petitioner.

5           We don't know whether potential future enforcement  
6 action would be under 1052 for liability or whether it  
7 would simply be a cease and desist order, which apparently,  
8 according to Miss Spaletta, if it were a cease and desist  
9 order, we wouldn't have a problem. And like -- also, as  
10 Mr. Lee pointed out, we don't know whether there is some  
11 alternative right for any of these particular diverters.

12           So this really is a case like in the PG&E case and  
13 like in Wilson, where the case isn't right because the  
14 court shouldn't be interfering in decisions by  
15 administrative agencies until they've been formalized and  
16 there's really been a concrete effect on the parties.

17           THE COURT: There's no concrete effect on the  
18 parties?

19           MR. BULLOCK: Well, there isn't, your Honor. And  
20 this ties back in -- I see your face, and I would --

21           THE COURT: The Board has told these recipients to  
22 cease diverting water.

23           MR. BULLOCK: They have not. They haven't told  
24 these diverters. They have told people in general.

25           And here's the important thing though, the really  
26 important thing about why there's no parties. We don't  
27 have a stay now, and frankly why this whole case kind of  
28 goes away. Because I think the term that they use was a

1 Zugzwang in their --

2 THE COURT REPORTER: I'm sorry. Was a --

3 MR. BULLOCK: A Zugzwang. And I apologize. I  
4 probably can't spell that for you.

5 THE COURT REPORTER: Okay.

6 MR. HERUM: That's my fault. I apologize.

7 MR. BULLOCK: You can spell it. This idea that the  
8 Water Board is, by issuing this notice, has put them  
9 between a rock and a hard place, and that's simply not the  
10 case. Because this notice does not affect their legal  
11 rights in any way.

12 And I see your face, so let me explain further. I  
13 covered this some in our brief. But what affects their  
14 rights is the ability of water in the state and whether the  
15 notice is there or not, there's the same amount of water.

16 And whether the notice is there or not, the Water  
17 Board has the authority to bring an enforcement action  
18 under section 1052 and section 1531 of the Water Code.

19 So the situation for these petitioners before the  
20 notice and after the notice is exactly the same. The only  
21 difference is that they now have the information to know of  
22 the potential for the enforcement action, but it doesn't  
23 change their legal rights in any way. And staying this  
24 notice, we can change that fact.

25 The court could save the notice, and the Water Board  
26 would still have full authority under the Water Code to  
27 bring an enforcement action against them. So it's  
28 really -- it's the drought and not the notices that is

1 limiting their ability to divert water.

2 And this leads us then, I think, into my second  
3 broad category that I wanted to talk about, which was the  
4 limited availability of a remedy here. So the petitioners  
5 have asked for either a stay or a temporary restraining  
6 order or injunction.

7 And so the stay, I'll address first. It would be  
8 under section 1094.5 of the Code of Civil Procedure. And  
9 as we stated in our brief, it's the Water Board's decision  
10 that 1094.5 doesn't comply because 1094.5 only applies to a  
11 final administrative order or a decision made as a  
12 result --

13 THE COURT REPORTER: Excuse me, counsel. If I could  
14 ask you to slow down, please.

15 MR. BULLOCK: Sure. I'll repeat that.

16 THE COURT REPORTER: Thank you.

17 MR. BULLOCK: 1094.5 only applies to final  
18 administrative orders or decisions that are made as a  
19 result of proceeding, in which by law a hearing is required  
20 to be given. And it's the Water Board's position that this  
21 is not that type of decision. So 1094.5 doesn't comply.

22 But even if it does, the stay provision is  
23 subdivision "g" and that says that the court may stay the  
24 operation of the administrative order or decision pending  
25 judgment.

26 And if the court were to do that, it really would  
27 have no practical effects because staying the notice -- I'm  
28 not really sure how you stay a notice because all the

1 notice did was tell them that they -- well, that there  
2 wasn't water available.

3 It just stated our understanding of the facts, and  
4 it wouldn't change the Water Board's ability to then bring  
5 an enforcement action. And I don't think under 1094.5, the  
6 court could go further and stay the Water Board's authority  
7 under an entirely separate section of the statute because  
8 the stay can only stay the order.

9 Now similarly, under a temporary restraining order  
10 or a preliminary injunction, you get to the same result.  
11 Because under Code Of Civil Procedure 526(b) an injunction  
12 cannot be granted to prevent the execution of a public  
13 statute by officers of the law for the public benefit.

14 So a temporary restraining order that restrained the  
15 Water Board from carrying out section 1052 or section 1831  
16 of the Water Code, is not allowed under the statute,

17 And if all you do is enjoin the notice, there's no  
18 legal or frankly, practical effects, and all it would  
19 really do would incorrectly suggest to the water diverting  
20 community that they could divert water with impunity and  
21 not have to face enforcement.

22 THE COURT: What if the court were to enjoin just  
23 the portion dealing with the compliance certification? If,  
24 in fact, as the Water Board asserts, this is simply some  
25 sort of public service it's providing to the water users of  
26 the drought situation, and then it serves no purpose for  
27 them to -- for the recipients to sign the certification?

28 MR. BULLOCK: With regard to the limitation on the

1 remedies, I think the court could do that. I think it  
2 would be unwise for a few reasons -- or maybe just one  
3 reason. And that is that -- no, I guess it is two reasons.  
4 I apologize.

5 It goes back to the rightness argument and that the  
6 court really shouldn't get involved in preliminary  
7 decisions before they're formalized and are concrete, and  
8 this is our attempt by the Water Board under its authority,  
9 under section 1051 of the Water Code to investigate. And I  
10 think it would be unwise for the court to impede that  
11 investigation. Furthermore --

12 THE COURT: But if you say this is just simply  
13 informational, then how can that serve as a basis for the  
14 investigation? I mean, it sounds like you're being  
15 somewhat inconsistent here.

16 Your papers characterize the letters as simply  
17 informational, but now you're saying well, but it's also  
18 the basis for the Board to make certain investigations of  
19 those who don't sign the certifications.

20 So if it's just simply, as you say, public service  
21 notice. Hey, here's the situation. Do what you want to  
22 do, but we're just telling you, we're in a drought.

23 Then what's the purpose of the certification?

24 MR, BULLOCK: I -- it's informational in two  
25 directions: It's providing information to the water  
26 diverting community and requesting information from the  
27 water diverting community.

28 THE COURT: But that's not the way the letter



1 characterized it. I agree it asks for alternate sources of  
2 water, but it also says it confirms your sensation of  
3 diversion.

4 MR. BULLOCK: So I think if the court were to enjoin  
5 that requirement, all it would do -- it would discourage  
6 people from providing information. It would make the Water  
7 Board's job more difficult.

8 It would result in the Water Board spending time and  
9 resources investigating people when there's no reason to  
10 because they have stopped diverting. And there's no real  
11 legal penalty to not complying with this request.

12 Because if the Board were to enjoin the -- and to  
13 enjoin this request, it would mean that the Water Board  
14 would have to assume that everyone who has one of these  
15 rights is attempting to divert water, and whether people  
16 just simply don't respond or whether people -- or whether  
17 the court tells them they don't have to respond, we're in  
18 that same situation.

19 So really it just discourages people from getting  
20 out of a situation where they're going to be unnecessarily  
21 harassed by the Water Board.

22 THE COURT: All right.

23 Anything further?

24 MR. BULLOCK: Mr. Lee now would like to speak about  
25 the water crisis.

26 THE COURT: Before I do that, let me just ask, do  
27 you need a break? All right. We're going to give the  
28 court reporter a break. How about -- why don't you come

1 back in 20 minutes. Is that right? 10:45. Thank you.

2 (Recess)

3 THE COURT: All right. Mr. Lee.

4 MR. LEE: Thank you, your Honor. Deputy Attorney  
5 General Clifford Lee here on behalf of the State Board of  
6 Resources Control Board.

7 I would like to -- my presentation primarily address  
8 the issue of whether the Water Board has the authority to  
9 regulate senior water rights appropriate or as diversion  
10 and to demonstrate that that authority includes the Delta  
11 appropriators that are petitioners in this case.

12 Before I do that though I -- just to sum up, I would  
13 perhaps raise three brief points summing up the rightness  
14 issue that was addressed by Mr. Bullock, okay.

15 First we should again stress -- the first point,  
16 this is not an action that subjects the plaintiffs any  
17 sanction. It is not an individualized determination of  
18 unauthorized diversion under 1052 of the Water Code, as was  
19 the case in Phelps, where there was an individualized  
20 determination.

21 There will be further Board enforcement proceedings,  
22 if the Board determines enforcement is appropriate against  
23 any of the Petitioners, those would be conducted with full  
24 notice and hearing, and the Board would have the burden of  
25 proof. So this is a non-individualized categorical  
26 provision of information to a category of diverters.

27 The court has asked, why should we have this  
28 certification then? Why require the parties to certify

1 about certain water right information? Well, the  
2 certification process is fully consistent with the Board's  
3 broad authority to conduct investigations for water under  
4 1051 of the Water Code.

5 Ten fifty-one of the Water Code, subdivision a says:  
6 The Board has the authority to investigate all streams,  
7 stream systems, portions of stream system, lakes or other  
8 bodies of water. That is 1051(a)

9 Ten fifty-one, subdivision "c," as in cat says: The  
10 Board may ascertain whether or not water therefore filed  
11 upon or attempted to be appropriated is appropriated under  
12 the laws of the state.

13 So the information that the Board is requesting,  
14 pursuant to this proceeding, is fully in line with its  
15 investigatory powers, broad powers given to the Water Board  
16 under Section 1051 of the Water Code.

17 As we have also mentioned, there are some practical  
18 administrative efficiency purposes here. As the court is  
19 well aware, there are hundreds, thousands of diverters in  
20 the State of California. The Water Board, with its limited  
21 resources, is attempting to avoid unnecessary commitment of  
22 resources to unnecessary enforcement proceedings.

23 The information that the certification provides can  
24 allow the Board to tailor its enforcement actions and use  
25 its scarce resources.

26 As we mentioned before, we have two petitioners  
27 here, Central Delta Water Agency and South Delta Water  
28 Agency that claim under both Riparian and Pre-1914 rights.

1 The Board has made clear that the curtailment notices at  
2 issue in this case don't go to Riparian water rights.

3 So if, in fact, the users within Central Delta Water  
4 Agency and South Delta Water Agency can assert their  
5 Riparian rights to meet their demands, rather than using  
6 Pre-14 appropriative rights, then there would be no need  
7 for any wasted effort on the part of the Water Board or any  
8 of the water users to participate in an enforcement  
9 proceeding.

10 Finally, on the rightness, I'd like to talk about  
11 the dilemma issue that the petitioners have argued. Very  
12 bluntly, your Honor, the diverters in this case face the  
13 dilemma, they allege to be their harm in their economic  
14 injury, with or without the curtailment notice.

15 The diverters potentially subject to enforcement  
16 actions based upon the diverters unauthorized diversion of  
17 water under 1051 of the Water Code, not the violation of  
18 the notice. The violation of the notice serves no function  
19 in the enforcement of the proceeding.

20 The enforcement proceedings are addressed based on  
21 unauthorized diversion as defined in the Water Code. The  
22 curtailment notice is, therefore, not -- I stress not the  
23 proximate cause of the diverter's dilemma.

24 The proximate cause of the diverter's dilemma is the  
25 reduced water supply due to the drought and the diverters  
26 Junior priority case. So there is a causality problem  
27 here. Curtailment notice doesn't cause dilemma. Dilemma  
28 is the basis for harm. The harm is the basis for their

1 stay. That's the fallacy in their analysis.

2 With that, I would like to turn to the water rights  
3 and related issues that are raised in this proceeding. I'd  
4 like to begin by briefly summarizing the category of  
5 California water rights, but I will do this quickly because  
6 it was in our papers.

7 I'll speak to why the Board has the authority under  
8 those laws to regulate senior appropriaters who are on  
9 authorized diversion. Then talk about the special  
10 distinction between the use of the natural flow by  
11 diverters and the release upstream storage water that's --  
12 impact on determining whether a diversion is unauthorized.

13 Fourth: Address the employment of this distinction  
14 of natural flow and upstream storage releases on the  
15 quantity versus quality issue, which is critical to the  
16 substance claim.

17 And then lastly, Fifth: Apply these principles to  
18 the factual context of Petitioners, West Side Irrigation  
19 District, Central Delta Water Agency and South Delta Water  
20 Agency. So let's talk about just very briefly -- because I  
21 know your Honor is somewhat familiar with this -- when we  
22 talk about our water right system, what are we talking  
23 about?

24 Well, in California, we have a dual water right  
25 system. A dual water right system means you have both  
26 Riparian water rights and appropriate water rights.  
27 Riparian water rights derive basically from English common  
28 law. And in 1850, the California Legislature adopted

1 English common law, unless otherwise inconsistent with the  
2 law of the State of California.

3 Based upon that 1850 statute, the California Supreme  
4 Court has affirmed that Riparian rights exist in  
5 California. Riparian rights are un-quantified. They only  
6 go to land that is adjacent to the water course.

7 Now they, generally speaking, have a paramount  
8 seniority over other rights, and it's because the Riparian  
9 rights priority comes from the date in which the land was  
10 patented from public domain to private use.

11 And as you might guess in California, that probably  
12 for the most part, in the 19th century. All right? So  
13 when we say riparians have a paramount right, it is because  
14 their land patents go to the very beginning of the history  
15 of California.

16 Now there may be some -- some situations where a  
17 land patent is later and an appropriator is earlier, but  
18 that's the minor exception.

19 Generally speaking, riparians have primary and  
20 paramount rights, and their needs should be met first,  
21 subject to the requirement of reasonable use.

22 Well, very early in the 19th century, it was quite  
23 clear that the common law doctrine of Riparianism, which  
24 was useful in allocating water in the water shed of the --  
25 would serve no purpose in the desert lands of the west, and  
26 minors not necessarily attended to English common law  
27 simply chose to divert water from the stream, put it to  
28 beneficial use.

1           And this mining custom developed into our current  
2 appropriative water right system. This system is  
3 dramatically different from the riparians. What it says is  
4 that you have a right to a specific quantity of water.  
5 That quantity of water has to be placed to beneficial use.  
6 It can be used on non-adjacent land.

7           In fact, it can be used on land miles away. And in  
8 time of shortage, where there are conflicts among  
9 appropriaters who have used this mining custom, the rule is  
10 first in time, first in right. Hence, the seniority  
11 system.

12           So your seniority would come from when you diverted  
13 the water and when you placed it to beneficial use. If you  
14 were the first person on the stream to do that and there  
15 were no other riparians, you get the flow of water in time  
16 of shortage. Everyone else has cut back based on their  
17 priority date. That is what the rule of priority is about.

18           Now in 1872, the California Legislature attempted to  
19 codify this mining custom, through adoptions of provisions  
20 in the Civil Code, but they did not make the Civil Code  
21 procedure for securing appropriative rights exclusive. You  
22 could still get an appropriative right the old fashioned  
23 way, by supporting water and putting it to beneficial use.

24           But if you use the Civil Code appropriation, you've  
25 got the benefit that your date of priority was dependent  
26 upon when you posted a notice, usually on a tree next to  
27 your point of diversion saying, you're taking water this  
28 date, for this quantity, for this place of use, and then

1 filing it with the County Recorder's Office.

2 Like I said, the Civil Code process was not  
3 exclusive. As such, our records in the 19th Century, of  
4 who has appropriative rights, as you might anticipate are  
5 sparse, to say the best. All right?

6 Well, by 1913, the California Legislature had enough  
7 of this combination of English common law mining custom,  
8 non-exclusive Civil Code process and adopted the Water  
9 Commission Act of 1913.

10 That is the predecessor of our current water rights  
11 system, where you can get a water right for an  
12 appropriative right, only by filing an application with a  
13 state agency, now the State Water Resources Control Board.  
14 Your priority date -- your priority date is the date of  
15 your application.

16 So the first person to file an application with the  
17 Water Board obviously has seniority over anyone that came  
18 later, to the extent that person is putting the water to  
19 consumptive use.

20 That is the current system we have now; however,  
21 because there was no attempt at the time to in any way  
22 disparage preexisting rights, that system was built on top  
23 of the system of Riparian rights and Pre-1914 rights that  
24 were mining custom.

25 So to sum up, you have generally speaking, Riparian  
26 rights that have the highest priority. You have pre-1914  
27 rights, whose priority for the most part is placed from the  
28 time the water was diverted and put to beneficial use.



1           And then you have the Post-1914 system because the  
2 Water Commission Act of 1913 became effective on December  
3 19th, 1914, where your priority dates are set based upon  
4 the date in which you filed your application with the State  
5 agency, now the State Water Resources Control Board. The  
6 over-arching rule for allocation is the rule of priority.

7           And as we cited in the Millview case, under the rule  
8 of top priority, which governs water use, the rights of  
9 Riparians generally are paramount. Appropriaters may be  
10 deprived of all use of water when the supply is short, and  
11 senior appropriaters are entitled to satisfy their  
12 reasonable needs before more junior appropriaters are  
13 entitled to any water.

14           There is one last component of sort of a thumbnail  
15 summary of our water rights system. We have the Riparian  
16 system, the Pre-14 appropriaters, the Post-14 appropriaters  
17 under the Water Commission Act of 1913.

18           In 1928, the people of the State, the California  
19 Legislature, the people of the state adopted a  
20 constitutional right that all use of water must be  
21 reasonable and beneficial.

22           So Article Ten, Section Two of the California  
23 Constitution says that there can be no property right to an  
24 unreasonable use of water. You only have a vested right to  
25 a reasonable and beneficial use of water. This has been  
26 deemed by the California Supreme Court as a paramount rule  
27 of California water policy. So that's the background for  
28 our California Water Right System.

1 We have briefed this issue, and I won't go any  
2 further, and it wasn't raised specifically by the  
3 petitioners.

4 But two cases, Young versus State Water Resources  
5 Control Board and Millview County Water District versus  
6 State Water Resources Control Board have made it clear, if  
7 it was not clear before, that the Water Board has the  
8 authority to review Riparian and Pre-1914 rights to  
9 determine whether their use is unauthorized within the  
10 meaning of 1052 of the Water Code.

11 So after Young and Millview, there is really no  
12 question that the Board has the legal authority to look at  
13 Pre-1914 and Riparian rights to determine if their water is  
14 unauthorized under 1052 of the Water Code.

15 We have some -- my third point here is, I would like  
16 to add to this the complication of rights to water in a  
17 stream that are due to natural flow and to releases from  
18 upstream storage. This is my third point here. All right?

19 When you look out at a stream, you're just going to  
20 see water, but that water could be there based upon runoff  
21 from the mountains or from the drainage system, water that  
22 we would call natural flow. That is water that in the  
23 state of nature, without any physical facilities on the  
24 project, would be present in the stream.

25 And as you might anticipate, that would vary,  
26 depending upon the type of water year we have and the  
27 season. In California, we tend to have lots of natural  
28 flow in the winter and spring and very little natural flow

1 in the Summer and Fall on our major rivers.

2 This is particularly exacerbated in the drought  
3 because nature typically doesn't give us the water;  
4 however, if you go and look at your -- out from your  
5 diversion intake, you might see a lot of water in your  
6 system, but that is because the State has invested large  
7 sums of money, the State and the Federal Government, to the  
8 State Water Project and the Central Valley Project, to  
9 build storage facilities upstream.

10 You probably have seen them. Folsom Dam, Shasta  
11 Dam, Oroville Dam, these are -- New Malones Dam, these are  
12 State or Federal facilities that will store water during  
13 the wet years and the wet months and then will release them  
14 during dry years and dry months.

15 They are mandated to do so because those water  
16 rights are subject to the regulation of the water, and  
17 those water rights are required to release upstream  
18 storage, water that is sometimes called foreign water, to  
19 use the technical term, water that would not be in this  
20 river at the time it's there because the releases might be  
21 in the late Spring, Summer or Fall.

22 The standard rule -- and we have cited it in our  
23 briefs, and I won't go over the cases -- is that regardless  
24 of how senior your rights are downstream, as a Riparian or  
25 Pre-1914 appropriator, you don't have a right to that  
26 release storage. Now why is that?

27 The reason is that diverters down stream for the  
28 most part have not invested in the upstream storage

1 facilities. They aren't water contractors of the upstream  
2 storage facilities. They are entitled only to the natural  
3 flow.

4 And so the rule of law in California -- and we have  
5 cited it in some detail on page 13 of our brief -- makes it  
6 clear that people who are down stream diverters that have  
7 direct diversion rights, regardless of how senior they are,  
8 don't have a right to release stored water they haven't  
9 paid for. So that is an important understanding and Point  
10 Three here that I want to make.

11 Point Four: All right. How does this relate in the  
12 Delta when, as the petitioners will point out, you're  
13 always going to have water. Why? Even if there is no  
14 natural flow coming down from the Sacramento River or the  
15 San Joaquin River -- imagine a situation where there is no  
16 flow in the river. All right.

17 Because the Delta is an estuary where salt water and  
18 fresh water meet, there will always be water from the  
19 Pacific Ocean coming in. They, therefore, argued that  
20 there is never a water rights problem. Nothing could be  
21 further from the truth.

22 While it is true that senior appropriaters and  
23 riparians have a right to a specific quantity of water,  
24 they only have the right to the quality of water as stated  
25 in Wright V. Best, in its natural state of purity, or as  
26 stated in Crum versus Mount Shasta Power Corporation, the  
27 right to quality, quote, "Which nature provided the land."

28 This analysis brings in sharp relief the problem

1 we're facing in the Delta. There is very, very, very  
2 little natural flow coming down this summer because we are  
3 in extreme drought conditions.

4 As a result, salt water from San Francisco Bay has  
5 moved, and will continue to move far to the east, affecting  
6 points of diversion throughout the interior Delta.

7 As the petitioners note in their complaint, one of  
8 the reasons why we don't see even worse effects of this  
9 salt water intrusion is because the water projects upstream  
10 have been releasing stored water, water stored from  
11 previous years and previous times to repel salt water  
12 intrusion, to meet the water quality standards set forth by  
13 the Water Board in Decision 1641.

14 Like I said, all of these projects have water rights  
15 from the Water Board. The Water Board conditions those  
16 projects' storage of water on meeting public interests,  
17 terms and conditions, and one of those sets of conditions  
18 is to insure the protection of water quality for fish,  
19 wildlife and agriculture uses. So the projects themselves  
20 are basically holding back the ocean. All right?

21 As we have cited in our case, in our brief, Delta  
22 riparians that are appropriaters have no right to this  
23 water that's stored by upstream irrigators. They pay for  
24 it. They don't have contracts with it. They were not part  
25 of these projects, and their water right does not extend to  
26 that.

27 So these are the five principles that I wanted to  
28 talk about as -- four principles I wanted to talk about is

1 introduction. Those are the kinds of water rights we have.  
2 The Board has authority to regulate senior appropriaters.

3 There is a special distinction between natural flow  
4 and release upstream storage and that in the case of the  
5 Delta -- in the case of the Delta, regardless of how senior  
6 Riparian and appropriative water rights are for the  
7 diverters in the Delta, they have no right, as was said  
8 most recently by Justice Robey in the State Water Resources  
9 Control Board cases, Delta riparians and appropriaters have  
10 no right to water stored by upstream entities. All right.

11 How can and should we apply these facts to the  
12 alleged harm that the petitioners have raised in this case?  
13 All right. Excuse me, not these facts, these principles.  
14 All right?

15 Your Honor, if it may please the court, just for  
16 simplicity, there were some exhibits that were attached to  
17 the two declarations. To avoid the parties and the court  
18 having to flip through declarations, I would simply like to  
19 distribute them, if that's appropriate.

20 THE COURT: That's fine.

21 MR. LEE: Okay. The first item that I'd like to  
22 distribute is Exhibit Seven to the John O'Hagan  
23 declaration, and it's entitled the 2015 combined Sacramento  
24 San Joaquin River Basin Senior Supply and Demand Analysis.  
25 This chart actually is much simpler than it may look, okay?

26 The yellow block determinations are determinations  
27 by the Water Board of Riparian demands. These are based on  
28 the statements of diversion in use that riparians have

1 provided to the Water Board.

2 The Pre-1914 block, which is in orange, is added on  
3 top because as we mentioned, they generally have a more  
4 junior priority than riparians. And it's also based on  
5 self-reporting through statements of diversion and use  
6 filed by the Water Board. The foundation for this is set  
7 forth in the O'Hagan declaration.

8 I would ask the court to look at the daily FNF, and  
9 that is full natural flow, that is provided in the blue  
10 line. As you can see, the natural flow in this serious  
11 extreme drought year, has cut into not only Post-1914  
12 rights, but into Pre-1914 rights.

13 Now Mr. Herum says as to return flow -- and I will  
14 get to that in a moment, all right -- but I wanted to  
15 provide this to the court, simply to show the gravity of  
16 the situation and the importance of understanding the  
17 distinction between natural flowing river and water that's  
18 released into the river by upstream storage facilities.

19 Now unless your Honor has questions about the chart,  
20 then I'll move on.

21 THE COURT: Go ahead.

22 MR. LEE: Okay. Now the petitioners, Thomas Burke  
23 declaration, recognizes that without upstream storage  
24 releases from the Central Valley Project and the California  
25 State Water Project, the overwhelming bulk of the water  
26 available to West Side Irrigation District and Woods  
27 Irrigation District would be from San Pablo Bay.

28 Now, your Honor, we have not included this in our

1 declaration, and I don't believe it's controversial. But  
2 if there's any objection to this, we are certainly subject  
3 to talk about it. But I have a map that --

4 MR. HERUM: Could we look at it before we decide to  
5 see if we want to object to it? I'm sorry, your Honor.

6 THE COURT: That's all right.

7 MR. LEE: This document is judicially noticeable.  
8 It's from the May 1995 State Water Resources Water Quality  
9 Control Plan for the San Francisco Bay, Sacramento San  
10 Joaquin Delta Estuary, again issued in May of 1995 -- a  
11 copy for the court.

12 THE COURT: Thank you.

13 MR. LEE: And I just thought it would be helpful for  
14 the court to have a graphic, a simple graphic of the Delta.  
15 If we had had a little more time to do our papers, we would  
16 have included it within the declarations. But I think this  
17 will be helpful. --

18 MR. HERUM: If Mr. Lee is treating this as a  
19 demonstrative exhibit, we're okay.

20 MR. LEE: I am, your Honor. I'm treating it as a  
21 demonstrative.

22 THE COURT: All right. Thank you.

23 MR. LEE: Now as I had mentioned, Mr. Burke, using a  
24 computer model called -- a computer model called DSM2, all  
25 right, did what is called a source analysis and determined  
26 under certain hydrologic conditions, what is the location  
27 or source of the bulk of the water at the Woods Irrigation  
28 and the West Side Irrigation District diversion points.



1           And very hopefully, what Mr. Burke did is, he looked  
2 at it in the context, as you can do under these computer  
3 models, if the water projects were present and if the water  
4 projects were not present, there is a capability to project  
5 using this model about what would be the source of the  
6 water at these diversion points in the hypothetical  
7 situation, if we had no upstream storage projects like the  
8 Federal Central Valley Project or the State Water Project.

9           In paragraph 13, he says: Woods Irrigation  
10 Company's point of diversion, assuming no State or Federal  
11 project operations, quote, "During the month of July, in  
12 the 1977 drought year, 39 percent of the water available in  
13 the Middle River originates from agriculture return flows  
14 from the Delta, 60 percent from San Pablo Bay and one  
15 percent from the San Joaquin River." That's paragraph 13  
16 of the Burke Declaration. All right?

17           And, your Honor, with this figure you can see where  
18 San Pablo Bay is. It, of course, has -- is much closer to  
19 San Francisco Bay.

20           On paragraph 14, the Burke Declaration says:  
21 "During a drought condition that does not include State and  
22 Federal water projects, 39 percent of the water is from the  
23 agricultural return flow. Sixty percent is from San Pablo  
24 Bay and one percent from the San Joaquin River."

25           So in both situations, the projects were not there.  
26 The overwhelming bulk of the water that arrives at the  
27 diversion points of Woods and West Side Irrigation District  
28 come from San Pablo Bay. What the Burke Declaration

1 doesn't take from this is what consequences to the water  
2 quality would be in the, without project situation.

3           And this is where the Water Board's hydrologist, Les  
4 Grober, picked up on the source analysis used by Mr. Burke  
5 and said, it is very simple as a matter of hydrologic  
6 analysis, to then determine, assuming 60 percent of the  
7 water is from San Pablo Bay, what the salinity level would  
8 be at these points of diversion.

9           We're going to get a little technical, and I may  
10 mispronounce some terms here. But salinity is measured  
11 through a concept called electrical conductivity, which is  
12 commonly reduced in documents to E.C.

13           We may all remember from our high school chemistry,  
14 that saline water is more conductive of electricity than  
15 fresh water. And so you can actually measure how salty  
16 water is by determining its conductivity.

17           And so the modern method of determining salinity is  
18 to use the E. C. standard, and the metric used is called  
19 milliSiemens per centimeter, so I may be using that term,  
20 milliSiemens per centimeter.

21           Just as an aside, before they used this, they would  
22 use something called parts per thousand as a measurement.  
23 So you would have total dissolved solids. You add some  
24 water. You would determine -- you would dry it and  
25 determine how much salt was left.

26           That was not very useful for real time analysis  
27 because you had to take the water to the lab, and you had  
28 to dry it out. And then you had to find out how much was

1 left and weigh it, and that could take several days.

2 The benefit of using E.C., electrical conductivity,  
3 is you can almost get real time determination of what the  
4 salt content of the water is by simply putting electrodes  
5 in the water. So that's why we use electrical  
6 conductivity.

7 Now if you look at the chart, there is on it, the  
8 town of Martinez -- excuse me, not the chart, the map --  
9 and Martinez is the typical site used to represent salinity  
10 of water that enters the Delta for San Pablo Bay.

11 Now Mr. Grober took a look at what the mean monthly  
12 salinity of Martinez was as of June, 2015, the average for  
13 June. All right? And it was 29.73 milliSiemens per  
14 centimeter, okay? Almost 30 milliSiemens; however,  
15 Mr. Grober was careful to note that this is not a state of  
16 nature figure.

17 This is not what the situation would be at Martinez  
18 if there were no projects, because the projects are  
19 releasing between 3,000 and 6,000 cubic feet per second of  
20 water from stored water. This is pushing salt water to the  
21 west.

22 In the absence -- in the absence of these releases  
23 of stored water -- stored water that we contend the  
24 petitioner has no right to -- the salt water at Martinez  
25 would approach the level of sea water, and that's 55  
26 milliSiemens per centimeter. All right.

27 I might add, that these are conservative numbers  
28 because they don't include the consequence of salinity at

1 the petitioners' point of diversion that may result from  
2 applying excessive salt water on their property. But let's  
3 just put that aside for now.

4 In Exhibit Five of the Grober declaration -- and  
5 again, it might be easiest if I simply provide the court  
6 with a copy of that.

7 THE COURT: I have it in front of me. It's fine.

8 MR. LEE: Okay. There is in the lower two boxes a  
9 calculation of what salinity would be like at the Woods  
10 point of diversion during the 1977 drought year without  
11 projects at all. And this again is based on the source  
12 analysis derived from the Petitioner's Burke Declaration.

13 Well, 1977 was the only drought year in recent times  
14 that mimics the present drought conditions. And we can see  
15 that the salinity at the petitioner's point of diversion  
16 would be 33.41 milliSiemens per centimeter, extraordinarily  
17 high. Below it you see 1979.

18 1979 was actually a pretty good water year. All  
19 right? It was an above normal year, but without the  
20 projects releasing stored water upstream, the salinity  
21 would likely be 28.56 milliSiemens per centimeter.

22 Well, what does that all mean? All right. Well, I  
23 think the key here is if you look at Exhibit Six to the  
24 Grober declaration, and Exhibit Six is derived from the  
25 United Nations Food and Agriculture Organization document,  
26 water quality for agriculture. All right?

27 You will see an array of field crops, vegetable  
28 crops and fruit nuts, which include the overwhelming

1 majority of the crops from -- in the Delta.. This chart  
2 looks complicated, but actually it's pretty straight  
3 forward.

4           If you go to the far right-hand column, on top of  
5 zero percent, okay, the zero percent means that there is  
6 zero yield; that is, no yield at the salinity levels  
7 measured by milliSiemens per centimeter that are set out  
8 below. All right?

9           So you can see, for example, if the water quality  
10 diverted at Woods Irrigation Company point of diversion or  
11 West Side Irrigation Company's point of diversion  
12 exceeds -- is ten milliSiemens per centimeter or greater,  
13 then there would be zero yield for alfalfa. The rest of  
14 the column is pretty self-explanatory.

15           It is based upon this analysis that the Board has  
16 determined that without project operations, without the  
17 benefit of the water projects releasing thousands of cubic  
18 feet per second of water from storage, the petitioners  
19 could not divert any water for reasonable and beneficial  
20 agricultural use. Why?

21           Because at 33 milliSiemens per centimeter you are  
22 three times, in some cases, higher salt quality than would  
23 allow for production of any alfalfa and related crops. So  
24 the numbers aren't even close.

25           Now I might also add that if the argument is made  
26 that water was -- be available for something other than  
27 agriculture, that would not be the case.

28           The maximum salinity standards for drinking water,

1 set forth in the Grober declaration of paragraph 27, are  
2 1.4 milliSiemens per centimeter. Obviously, if your water  
3 quality is 33 milliSiemens per centimeter salinity, the  
4 water will not be usable for beneficial use or for drinking  
5 water purposes either.

6 Now for that reason, the petitioners could not  
7 divert any water for reasonable and beneficial drinking  
8 water use. It's based upon this analysis that the Board  
9 has determined that to the extent the petitioners have  
10 senior rights, those rights are to natural flow.

11 That natural flow does not include the benefit  
12 available from release of upstream storage. In the absence  
13 of the release of upstream storage, there could be no  
14 diversion of water for reasonable and beneficial use for  
15 either agriculture or for drinking water supply.

16 Now petitioners claim that this is a new theory.  
17 Well, I might add, if you look at the curtailment notice  
18 that were appended to the petition, the threat of salt  
19 water contamination to fresh water supplies is addressed in  
20 the very first paragraph.

21 And at the very last paragraph of the letter, the  
22 paragraph states the State Water Board also encourages  
23 water right holders to insist in the prevention of unlawful  
24 diversion of water, which is what we've been mostly talking  
25 about, and in discouraging any waste or unreasonable use of  
26 water. So the issue of waste and unreasonable use and salt  
27 water intrusion were at least referenced in the curtailment  
28 letter.

1           Your Honor, at issue in this drought year is whether  
2 California's allocation in the Board's mind is to be  
3 determined by the rule of law, and that is in this case the  
4 rule of priority that we've discussed or the California  
5 Constitutional -- and the California Constitutional  
6 requirement of reasonable and beneficial use, or whether  
7 we're going to abandon these rules and principles and  
8 embrace some unknown allocation rule, a rule that hasn't  
9 been codified, hasn't been tested by case law or statutory  
10 authority and depends on -- and frankly, who comes to a  
11 Superior Court judge first and speaks the loudest.

12           Given the serious nature of the drought, more than  
13 ever, the Water Board respectfully submits that we should  
14 have the parties comply with the rule of law and not some  
15 unknown method of allocation. And for that reason, on the  
16 merits of the Stay petition, we urge this court not to  
17 grant the stay.

18           THE COURT: All right. Thank you.

19           Mr. Herum.

20           MR. HERUM: Yes, your Honor.

21           If I may -- and I think Miss Spaletta would like to  
22 make a few comments, as well. I'm not going to respond to  
23 everything. I have five points that I'd like to leave you  
24 with. If I miss something that I need to cover, please  
25 tell me to do that. But in the interest of time, I'm not  
26 going to go point by point, as much as I would love to.

27           Point Number One: This is a coercive letter. It's  
28 not a courtesy notice. When I think of a courtesy notice,

1 it's the first card you get in the mail that says, save  
2 this date. That thing is many things. It's not that.

3 We urge you to read it because it is coercive, and  
4 we find it astonishing that the State increasingly and  
5 overwhelmingly tells you, it's meaningless. It doesn't do  
6 anything. It's irrelevant.

7 So my question is really simple back to the State.  
8 If this letter is meaningless and doesn't do anything, why  
9 are you fighting so hard for it? It must mean something.  
10 If it meant nothing, the easy thing to do would be to  
11 withdraw it and put out a new letter.

12 There's got to be some significance of it because  
13 we're just fighting too hard and banging heads too hard  
14 with really good lawyers for that letter to be meaningless.  
15 Common sense suggests that it isn't. I just urge you to  
16 read the letter. Use the commenting, which it is a letter  
17 of coercion, the same as Duarte was. And you can't get  
18 around that.

19 The problem with the letter is, it is coercive. It  
20 also contains a finding that anyone who diverts is in  
21 violation of the law. So we're basically guilty before we  
22 have a chance to be charged. That is a problem with the  
23 letter, and that the penalties immediately accrue from the  
24 date of the letter. And then finally, contrary to what the  
25 State Board keeps saying, it is individualized.

26 Now they keep saying it on the theory, if you say it  
27 enough, people will believe it. But the letter is  
28 addressed to West Side. It's addressed to their address.



1 It specifically gives their license number in it.

2 Common sense and just the common English can say  
3 many things, but that is an individualized notice. That is  
4 the problem. And they can say it until the cows come home,  
5 but that doesn't make it true.

6 Number Two: The matter is ripe. We received the  
7 letter. We filed a request for reconsideration. We have  
8 never heard from the State Board on our re-considerations,  
9 we believe we have to do because this letter was done under  
10 the authority of an Officer Tom Howard, and reconsideration  
11 is mandatory under the Water Code.

12 We point out to this court, in paragraph 21 of our  
13 petition, the cases that indicate if you're in  
14 administrative process that isn't complete and you face  
15 harm, you may go to court and seek injunctive relief or a  
16 stay, which is exactly what we've done here, which is  
17 exactly what happened to Duarte Nursery.

18 And I think Duarte Nursery answers that question.  
19 The Duarte Nursery report said, that the matter was right,  
20 even though formal enforcement had not taken place. This  
21 is exactly our situation here. Duarte applies.

22 And the whole rightness issue at the end of the day,  
23 dove tails to whether the notice is coercive or just a  
24 meaningless notice. And there's no way you can look at the  
25 letter and say it's a meaningless notice.

26 Number Three: The State now for the first time  
27 says, well, you know, this is only for informational  
28 purposes to give you notice and assemble data. That's a

1 legitimate use. That may or may not be true, but the point  
2 is, there is a method to accomplish that without the  
3 hand-handed letter that was sent out.

4           They may be making that up now as an excuse, but if  
5 you look at the letter -- and the call of that letter is to  
6 stop people from diverting. It's not to get information.  
7 It's very, very clear that's what it is. And that may be a  
8 legitimate basis, but there's a way that they can do that  
9 without violating due process and without violating Duarte.

10           And what we're asking from this court today is to  
11 issue a stay and compel them, if they want information, do  
12 it in a way that doesn't violate due process. That is all  
13 we are asking for.

14           Number Four: With respect to Mr. Lee's comments, I  
15 think his presentation, to a great extent, illustrates why  
16 there is a need for a pre-investment due process hearing.  
17 I don't know about you. My first thought was no one told  
18 me there would be math today, and I was confused. You  
19 know, those may be good arguments, no may be bad arguments.

20           But I'm not aware that this court has 500  
21 hydrologists working for them that can analyze it. That's  
22 why you go and have a hearing. We'll bring our folks.  
23 They'll bring their folks, and we'll fight it out with  
24 cross-examination, and we can go through that process. And  
25 then if we come back to you, you'll have an administrative  
26 record to review. That's the right way to do it.

27           THE COURT: And that struck me, you know, Mr. Lee --  
28 that struck the court, as well. I'm the last person to be

1 making these kinds of technical decisions. I'm just a  
2 judge. I have no expertise in this area, other than what  
3 I've read, other than, you know, what you've -- you know,  
4 given the court.

5 But all this technical thing -- and frankly, from  
6 both sides -- all the experts' declarations as to the  
7 salinity of the water and which expert is right and who's  
8 wrong, I cannot make that call.

9 MR. LEE: Your Honor, if I could speak to that  
10 briefly because you directed the question to us.

11 First of all, we would not have provided the Grober  
12 Declaration if it wasn't for the fact that the petitioners  
13 provided this court with math in the Burke Declaration. If  
14 we had not provided any response to the Burke Declaration,  
15 they would have said, we have conceded their factual  
16 determination so to the extent that we have math here, I  
17 think the petitioner's involved.

18 But more importantly, your Honor, I think this goes  
19 to the process that the Board will provide. The  
20 curtailment notice is simply the beginning of that process.  
21 The Board has not issued any enforcement orders or draft  
22 orders against any of the petitioners. It has not  
23 predetermined whether the petitioners are unauthorized  
24 users of water. The individual petitioners, as was the  
25 case in Phelps, here, if that is to occur, the Board will  
26 hold a hearing that Mr. Herum is asking for. The evidence  
27 that Mr. Herum wants to introduce will be introduced. The  
28 contrary evidence by any party will also be introduced, and

1 there will be an opportunity for adjudicatory proceeding.

2           The process we have explained to you, the  
3 investigation process of opening up an investigation, the  
4 then issuance of a draft, cease and desist order say if  
5 that's the way, and then a hearing is a part of the due  
6 process that is provided in this water right proceeding,  
7 and all of these issues can come out. It would take  
8 considerable issue for Mr. Herum's motion that we have  
9 predetermined anything here.

10           THE COURT: Well, by the same token, Mr. Herum, you  
11 don't dispute the authority of the Water Board to say, to  
12 give these users a heads-up, so to speak? Hey, we don't  
13 think there's going to be enough water. You may be in  
14 danger of violating -- and whatever rights you might have  
15 and exceeding your rights, right?

16           MR. HERUM: You could write the letter correctly.

17           THE COURT: But -- and to the extent the Board has  
18 made some determination that they think there is a danger  
19 that these recipients could be in violation and could be  
20 subject to certain sanctions, that's obviously not for this  
21 court to second guess the Board's wisdom as to whether or  
22 not that determination is correct or not, but for the fact,  
23 as you say, that it is coercive in nature so --

24           MR. HERUM: That's right.

25           THE COURT: -- so it's sort of a courtesy notice.  
26 And whether or not that courtesy notice has merit, whether  
27 or not their determination is correct or not, whether or  
28 not there's sufficient water for the Pre-1914 water users,

1 that's not for this court to decide, right?

2 MR. HERUM: That -- but the -- well, I think it's  
3 appropriate for the court to look at this letter because of  
4 its coercive nature, and I think that the coercive language  
5 of that should be filtered out so it's a true, hey, guys.  
6 Here's what we think. That's fine.

7 Now keep in mind, however, the State Board can  
8 proceed with a cease and desist order against any of these  
9 folks at any time. They don't have to be courteous. And  
10 this letter is purely intended to coerce people to give up  
11 their water rights without the public hearing. That's what  
12 it was intended to do, and it hit just as the growing  
13 season commenced. It didn't happen in January or February.  
14 It hit the farmer at the worse possible time.

15 It's designed to take away people's rights, and  
16 we're asking the court simply to filter out the  
17 unconstitutional parts of that. But certainly, you know,  
18 the State can send a letter to someone if they want to.  
19 We're not suggesting they can't do that. We're saying they  
20 can't send out this letter.

21 THE COURT: All right. I'm sorry to interrupt.

22 MR. HERUM: No. No, please. We're here to try to  
23 help.

24 And I'd say to Mr. Lee, you know, on the rightness,  
25 is that Duarte answers that question. Duarte says relief  
26 is available to a private party even before enforcement  
27 commences with these sort of letters, and Duarte answers  
28 that question.

1           And I point out to you, we cited Duarte in our  
2 brief. We spent a vast amount of time in our San Joaquin  
3 argument, talked to you about Duarte, and yet the State  
4 Board in their written arguments never gives you a written  
5 analysis of Duarte because they don't have any answer to  
6 it.

7           And then finally, with respect to Young and Milburn,  
8 that's not before you today. It doesn't matter. All I can  
9 say is, we disagree with the State Board's reading of those  
10 cases. It's passionately -- it's a guy's hair is on fire,  
11 but that's not for today. But I don't want to leave anyone  
12 with the motion (sic) that we -- notion that we agree with  
13 that.

14           And then finally, I point out to the one chart that  
15 Mr. Lee provided for Mr. Grober, speaks of salinity for  
16 purposes of crop deal. But realize, we may have -- but  
17 then, we have a different situation here.

18           Because of the lack of waters, farmers may decide to  
19 water their permanent crops, twenty-five million dollars,  
20 to keep them alive for next year in case there's water, and  
21 they may not have that crop yield. But they're not losing  
22 the capitol investment.

23           They should have the opportunity, even assuming Mr.  
24 Lee is correct, and at least be allowed to irrigate those  
25 crops in order not to lose the twenty-five million dollars,  
26 even if it means they sacrifice one year of production.  
27 And that's taken away from them.

28           So that chart basically proves our point, I think.

1 It does not prove his point, that the water is not usable.  
2 It's still usable to save the twenty-five million dollar  
3 investment, and that's taken away from them.

4 My fifth point is: What should be the form of the  
5 stay? And if I may be so presumptuous as to tell you what  
6 I think it should say -- and I apologize in advance --  
7 number One, we think it should confirm to Duarte, which  
8 means that the coercive language should be removed.

9 And to us, that includes the underlying language in  
10 the second full paragraph that says: You shall immediately  
11 stop diverting. That's language of coercion. And then two  
12 sentences later: This condition of curtailment will  
13 continue because that is -- again, is coercive to the other  
14 one.

15 As to the final paragraph, there should be a stay of  
16 having to submit the document in order to avoid unnecessary  
17 potential enforcement. And I think those -- that's the  
18 language that should be stricken from it. And I would go a  
19 step further.

20 Besides taking out and striking the language of  
21 coercion from it, I would say that the stay ought to  
22 suggest that it be remanded to the State, telling them to  
23 issue a new letter that is consistent with Duarte and is  
24 not coercive in nature.

25 And, in fact, I would go a step further, and if  
26 necessary and indicate that the State still could proceed  
27 with enforcement against any water user if they have the  
28 authority to do that we disagree on Pre-1914 reasons not

1 before this court.

2 But I would say that the State does not need to  
3 present a courtesy notice to a party before serving them  
4 with a cease and desist order. We don't think this is a  
5 necessary legal preparatory step to enforcement. So we're  
6 not trying to take their autonomy.

7 And if the issue is, they don't have enough people  
8 to do all of this, I think the answer should go to the  
9 State Legislature -- not to run rough shot over people's  
10 constitutional rights. They're going at this all wrong.  
11 So in essence, we want the remedy, if we were to get our  
12 choice, is simply to strike all the coercive nature in  
13 this.

14 THE COURT: You submitted a proposed ruling on the  
15 stay application.

16 MR. HERUM: Yes, I did.

17 THE COURT: I'm not going to sign something with all  
18 those findings. I'll tell you that much.

19 MR. HERUM: Well, you can always try. I understand  
20 completely.

21 THE COURT: Not for want of trying.

22 Did you submit a proposed order at all?

23 MR. HERUM: No, we did not. We just ordered the  
24 stay. And I have a slightly amended one that changes line  
25 seven through nine on the final page because we only had  
26 Pre-1914.

27 Could I provide that?

28 THE COURT: You can provide that.



1 MR. HERUM: And we gave a copy to the Attorney  
2 General earlier today. Thank you, your Honor.

3 THE COURT: Mr. Lee, can I just cut to the chase?

4 If, in fact, the purpose and the intention of the  
5 Board was simply to give notice to the water users and let  
6 them know, hey, there's not enough water. If you use  
7 water, you could be in potential violation, and you could  
8 be subject to certain enforcement proceedings.

9 If that's really the Board's intention, what  
10 objection would there be to taking out any kind of language  
11 that says, "cease and desist. Sign the certification.  
12 We're ordering you to immediately stop diverting," if it's  
13 simply, we're in a drought situation.

14 There may not be enough water. Even though you've  
15 got these Pre-1914 water rights, that may not be  
16 sufficient. If, in fact, that's the Board's intention, why  
17 not write a letter that simply says that?

18 MR. BULLOCK: I think I can handle this.

19 THE COURT: Okay.

20 MR. BULLOCK: I think that it sends a really  
21 dangerous message, your Honor, because the fact that folks  
22 that are diverting water are subject to potential  
23 enforcement if they don't cease diverting, it's true with  
24 or without the notice.

25 THE COURT: Right.

26 MR. BULLOCK: And if the language is removed from  
27 the notice at this point by order of the Court, it's going  
28 to suggest to the water diverting community that that's not

1 the case.

2 THE COURT: Well, but that's their risk. That's the  
3 risk they take just like anything else. You get a notice.  
4 You say hey, if you continue doing what you're doing, you  
5 could be subject to some sort of enforcement proceeding.  
6 But that's the risk they take.

7 MR. BULLOCK: And the fact that the notice -- at  
8 least in the court's mind -- complies that if they don't,  
9 that there will be further enforcement -- if we take out  
10 some of that mandatory language, again, I think it's going  
11 to imply to people, especially if it's under the auspices  
12 and the order of the court that it be taken out, that  
13 somehow they won't be subject to enforcement if -- and so I  
14 think that very important in this case.

15 And Mr. Herum said, if this is meaningless, why  
16 fight it? And I think that's the exact reason that we're  
17 here today, is the concern that it's going to cause people  
18 to divert when they really don't have a right to in a way  
19 that the notice -- even if the notice had never gone out,  
20 they might not.

21 But having the notice go out and then have part of  
22 it being retracted where it says, if you divert without a  
23 right, you will be subject to enforcement, it's going to  
24 send a really bad message to the water diverting community.

25 THE COURT: I'm not sure what message -- what bad  
26 message that says is what you mean by enforcement action,  
27 if they don't comply?

28 How does that send a bad message?

1 MR. BULLOCK: I'm sorry if you take that language  
2 out of --

3 THE COURT: No. If you put language -- if you have  
4 language that says, look. We're in a drought situation.  
5 We're just giving you a heads-up that there's not enough  
6 water here --

7 MR. BULLOCK: Right.

8 THE COURT: -- okay? And if you don't take certain  
9 steps, take certain actions, you could be subject to  
10 enforcement action. Nothing like, notifying all holders to  
11 immediately stop diverting, taking out that mandatory  
12 language, how is that a bad thing?

13 MR. BULLOCK: Because then you have a court order  
14 taking out this language, saying that they must immediately  
15 stop diverting. And if you take that language out -- if  
16 you affirmatively take that language out, it very strongly  
17 implies that they don't need to immediately stop diverting  
18 if they don't have a right.

19 THE COURT: Mr. Lee?

20 MR. LEE: Your Honor, if I might just clarify.

21 If you take a look at the underlying language that's  
22 on the first page of the notice, it says: "With this  
23 notice, the State Water Board is notifying Pre-1914  
24 appropriators claims of rights to the prior date of 1903  
25 and later within the Sacramento, San Joaquin Water Shed and  
26 the Delta of the need to immediately stop diverting water,  
27 with the exceptions discussed below.

28 Now the reason why that language is so critical is

1 because in those exceptions, we have situations where  
2 people can come to the Water Board and say, I fall within  
3 this exception, okay? And that's why the certification  
4 material is so important. I have an alternate water right,  
5 all right?

6 And as a result then, Mr. Herum says: Well, why  
7 can't you just go ahead and just issue draft cease and  
8 desist orders? Why should the Board do that if facts on  
9 the ground don't warrant it and that the Board can only  
10 become aware of those facts based upon the information  
11 that's in the certification?

12 THE COURT: Well, I think we're talking about two  
13 different things.

14 MR. LEE: Sure.

15 THE COURT: I think to the extent the Board wants  
16 information from these water rights holders, as far as  
17 an -- alternate sources, that's fair game. I think it's  
18 well within the Board to say, you know, give us a list of  
19 all your alternate water sources, like you said.

20 I don't have a problem with any information,  
21 gathering-type thing, but I think the problem is: This  
22 immediately cease diverting water and the other language  
23 that says, this form confirms verification of diversion  
24 under the specific Post-1914 water right.

25 MR. LEE: Or that you have an alternate source.

26 THE COURT: Well, I mean -- you know -- I mean, a  
27 notice could be drafted that is not coercive in nature, is  
28 my point. That it's simply to the extent, as you say in

1 your arguments, that this is simply an informational  
2 letter.

3 If it is, then why can't the letter be drafted such  
4 that it is, in fact, an informational letter? If it is not  
5 the basis for any enforcement action, then why have any of  
6 that language in there? Just tell people, we're in a water  
7 shortage.

8 The next language, please be advised that if you  
9 continue to divert under claim of Pre-1914 right, most or  
10 all Pre-1914 rights in the Sacramento River watershed are  
11 likely to be curtailed later this year, due to extreme dry  
12 conditions? That's informational. It's not making them do  
13 anything.

14 MR. BULLOCK: Your Honor, how is that degree of  
15 coercion different if the language is not there? The  
16 coercion doesn't come from the notice. It comes from the  
17 Water Board's authority. The only difference is whether  
18 it's being explicitly stated or not.

19 MR. LEE: We would also, your Honor -- and I'm sorry  
20 to interrupt Mr. Bullock -- but we would urge the court to  
21 look at the modified order -- the modified letter that  
22 was -- that was sent out on -- I believe it's June 16th,  
23 all right, that is appended as -- appended to Exhibit  
24 Three, all right, and which clarifies the earlier order.  
25 And it does indicate that you have an alternate source of  
26 water that you, in fact, are not asked to curtail. All  
27 right?

28 That would be Exhibit Three attached to the O'Hagan

1 declaration. So while we've been talking about the earlier  
2 June notice, the June 12th notice, we would urge the court  
3 to read the June 12th notice in the context of the June  
4 16th clarification.

5 THE COURT: But that appears to the court that  
6 that's clarifying someone who also has not just a Pre-1914  
7 water right, but a Riparian water right so --

8 MR. LEE: -- as is the case with two of the  
9 plaintiffs in this case.

10 MR. HERUM: Not West Side, no.

11 MS. SPALETTA: And not on the Delta Agency and  
12 others like it.

13 MR. LEE: I'm just relying on what the allegations  
14 are in their complaint, and they have said that Central  
15 Delta Water Agency and South Delta Water Agency represents  
16 both Riparians and the Pre-1914 users. They have not  
17 gotten any more granular in their allegations in their  
18 complaint.

19 And as to West Side, very frankly, they are not  
20 diverting under Pre-1914 rights. They are diverting under  
21 Post-1914 rights, and so they don't come within either of  
22 the June letters to begin with.

23 So I think if you were going to focus on the June  
24 12th letter, you should read it in the -- the context of  
25 the June 16th letter, as well.

26 THE COURT: Well, like I said, I read the June 16th  
27 letter, and the way I interpreted it, it also said hey. If  
28 you also have this Riparian right, your rights may be a

1 little different than what you said in the June 12th.

2 MR. LEE: That's correct.

3 THE COURT: Okay. So it doesn't necessarily  
4 supercedes the June 12th letter. It just simply clarifies  
5 for those individuals who may have both types of water,  
6 correct?

7 MR. BULLOCK: Your Honor, if I may?

8 THE COURT: Yes.

9 MR. BULLOCK: It's not just the differentiation  
10 between Riparian and Pre-14, because they're also Pre-14  
11 rights that aren't referenced in this notice. Anything  
12 from 1860, all the way through 1903, is not referenced by  
13 this. So if they have those types of rights, then they can  
14 still divert.

15 And I know that -- in our standing argument, there's  
16 been no statement that any of these parties actually hold  
17 rights that are subject to the 1903 to 1914, to the notice.  
18 They said they had Pre-14 rights, but nowhere in their  
19 papers have they stated the priority date of those rights.  
20 And so there's really -- there's no allegation that this  
21 notice even applies to them.

22 THE COURT: Mr. Herum?

23 MR. HERUM: Do you have any other questions of us?

24 THE COURT: No. I mean, I think perhaps my  
25 questions again are directed to counsel for the  
26 respondents.

27 And I'm having a hard time understanding what the  
28 objection is to a temporary restraining order on the

1 curtailment notice and with -- and with some understanding  
2 that it needs to be revised to avoid the coercive nature of  
3 the language in the letters.

4 Now Mr. Herum, I guess I have some concerns about  
5 remanding back to the Water Control Board because there's  
6 really no mechanism for me to do that because it's not a  
7 1094.5 proceeding.

8 MR. HERUM: I'm wondering if you didn't stay the  
9 letter, that the natural course of the administrative body  
10 at that point would be to reverse itself and send that  
11 letter and then draft a non-coercive courtesy notice. And  
12 if that happened, then they're done.

13 THE COURT: Because I fully believe that the Board  
14 has the right to send out notices. It's their job, and  
15 that's what they have all of the 500 people to do and  
16 examine, you know, the drought situation and the water  
17 situation and to send out notices.

18 But the concern I have is again, all the language  
19 that's ordering the water users, water right users to take  
20 certain action in response to the letter.

21 If, as you point out and as I've said, if you point  
22 out in your papers this is sort of a nothing thing, that  
23 this is just sort of a courtesy, then on a certain level I  
24 agree with Mr. Herum.

25 What is the objection to them revising a letter that  
26 is consistent with their legal position, that is simply  
27 informational? I really don't understand the objection.

28 MR. BULLOCK: Your Honor, I think that part of the



1 information that's being provided frankly is that if people  
2 are diverting without a right, they're subject to  
3 enforcement and so --

4 THE COURT: Absolutely.

5 MR. BULLOCK: -- and so whether we're saying that or  
6 not -- I mean, whether we're saying hey, you need to show  
7 us and help us understand why what we're doing is legal or  
8 there's going to be an enforcement action against you. I  
9 mean --

10 THE COURT: But that's not all that the letter says.  
11 That's not all that the letter says.

12 MR. BULLOCK: So are we not just talking about the  
13 certification?

14 THE COURT: We're not. We're talking about both.

15 I don't have a problem with the certification, but  
16 saying, tell us if you have alternate sources, I have a  
17 problem with that certification that says that you're  
18 confirming that you are ceasing your diversion. I have a  
19 problem with the language that says, "immediately stop  
20 diverting."

21 The Board has every right to gather information to  
22 assist in its enforcement proceedings and poll the water  
23 users as far as what their alternate sources may be. And I  
24 think that was similar to the June 16th letter, but the  
25 concern the court has is to say stop, stop diverting. And  
26 you're absolutely right, their liability remains the same  
27 whether it's stated or not.

28 So then what's the problem of taking it out?

1           MR. BULLOCK: And I think that that's actually what  
2 the notice says. Because it says, these are the facts.  
3 Due to these facts, you need to stop diverting water. It's  
4 not saying because we issued this notice, you have to stop.

5           And so it really is -- it's informational. It's not  
6 like -- and I need to go back to Mr. Herum. He's misstated  
7 something a number of times now that somehow this notice  
8 starts the clock and it doesn't.

9           It's really not relevant to the violations. And  
10 what the notice says is: That due to the facts on the  
11 ground, you need to stop diverting water, not because of  
12 this notice.

13          THE COURT: Right, and I kind of agree with that. I  
14 mean, if someone's unlawfully diverting, with or without  
15 this notice, they're subject to liability, with or without  
16 the notice. I don't know if this notice necessarily  
17 exposes the water user to any greater liability.

18          MS. SPALETTA: Your Honor, may I address that point?

19          THE COURT: Yes.

20          MS. SPALETTA: I think in the context of the Delta,  
21 this is a very, very important issue and it's a very nuance  
22 issue.

23                 If we had had a notice from the State Board that  
24 said to diverters in the Delta, we now believe that under  
25 natural flow conditions, the water would be so salty that  
26 you would not be able to put it to beneficial use;  
27 therefore, we think that your continued diversions under  
28 current circumstances could be unlawful unless you provide

1 us with information otherwise.

2 That would have been a notice of what the State  
3 Board is still thinking and an opportunity for the  
4 diverters to supply information to defend their right to  
5 divert.

6 And then the diverters could have put forth their  
7 information and said, we disagree for the following reasons  
8 and we request a hearing, which is pretty much what West  
9 Side did when it filed this petition for reconsideration.

10 And if the State Board had held a hearing, there  
11 would have been a decision, after an evidentiary  
12 explorational issue, and that decision would have set the  
13 quote, unquote, speed limit.

14 Right now we don't know what the speed limit is on  
15 this issue because there is no facts and no State Board  
16 order that has ever determined when the quality of water  
17 could make it unlawful for someone to divert under an  
18 otherwise valid water right. That is an entirely new  
19 concept, for which there is no precedent to guide  
20 diverters.

21 So unlike a situation where there literally is no  
22 water flowing to the channel, in the Delta it's a much more  
23 nuance issue. We have been asking now for two years for  
24 the State Board to hold an evidentiary hearing to get to  
25 the bottom of this issue so the people would know what the  
26 speed limit is, and it hasn't happened.

27 So what's now being told to you by the Attorney  
28 General's Office is, we want to warn people because we're

1 going to come back to them after the fact and say, you were  
2 warned. Here's our expert, who's going to testify that the  
3 water was so salty in the summer of 2015, that your  
4 diversion of it was an unreasonable use of water and  
5 therefore unlawful. After the fact, they will then impose  
6 monetary penalties, but the decision on whether to divert  
7 is made now.

8           So if the State will commit to not impose monetary  
9 penalties on the diverter in the Delta until this factual  
10 issue is resolved, after an evidentiary hearing, then we  
11 will not be here. But we have asked for that commitment,  
12 and we have not received it. So that makes this letter  
13 that has gone out that much more coercive.

14           MR. BULLOCK: Your Honor, if I could respond to that  
15 specific point?

16           THE COURT: Yes.

17           MR. BULLOCK: I think it's really important to note  
18 that under Section 1052 of the Water Code, unauthorized  
19 diversion of water is a trespass.

20           The right to water is a property right, and if  
21 you're going to use property, it's your responsibility to  
22 know that it's your property.

23           It's not the responsibility of the Water Board to  
24 tell them what their rights are. It's our responsibility.  
25 It's not meant to go in and stop them from trespassing.

26           And it seems that what Miss Spaletta is saying is  
27 that they can go in and use a house without it being  
28 theirs, and it's not illegal and it's not a problem until

1 we've warned them that it's not their house. And that's  
2 not how it works.

3 If you're going to use property, it's your  
4 responsibility to make sure it's your property. And the  
5 Water Board is doing what it can to help people to do that,  
6 but the ultimate responsibility does not lie with the Water  
7 Board. It lies with the water users.

8 THE COURT: All right.

9 MR. LEE: One final point -- and I certainly think  
10 I've pretty much exhausted my view on this -- I want to  
11 again stress that it appears -- if there is any curtailment  
12 notice that's ripe for consideration, my only beef -- and I  
13 don't accept that, but it could conceivably be his name --  
14 and the reason is, the main notice went out on Post-1914  
15 for Riparian rights web-site and Post-1914 appropriate --  
16 but if you look at the allegations in the complaint, to the  
17 extent any of the petitioners would claim Pre-1914 rights,  
18 there is no allegation in the complaint that they are  
19 within that time period that are affected by the June  
20 notice.

21 So any remedy, if at all, should only go to the May  
22 notice and not to the June notice because the petitioners,  
23 who have had time to put their petition together, have not  
24 alleged that they represent users that fall within the  
25 Post-1903 to 1914 period.

26 So the June notices should not be at issue here, and  
27 if there's anything at issue at all, it's the -- whether  
28 the main notice was appropriate or not because that is the

1 only one that relates to Post-1914, which we would remind  
2 the court again, that the petitioners have a  
3 reconsideration petition pending before the Water Board to  
4 have the Water Board address their concerns. So because of  
5 that, there is a petition for reconsideration pending  
6 before the Water Board with regard to the May notice.

7 So we would urge the court not to get involved in  
8 that process for the May notice because the Board has a  
9 petition for reconsideration pending, as they allege in  
10 their complaint, and as to the June notices they haven't  
11 alleged facts indicating that they are --

12 THE COURT: -- I'm sorry. With respect to that  
13 request for reconsideration, is there any deadline by which  
14 the Board has to act?

15 MR. HERUM: No there isn't, your Honor. And so in  
16 theory, they could sit on it until after the growing  
17 season.

18 THE COURT: Mr. Lee?

19 MR. LEE: If I could speak with my counsel for a  
20 moment.

21 THE COURT: Sure.

22 (Unreported discussion held off the record)

23 MR. LEE: Your Honor, notwithstanding the fact I've  
24 been practicing in this field for a while, I don't have all  
25 the statute of limitations right here. 1126 of the Water  
26 Code gives the Board 90 days to act, after which time  
27 judicial review of whatever action of the Board is  
28 appropriate. So the letter was sent out in May, and I

1 don't have the precise date.

2 MR. HERUM: It was May 11th.

3 MR. LEE: The letter is dated May one.

4 MR. HERUM: And the reconsideration was filed on May  
5 11th.

6 MR. LEE: And so there's a 90-day window for the  
7 Board to act, and after that 90 day period lapses, it's not  
8 as if there isn't judicial review. The judicial review is  
9 available for any conduct that the petitioners might claim  
10 is unlawful, based on the May first, 2015 notice.

11 MR. HERUM: But, your Honor, the main -- the  
12 reconsideration doesn't say your letter is coercive because  
13 it's a completely different issue. So this is a red  
14 herring on their part. I would go a step further and say  
15 with all due respect, Mr. Lee is not factually correct or  
16 giving you the right analysis.

17 The 90 days is the 90 days for the State Board to  
18 decide whether to accept the reconsideration. If they  
19 don't accept the reconsideration, then you would have a  
20 final administrative decision. But if they accept it, then  
21 it keeps going.

22 So -- and at that point under the statute, if they  
23 do accept it, there is no statutory requirement for them to  
24 set the reconsideration hearing within a certain time.

25 THE COURT: Okay.

26 MR. LEE: Your Honor, we urge the court just to read  
27 1126, if we have 90 days to act on the petition.

28 MR. HERUM: The way the State Board has operated is

1 that they use the 90 days to decide whether they accept the  
2 petition or not.

3 THE COURT: So the language says to act on the  
4 petition?

5 MR. HERUM: Yes, which means to accept or -- and the  
6 way that they have interpreted it administratively is  
7 whether to accept it or summarily deny it without a noticed  
8 hearing.

9 THE COURT: After -- is it then a situation where  
10 the Board decides whether or not to accept the petition for  
11 reconsideration and then has further proceedings, or does  
12 it decide the merits of the request for reconsideration  
13 within the 90 days?

14 MR. HERUM: At the end of 90 days, it will either  
15 summarily deny it or it will set a notice of public  
16 hearing.

17 THE COURT: I want to hear what Mr. Lee's position  
18 is.

19 MR. LEE: I think the latter option is available to  
20 the Board. If I can -- this is more practice --

21 THE COURT: I understand.

22 MR. LEE: If I could speak with staff counsel for a  
23 moment.

24 (Unreported discussion off the record)

25 MR. LEE: Your Honor, my understanding is that the  
26 Board must act, reject or accept the petition within that  
27 time period. They must take some kind of action, but the  
28 key point is that if the 90 days runs and the Board hasn't



1 acted definitively, the matter is open for judicial review.  
2 All right? The parties can come to court, okay?

3 THE COURT: So a no action is the same as original  
4 action?

5 MR. LEE: Yes.

6 THE COURT: Okay.

7 MR. HERUM: And we agree if they don't take action,  
8 then it's finalized --

9 MR. LEE: If it ends up in someone's in box and no  
10 one acts on it in 90 days, they can be back before you.

11 THE COURT: Okay. All right. I'm going to take  
12 this matter under submission. I will try to have a ruling  
13 by the end of today, okay, and we will notify counsel.

14 MR. HERUM: Thank you, your Honor.

15 MR. LEE: Thank you.

16 (Proceedings concluded)

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CERTIFICATE OF OFFICIAL SHORTHAND REPORTER

State of California )

) ss.

County of Sacramento )

I, Kristan E. Martin, hereby certify that I am a certified shorthand reporter and that I recorded verbatim in stenotype the proceedings held Wednesday, July 8, 2015, in the matter of West Side Irrigation District, et al., Petitioners and Plaintiffs, versus California State Water Resources Control Board, Respondents and Defendants, Case No. 34-2015-80002121, completely and correctly to the best of my ability; that I have caused said stenotype notes to be transcribed into typewriting, and the foregoing pages 1 through 95, inclusive, constitute a complete and accurate transcript of said stenotype notes taken at the above-mentioned proceedings.

I further certify that I have complied with CCP Section 237(a)(2) in that all juror information has been redacted if applicable.

Dated: \_\_\_\_\_, 2015.

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Kristan E. Martin, CSR No. 5034

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