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JUL 23 2015  
By E. Higginbotham, Deputy Clerk

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5 Attorneys for Petitioner  
6 THE WEST SIDE IRRIGATION DISTRICT

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 IN AND FOR THE COUNTY OF SACRAMENTO

10 THE WEST SIDE IRRIGATION DISTRICT;  
CENTRAL DELTA WATER AGENCY;  
11 SOUTH DELTA WATER AGENCY; and  
WOODS IRRIGATION COMPANY,

12 Petitioners/Plaintiffs,

13 vs.

14 CALIFORNIA STATE WATER  
RESOURCES CONTROL BOARD;  
15 THOMAS HOWARD, EXECUTIVE  
DIRECTOR OF CALIFORNIA STATE  
16 WATER RESOURCES CONTROL BOARD;  
and DOES 1 THROUGH 100, INCLUSIVE.

17 Respondents/Defendants.

) Case No.: 34-2015-80002121  
) ~~PROPOSED~~ ORDER PARTIALLY  
) GRANTING PETITIONERS' EX PARTE  
) APPLICATION FOR TEMPORARY  
) RESTRAINING ORDER AND ISSUING AN  
) ORDER TO SHOW CAUSE AS TO WHY A  
) PRELIMINARY INJUNCTION SHOULD  
) NOT BE GRANTED

) Petition Filed: June 29, 2015  
) Hon. Shelleyanne W. L. Chang

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BY FAX

25 On July 8, 2015, Petitioners/Plaintiffs', The West Side Irrigation District, Central Delta  
26 Water Agency ("CDWA") and South Delta Water Agency ("SDWA") (collectively,  
27 "Petitioners"), Ex Parte Application Seeking a Stay or Temporary Restraining Order / Order to  
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ATTORNEYS

1 Show Cause concerning the May 1, 2015 and June 12, 2015 Curtailment Letters<sup>1</sup> issued by  
2 Respondents/Defendants, the California State Water Resources Control Board and through its  
3 Executive Director, Thomas Howard (collectively, "Respondents"), came on for ex parte hearing  
4 in the above-referenced Court before the Honorable Judge Shelleyanne W. L. Chang, Judge  
5 Presiding.

6 Steven A. Herum, Jennifer L. Spaletta and Dean Ruiz appeared for Petitioners/Plaintiffs  
7 and Matthew Bullock and Clifford Lee appeared for Respondents/Defendants at the Ex Parte  
8 Hearing. The parties submitted moving and opposing papers on an ex parte basis shortly before  
9 the hearing. All parties had the opportunity to present oral arguments concerning the issues  
10 raised in the moving and opposing papers.

11 Having considered the moving and opposing papers and having considered the oral  
12 arguments presented by the parties regarding the ex parte application for stay or temporary  
13 restraining order, and good cause having been shown, the **COURT FINDS AS FOLLOWS:**

- 14 1. The Curtailment Letters are properly subject to a judicial determination of whether they  
15 violate the Petitioners' due process rights such that a temporary restraining order/order to  
16 show cause should issue.<sup>2</sup>
- 17 2. Although a petition for reconsideration filed by West Side Irrigation District is pending  
18 concerning the May Curtailment Letter, the Court finds this is a situation where the  
19 pursuit of the administrative remedy would result in irreparable harm absent a temporary  
20 restraining order. (See *People ex rel. DuFauchard v. U.S. Financial Management, Inc.*

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22 <sup>1</sup> The May 1, 2015 Curtailment Letter is titled "NOTICE OF UNAVAILABILITY OF WATER  
23 AND IMMEDIATE CURTAILMENT" (hereinafter "May Curtailment Letter"). The June 12,  
24 2015 Curtailment Letter is titled "NOTICE OF UNAVAILABILITY OF WATER AND NEED  
25 FOR IMMEDIATE CURTAILMENT" (hereinafter "June Curtailment Letter"). Collectively, the  
26 May 1, 2015 Curtailment Letter and the June 12, 2015 Curtailment Letter are entitled  
27 "Curtailment Letters."

28 <sup>2</sup> Petitioners have filed a petition for reconsideration pursuant to California Water Code section  
1126(b) which petition is still pending before the Water Resources Control Board and for which  
the 90-day period for reconsideration has not yet expired. (See Petition, ¶ 21; Wat. Code §1122.)  
The Court declines to interfere in these administrative proceedings, and consequently in no way  
stays the furtherance of that petition in accordance with the Water Code. The Court agrees that in  
light of the pending reconsideration petition, this matter is not subject to a Civil Code section  
1094.5, subdivision (g) stay.

1 (2009) 169 Cal.App.4th 1502, 1512) (citing *Public Employment Relations Bd. v. Superior*  
2 *Court* (1993) 13 Cal.App.4th 1816, 1827). Petitioners' belief that they must stop  
3 diverting water, not because to do so would be a legal violation but merely a violation of  
4 the May Curtailment Letter, will result in irreparable harm to their crops while they await  
5 a decision on the petition for reconsideration. (Decl. of Jack Alvarez, ¶¶ 7, 8, 11.)  
6 Consequently, Petitioners will be irreparably harmed should they have to wait for final  
7 resolution of the administrative process before obtaining relief from the immediate  
8 mandate the May Curtailment Letter appears to impose outside of the statutory processes  
9 provided by the Water Code.

- 10 3. The Court further finds, for the reasons stated below, that the issuance of the Curtailment  
11 Letters violated Petitioners' Due Process rights. Every day the Letters remains in their  
12 current form constitutes a violation of those constitutional rights. Accordingly, it is  
13 proper for this Court to issue a temporary restraining order while the administrative  
14 process is ongoing.
- 15 4. With regard to the June Curtailment Letter, the Court liberally construes the allegations  
16 of the Petition For Writ of Administrative Mandate, as it must, and finds that for purposes  
17 of this *ex parte* application, Petitioners CDWA and SDWA have adequately pled that  
18 certain of their landowners exercise pre-1914 appropriative and/or permit licenses rights  
19 that are subject to the directives given in the June Letter. (Petition, ¶13, 14.)  
20 Consequently, Petitioners CDWA and SDWA have standing to bring the instant  
21 application concerning the June Curtailment Letter.
- 22 5. The Court finds the Curtailment Letters are coercive in nature and go beyond the  
23 "informational" purpose the Board claims prevents a stay. Consequently, Petitioners are  
24 likely to succeed on the merits. As in *Duarte Nursery, Inc. v. United States Corps of*  
25 *Engineers* (2014) 17 F.Supp.3d 1013 (*Duarte*), even though the Curtailment Letters are  
26 not enforceable on their own and there are no separate penalties for violating them, the  
27 language used in the Curtailment Letters results in a "comman[d] by the...[g]overnment  
28 to stop [water diverting] activities." (*Duarte*, 17 F.Supp.3d. at 1018.) It is not a

1 suggestion for “voluntary cessation of activities,” but instead requires Petitioners to  
2 “immediately stop diverting water.” (*Id.* at 1019; Pet. exh. B.)

- 3 6. Respondents argue *Duarte* is distinguishable because it involved a single letter sent to a  
4 single rights-holder, and provided that the Army Corps of Engineers had already  
5 determined that a violation of the Clean Water Act had occurred. (*Duarte*, 17 F.Supp.3d  
6 at 1015.) Respondents contend the challenged Curtailment letters are form letters being  
7 sent to hundreds of appropriators, and are merely informational with no pre-  
8 determination that any individual rights-holder has violated the law.
- 9 7. While all parties acknowledge the Curtailment Letters were sent to more than one  
10 appropriator, the letters provided to the Court are addressed to an individual company,  
11 and identify a specific claim of rights at issue. The Curtailment Letters further declare  
12 and determine that the recipient is not entitled to divert water because that water is  
13 necessary to meet senior water rights holders, thus making a determination of the  
14 recipient’s water rights priority. (Pet., exh. B, ¶2.) By including this specific information,  
15 the Curtailment Letters appear not to be generalized notices, but instead a specific  
16 adjudication and command with respect to the particular rights holder.
- 17 8. Further, nothing in *Duarte* limits its holding to an instance involving only one notice. The  
18 *Duarte* court’s focus was on the fact that nothing in the letter notified “plaintiffs that the  
19 Corps could not take action based upon the CDO alone.” (*Duarte*, 17 F.Supp.3d at 1022.)  
20 The same is true in this situation, as the Curtailment Letters indicate the recipient must  
21 “immediately stop diverting water” and do not clearly state the letter is merely  
22 informational, without any legal force or effect.
- 23 9. The Curtailment Letters also require recipients to “document receipt of this notice by  
24 completing an online Curtailment Certification Form (Form) within seven days. The  
25 Form confirms your cessation of diversion under the specific pre-1914 claim of right.  
26 Completion of the Form is mandatory...” Nowhere in this language do the Curtailment  
27 Letters assert that Petitioners are free to ignore the directive to cease diverting water or  
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1 that this directive is merely a suggestion.<sup>3</sup> At the hearing on this matter, Respondents  
2 acknowledged that the Form requires diverters to sign under penalty of perjury that they  
3 are no longer diverting water.

4 10. Although the Curtailment Letters do not state that the Board has made a specific  
5 determination that the particular recipient has already engaged in illegal conduct, the  
6 letters plainly state that the recipient must “immediately stop diverting water” because  
7 there is insufficient water for the diverter to continue diverting and that the only action  
8 available is to sign the compliance certification that “confirms your cessation of diversion  
9 under the specific pre-1914 claim of right.” (Pet., exh. B.)<sup>4</sup> As in *Duarte*, this strong  
10 directive implicates a pre-determination as to the availability of water pursuant to the  
11 recipient’s appropriation rights. The Board, “did not ‘notify’ plaintiffs they were  
12 operating in violation of the law, it commanded plaintiffs to stop their activities.”  
13 (*Duarte*, 17 F.Supp.3d at 1023.)

14 11. At oral argument, Respondents argued that because the Curtailment Letters did not  
15 expand or alter Petitioners’ civil liability for water diversions and are merely  
16 “informational documents”, a temporary restraining order should not issue. Respondents’  
17 argument is not only misguided, it is also inaccurate.

18 12. The focus is not whether the Petitioners’ legal exposure remains unchanged or not, but  
19 rather whether the Curtailment Letters could be reasonably interpreted to be an order or  
20 command by the government, not merely a suggestion or request for voluntary cessation  
21 of activities. (*Duarte*, 17 F.Supp.3d at 1020.) Moreover, contrary to Respondents’  
22 assertions, the Curtailment Letters have altered Petitioners’ legal position. The  
23 Curtailment Letters state that even if there is available water for the water user, said water  
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25 <sup>3</sup> This is similar to *Phelps v. State Water Resources Control Board* (2007) 157 Cal.App.4th 89,  
26 where the Court held plaintiffs were aggrieved by a curtailment notice within the meaning of  
27 section 1126(b) because it “required plaintiffs to immediately discontinue diversion of water  
under their licenses.” Although *Phelps* involved only one notice, the implication of the language  
of the letters is the same as in this case.

28 <sup>4</sup> In *Duarte* the Court noted that the assertion that a violation has already occurred, by itself, is  
insufficient to satisfy the ripeness requirement. A letter or notice must also threaten  
consequences for failure to take certain action, as it does here. (*Duarte*, 17 F.Supp.3d at 1025.)

1 is dedicated for senior water rights' holders needs, conclude that the recipient no longer  
2 has any legal right to said water, and orders the recipient to "immediately stop diverting  
3 water..." Indeed, the Curtailment Letters appear to alter Petitioners' civil liability as the  
4 Board has apparently concluded without hearing or notice that Petitioners are no longer  
5 entitled to divert water for their needs.

6 13. As the court in *Duarte* stated, "If the [Letters] were simply a 'notification' to plaintiffs,  
7 then it should have said so, rather than clothing itself as an 'order' which carried with it  
8 the authority to 'prohibit' the plaintiffs from continuing their activities." (*Duarte*, 17  
9 F.Supp.3d at 1020.) The Court recognizes, and Respondents admit, that the Curtailment  
10 Letters do not subject Petitioners to any additional liability or penalties above that which  
11 they may already be subjected to due to the extreme drought conditions California is  
12 currently experiencing. However, the Curtailment Letters represent that the Board has  
13 already adjudicated that the recipients are no longer entitled to divert water and that any  
14 future diversions would be improper and a trespass ["This Form confirms your cessation  
15 of diversion under the specific post-1914 water right... Completion of the form is  
16 mandatory to avoid unnecessary enforcement proceedings"].

17 14. Respondents are free to provide truly informational notices to water diverters of the  
18 nature of the drought and the Board's right to initiate Water Code section 1831 or 1052  
19 proceedings. Respondents are also free to initiate inquiries with diverters as to whether  
20 they have alternate water sources and to otherwise exercise their statutory enforcement  
21 authority under the Water Code, including investigation and instituting any actions for  
22 trespass. To be clear, Respondents are free to exercise their statutory authority to enforce  
23 the Water Code as to any water user, including these Petitioners, if it deems them to be in  
24 violation of any provisions of the Water Code, so long as the bases for said action are not  
25 the Curtailment Letters.

26 15. However, the language of the Curtailment Letters goes beyond informational and is  
27 instead coercive such that a recipient is likely to believe they are no longer allowed to  
28 divert. This belief is not because such a diversion would be a trespass or other legal

1 violation, but because the Board has already declared in the Curtailment Letters that it  
2 has made a determination that they are no longer entitled to divert under their  
3 appropriate water rights, without any sort of pre-deprivation hearing. Respondents do  
4 not challenge Petitioners' assertion that any cessation of water diversion done in response  
5 to the Curtailment Letters, not as a result of an unavailability of legally divertible water,  
6 would cause a serious hardship to Petitioners. This is an issue ripe for judicial  
7 intervention and the Court concludes that the Curtailment Letters as presently drafted  
8 constitute a violation of the due process rights of the Petitioners.<sup>5</sup>

9 16. The Curtailment Letters, including the requirement that recipients sign a compliance  
10 certification confirming cessation of diversion, result in a taking of Petitioners' property  
11 rights without a pre-deprivation hearing, in violation of Petitioners' Due Process Rights.

12 Based on the foregoing, the **COURT HEREBY ORDERS AS FOLLOWS:**

- 13
- 14 (1) Petitioners' ex parte application for a temporary restraining order and an order to show  
15 cause as to why a preliminary injunction should not issue requiring the Board to issue a  
16 revised letter/notice that is informational in nature are **HEREBY GRANTED.**
- 17 (2) A temporary restraining order shall issue staying or prohibiting Respondents/ Defendants  
18 State Water Resources Control Board and Thomas Howard from taking any action  
19 against the West Side Irrigation District and landowners of the other petitioner Districts  
20 on the basis of the 2015 Curtailment Letters sent by the Water Board's Executive  
21 Director, Thomas Howard, or on the basis of a failure to complete a Curtailment  
22 Certification Form.
- 23 (3) This matter is set for an Order to Show Cause **on July 30, 2015 at 9:00 a.m. in**  
24 **Department 24.** Respondents shall file with the clerk of Department 24 and serve (via  
25 email or fax) any supplemental Opposition to the Order to Show Cause no later than  
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27  
28 <sup>5</sup> There is no allegation that Petitioners have filed a petition for reconsideration with the Board concerning the June Curtailment Notice. Respondents made no argument that Petitioners were required to do so before bringing the instant petition and ex parte application. Consequently, the Court does not address whether such a reconsideration petition was required.

HERUM \ CRABTREE \ SUNTAG  
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**July 16, 2015.** Petitioners shall file with the clerk of Department 24 and serve (via email or fax) any Reply no later than **July 23, 2015.**

(4) Petitioners' application for a temporary stay pursuant to Code of Civil Procedure Section 1094.5(g) is **HEREBY DENIED.**

**IT IS SO ORDERED:**

Date: July 23, 2015

SHELLEYANNE W.L. CHANG  
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Honorable Judge Shelleyanne W. L. Chang  
Superior Court of California, County of Sacramento



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PROOF OF SERVICE

I, LAURA CUMMINGS, certify and declare as follows:

I am over the age of 18 years, and not a party to this action. My business address is 5757 Pacific Avenue, Suite 222, Stockton, California 95207, which is located in the county where the mailing described below took place.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing. On July 20, 2015 at my place of business a copy of [PROPOSED] ORDER GRANTING PETITIONERS' EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ISSUING AN ORDER TO SHOW CAUSE AS TO WHY A PRELIMINARY INJUNCTION SHOULD NOT BE GRANTED was placed for deposit following ordinary course of business as follows:

[X] BY U.S. MAIL with the United States Postal Service in a sealed envelope, with postage thereon fully prepaid.

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BY ELECTRONIC MAIL (EMAIL) at \_\_\_\_\_ a.m. By sending the document(s) to the person(s) at the email address(es) listed below.

BY FEDERAL EXPRESS/OVERNIGHT MAIL in a sealed envelope, with postage thereon fully prepaid. [Code Civ. Proc., §§ 1013(c), 2015.5.]

BY PERSONAL SERVICE/HAND DELIVERY.

BY FACSIMILE at approximately 8:40 a.m. by use of facsimile machine telephone number (209) 472-7986. I caused the facsimile machine to print a transmission record of the transmission, a copy of which is attached to this declaration. The transmission was reported as complete and without error. [Cal. Rule of Court 2008 and 2003(3).]

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

Dated: July 20, 2015

  
LAURA CUMMINGS