

**California Department of Water Resources
Maureen Sergent's Rebuttal Testimony Regarding
Enforcement Actions ENF01949 and ENF01951.**

My Name is Maureen Sergent. I am a Senior Engineer with the California Department of Water Resources (DWR) in the State Water Project Analysis Office (SWPAO). I have worked for DWR since 1991. I work primarily on issues related to DWR's water rights and water transfers. I am a registered engineer in the State of California. A copy of my statement of qualifications is DWR Exhibit DWR-2. I am testifying as an expert based on my special knowledge, skill, experience, training, and education.

As part of my work in SWPAO, I was directly involved in the negotiation of certain agreements with Byron Bethany Irrigation District (BBID) as well as evaluation of proposals from BBID for the transfer of water. The purpose of my testimony is to correct certain representations made by BBID in its testimony as to the purpose and scope of its agreements with DWR and representations it made regarding 2015 discussions with or decisions by DWR with respect to BBID's efforts to obtain alternate supplies.

1964 Right-of-Way Agreement

Prior to the construction of the State Water Project (SWP), BBID diverted water from Italian Slough under claim of pre-1914 water right. DWR bifurcated BBID's delivery canal with the construction of the intake channel to the Harvey O. Banks Pumping Plant. On May 4, 1964, DWR and BBID executed a right-of-way agreement to allow the construction of new BBID points of diversion within the DWR right-of-way. (Exhibit BBID206.) The agreement granted an easement to BBID to construct, operate and maintain pumping facilities on the intake channel. The agreement was a right-of-way agreement only. Article 4 of the 1964 Agreement states that "[n]othing contained in this agreement nor in State's consent to change in District's points of diversion shall either enlarge or restrict District's present water rights." (Exhibit BBID206 at p. 3.)

1993 Mountain House Agreement

BBID is primarily an agricultural district, and historic use within BBID was for irrigation purposes. In the early 1990s, a portion of the land within BBID was slated for a planned development, the Mountain House Community. The conversion of the Mountain House property from agricultural use to municipal and industrial use required securing a year round water supply. BBID filed a petition with the State Water Resources Control Board (State Water Board) to appropriate up to 3,420 af of water during the winter months for municipal and industrial use within the Mountain House Community, Application 29857.

In lieu of pursuing the winter water right, which would contain Term 91,¹ BBID entered into negotiations with DWR for an exchange of water under their respective water rights. DWR and BBID executed an Agreement for the exchange of up to 4,000 af per year on September 17, 1993 (Exchange Agreement, Exhibit DWR-10²). Under the Exchange Agreement, BBID would make water available to DWR under its pre-1914 water right April 1 through October 31 of each year through a reduction in irrigation season use within BBID in exchange for an equivalent amount of SWP water for use within the Mountain House Community November 1 through March 31. BBID was to provide information to DWR each year identifying the number of acres shifted from agricultural use to municipal and industrial use. Application 29857 was canceled on September 18, 1997 following execution of the Exchange Agreement with DWR. The agreement did not expand BBID's pre-1914 water right and contained no provisions addressing diversions by BBID for use outside the irrigation season other than the winter deliveries to the Mountain House Community. This 1993 Exchange Agreement was terminated as of the effective date of the 2003 Agreement.

2003 Agreement

Throughout the 1990s, BBID initiated several efforts to market water that it deemed was available under its pre-1914 water right but in excess of its current needs within BBID. DWR protested a number of the proposed sales based on potential injury to DWR's water rights arguing that the proposed sale represented an expansion in use and was beyond the scope of its pre-1914 water right. DWR and BBID initiated discussions with the goal of developing an agreement that would resolve the ongoing disputes. On May 28, 2003, DWR and BBID executed an agreement regarding the diversion of water by BBID from the Delta (2003 Agreement, Exhibit BBID208).

In Section A.2.2.4.2 of Mr. Rick Gilmore's testimony, he claims that under the 2003 Agreement, DWR agreed that BBID had the right to up to 50,000 acre-feet in each year which could be diverted year-round. (Exhibit BBID201, at p. 6.) Mr. Gilmore also implies that under the 2003 Agreement, DWR provides water to BBID regardless of the amount available to BBID under its pre-1914 water right. (*Ibid.*) DWR disagrees with these interpretations. The 2003 Agreement was for the sole purpose of resolving certain disputes between DWR and BBID. It does not provide any protections to BBID beyond those specifically provided in the agreement, nor does it restrict any other entity's authority, including the State Water Board.

¹ Term 91 is a standard permit term included in new permits to appropriate water from the Sacramento watershed. It requires diversions to cease when DWR and U.S. Bureau of Reclamation are making supplemental storage releases to maintain Delta standards. During dryer year types, Term 91 can extend into the winter months.

² BBID submitted a copy of the Exchange Agreement as Exhibit BBID207, but this exhibit is only partially executed. DWR-10 is the fully executed version of the Exchange Agreement.

Recital F of describes its purpose and limited scope:

The purpose of this Agreement is to describe the nature and extent of the District's right as between the District and the Department for the diversion of water from the Delta for agricultural, municipal and industrial uses within the District.

(Exhibit BBID208, at p. 2) The claim that DWR provides water to BBID under the 2003 Agreement, assumedly under DWR's water right, is inconsistent with the terms of the 2003 Agreement. BBID has consistently asserted that the water being diverted was done so under its claim of pre-1914 water right. During the negotiations for the 2003 Agreement, DWR was very clear that the while BBID made certain claims as to the scope of its pre-1914 water right, DWR did not agree with those claims. Through the 2003 Agreement, DWR agreed not to disturb or challenge BBID's use as long as the diversions were within the provisions of the 2003 Agreement. BBID asserted its claim as to the rights under which the water is being provided in Article 8 of the agreement:

The District maintains that water diverted by the District under this Agreement shall be deemed diverted under the District's present water rights. This Agreement neither enlarges nor restricts the District's present water rights. This Agreement shall constitute the full and sole agreement between the Department and the District to divert water from the Delta for agricultural, municipal and industrial use. The uses shall not be disturbed or challenged by the Department and the District shall not claim any right against the Department in conflict with provisions in this Agreement so long as this Agreement remains in full force and effect.

(Exhibit BBID208, at p. 6.)

In support of BBID's claim that DWR provides a backup supply irrespective of BBID's pre-1914 water right, it referenced a September 23, 2014 letter from DWR to the State Water Board. (Exhibit BBID217.) I would like to clarify the context within which the September 23, 2014 letter was written and the limited scope of its applicability. On July 23, 2014, DWR and the Bureau of Reclamation (Reclamation) sent a joint letter to the State Water Board requesting that the State Water Board use its authority to order those diverting from the Delta under claim of riparian or pre-1914 water right to provide information supporting their basis of right and records of diversion. (Exhibit DWR-11.) The purpose of the July 23, 2014 letter was to request that the State Water Board acquire additional information to determine whether there are unlawful diversions by diverters claiming a riparian or pre-1914 water right without adequate support for that right. On September 10, 2014, BBID sent DWR a letter claiming that its July 23, 2014

request to the State Water Board represented an attack on the validity of BBID's pre-1914 water right in conflict with Article 8 of the 2003 Agreement. (Exhibit DWR-12.)

The September 23, 2014 letter that Mr. Gilmore referenced in his testimony from was in response to BBID's September 10, 2014 letter. Its intent was to clarify that DWR was not including BBID in its request to the State Water Board to require substantiating documentation and diversion records from in-Delta diverters. DWR explained that the 2003 Agreement requires BBID to accurately measure and report its diversions. DWR includes, but does not verify, the diversion information provided by BBID when reporting its diversions to the State Water Board. The September 23, 2014 letter states that "DWR requests that *because of the reporting requirements agreed to by BBID in this contract*, the State Water Resources Control Board (SWRCB) not include BBID in any order..." (BBID217 at p. 1, emphasis added). The letter also states "[i]n 2003, DWR and BBID executed a contract to settle *between them* an issue over the amount of any pre-1914 appropriative water right that BBID could divert from the Clifton Court Forebay." (Exhibit BBID217, at p. 1, emphasis added.) The statement in the September 23, 2014 letter that DWR provides BBID up to 50,000 acre feet annually reflects the physical relationship of the SWP facilities and BBID's relocated pumping facilities which now reside within the SWP right-of-way, "a diversion location which establishes a unique relationship between BBID and DWR." (BBID217 at p. 1.) The 2003 Agreement does not provide BBID with a SWP water supply outside that of the winter water provided consistent with the Mountain House exchange which was incorporated in the 2003 Agreement. (Exhibit BBID208, at p. 2.) As noted earlier, the exchange for winter water in the 1993 Agreement was based on an equivalent reduction in irrigation season use by BBID under its pre-1914 water right which was to be provided to DWR. The 1993 Exchange Agreement was terminated as of the effective date of the 2003 Agreement. (*Ibid.*)

2015 Proposals to DWR for Alternate Water Supply

In section C.2.2 of Mr. Gilmore's testimony, he describes efforts to acquire a water supply through an exchange with Alameda County Flood Control and Water Conservation District, Zone 7 (Zone 7, Exhibit BBID-201, at pp. 11-13). I would like to correct some of the mischaracterizations made in Mr. Gilmore's testimony.

Zone 7 receives water from the SWP under the terms of a long-term water supply contract. The SWP long-term water supply contracts contain specific terms and conditions governing the delivery of allocated SWP water, as well as temporary or permanent transfers or exchanges of water that may be in excess of a SWP contractor's demands. On June 16, 2015, Zone 7 provided DWR with a copy of an executed June 15, 2015 letter agreement between Zone 7 and BBID, in which Zone 7 proposed to transfer up to 3,000 acre-feet of SWP water to BBID in exchange for a return of 4,500

acre feet of BBID water to be delivered to Zone 7 in future years through implementation of crop idling to be conducted consistent with DWR and Reclamation's Draft Technical Information for Preparing Water Transfer Proposals and Addendum (Water Transfer White Paper, Exhibits DWR-13 & DWR-14). Understandably, DWR and other SWP contractors expressed concern over the delivery of up to 3,000 acre-feet of allocated SWP water to a non-SWP contractor at a time when many SWP contractors were facing severe water supply shortages that threatened their ability to meet critical agricultural and municipal demands.

On June 17, 2014, Zone 7 submitted a modified letter agreement between BBID and Zone 7 for a similar exchange of up to 2,800 acre feet of Zone 7 local water rather than allocated SWP water (to be provided to BBID through an exchange of SWP water facilitated by DWR) with the return of up to 4,200 acre feet of BBID water in future years. The exchange required the approval of DWR consistent with Article 6 of the 2003 Agreement.³ (Exhibit BBID208, at p. 5.) As in the earlier proposal, the letter agreement stated that the BBID return water would be provided through cropland idling implemented consistent with the Water Transfer White Paper. DWR agreed to develop an agreement for the exchanges between DWR, Zone 7, and BBID. The terms of the proposed exchange agreement were largely consistent with other executed transfer agreements. The proposed exchange was unique in one respect: the specific details for the return of BBID water were undefined. DWR provided the draft agreement to BBID on July 10, 2015 and required compliance with the Water Transfer White Paper for any crop idling to be used for the return of BBID water to Zone 7. Although BBID had agreed in its June 17, 2015 letter agreement with Zone 7 that any idling would be consistent with the Water Transfer White Paper, BBID objected to DWR having specific terms on water management and reporting consistent with the Water Transfer White Paper and declined to sign the exchange agreement.

³ Article 6 limits the delivery or sale of water diverted by BBID to the area shown on the map included in the agreement. Water may not be sold outside those boundaries without the prior written consent of DWR.