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Some water agencies in California consider defying state cuts

By **Kurtis Alexander** Updated 5:23 pm, Thursday, June 25, 2015

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A pump that sends water to 160 farmers in the delta was shut off Wednesday. The Byron Bethany Irrigation District in eastern Contra Costa County was directed by the state to stop diverting water earlier this ... [more](#)

A handful of Central Valley water agencies that have been warned to stop pumping water from rivers to farms, in light of the drought, say they're considering running their pumps anyway.

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The defiance comes after state officials this week presented a legal case for their conservation crackdown — a framework the irrigation districts see as a retreat from tough talk of cutbacks and fines.

Many suppliers stopped drawing water from rivers and creeks this month, for the first time ever, when the state water board took the extraordinary step of sending curtailment notices to some of California’s

strongest water rights holders. Now, agencies with those historic claims say that state regulators, by their own admission, don’t appear to be in a position to penalize people who keep taking water.

“It’s a possibility” that we’ll resume pumping, said **Rick Gilmore**, general manager of the Byron Bethany Irrigation District in eastern Contra Costa County, which supplied water to about 160 growers in the delta until it turned off its pumps Wednesday. “We haven’t made that decision yet.”

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The irrigation district is alongside others that are calling attention to state attorneys who said notices to stop diverting water are “advisory” and that noncompliance won’t “result in any punishment or sanction.” The comments were submitted Tuesday in a San Joaquin County courtroom during a challenge to the notices by the Banta-Carbona Irrigation District in Tracy.

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“The resulting affect has been that water districts are already writing to the state board agreeing with the state board’s attorneys’ conclusions that the curtailment notice is of no force and affect, and need not be respected,” wrote **Jeanne Zolezzi**, attorney for the Tracy district, in an e-mail.

The Tracy district decided Thursday that it will honor the state’s demands and not pump, partly because it expects to make up for the loss with stored water.

The Patterson Irrigation District farther south, which Zolezzi also represents, however, was considering running its pumps, she said. The **State Water Resources Control Board** said that was not a good idea, and warned that the water agencies could face penalties for drawing water illegally.

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Water board attorney **David Rose** told **The Chronicle** that the notices to stop diverting water were indeed “informative” and don’t carry fines, but that the state could — and would — enforce unauthorized water draws with penalties under its broader mandate to protect diminishing water supplies.

The nuanced position reflects the state’s interest in making sure its much-criticized push for water savings amid a fourth year of drought stays on the right side of the law. The state water board is facing several lawsuits that challenge its power to force restrictions on those with water rights predating California’s regulatory system.

Critics say ordering curtailments on water rights holders before permitting began in 1914, first of all, is illegal. Orders to stop pumping water must come from the courts, they contend

and orders can only come if a person with a more senior water right challenges a draw from person with a more junior water right.

Second, such orders require due process, critics say, meaning those told to stop taking water would have to have an opportunity to contest the order — which hasn't happened.

The state maintains it's not ordering cuts. State attorneys say they're merely advising senior water rights holders that they could be illegally drawing water under California's seniority system, which directs those with the youngest claims to water to leave enough in rivers and streams for those with older claims — or face penalties.

"We're not curtailing anybody," Rose said. "They're supposed to curtail themselves because the water is not available."

"The responsibility to know those things and cease diversion if unauthorized is entirely on the diverter," he added. "And that would be true whether or not the board sent them a notice."

Water districts that have received notices, however, say the notices sound a lot like orders.

The notices state that there's a need for water rights holders to stop diverting water, and direct them to certify that they've ceased pumping. They also warn that those who continue to draw water could face penalties, which run \$1,000 a day and \$2,500 for every acre-foot of water illegally drawn.

"If it's a courtesy notice, why do you have to sign under oath a compliance statement?" said **Jeff Shields**, general manager of the South San Joaquin Irrigation District in Manteca, which has also filed a lawsuit challenging the state's authority to impose restrictions.

"I don't see how you can say this thing is anything other than an order," he said.

The state's notices target water rights holders with claims dating back to 1903. It's the first time since the drought of the late 1970s that regulators have reached past 1914 to warn of unauthorized draws.

The legality of the notices will likely be settled in any of at least three lawsuits that have begun making their way through the courts.

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