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9 AUTHORITY, Real Party in Interest

10 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

11 In the Matter of:) **SAN JOAQUIN TRIBUTARIES**
12) **AUTHORITY'S MOTION IN SUPPORT**
13) **OF BRYON-BETHANY IRRIGATION**
14) **DISTRICT'S AND WEST SIDE**
15) **IRRIGATION DISTRICT'S MOTIONS TO**
16) **DISMISS**
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Consolidated.)

1 I. INTRODUCTION

2 The San Joaquin Tributaries Authority (SJTA) supports the Byron-Bethany Irrigation
3 District's (BBID) and the West Side Irrigation District's (WSID) Motions to Dismiss. In
4 support and addition to those motions, the SJTA provides the following supplemental
5 argument:

6 II. BACKGROUND

7 The State Water Resources Control Board (State Water Board) issued an
8 Administrative Civil Liability Complaint (ACL Complaint) against the BBID on June 20,
9 2015. The State Water Board issued a cease and desist order (CDO) to WSID on July 16,
10 2015. The ACL Complaint and CDO are based primarily on allegations that BBID and

1 WSID continued to divert after receiving the May 1, 2015 and June 12, 2015 Notices of
2 Unavailability (Curtailment Notice). The ACL Complaint, CDO, and Curtailment Notice
3 were based on the State Water Board staff's water availability analysis (WAA) and
4 subsequent determination that there was not sufficient water to serve certain groups of
5 water users. The WAA and subsequent determinations of water availability were made by
6 State Water Board staff and never adopted by the State Water Board.

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8 **III. ARGUMENT**

9 **A. Legal Reasons in Support of Motion to Dismiss**

10 1. The State Water Board Acted Outside Its Authority To Curtail Water Users

11 The Water Code was amended in 2014 to provide the State Water Board with
12 curtailment authority during drought. (Water Code, §1058.5.) This section outlines the
13 process through which the State Water Board may curtail water users during drought;
14 specifically, section 1058.5 allows the State Water Board to adopt emergency regulations
15 to curtail water users. There is no other section of the Water Code that authorizes the
16 State Water Board to curtail water users. The State Water Board simply does not have the
17 authority to curtail water users outside its authority to adopt emergency regulations.

18 2. The State Water Board's Actions Amount To Unlawful And
19 Underground Regulation

20 The SJTA supports the BBID's and WSID's Motions to Dismiss based on curtailment
21 amounting to an underground regulation. We will not repeat the arguments made in the
22 WSID and BBID motions. However, in addition to these arguments, the SJTA would like to
23 emphasize that never before has the State Water Board curtailed water right holders in the
24 manner it did in 2015. Previously, the State Water Board has only curtailed water users
25 through regulation or order. Both regulatory action and orders involve notice, hearing,
26 approval by the State Water Board, and are immediately appealable.

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1 In 2014, the State Water Board used its newly granted authority in Water Code
2 §1058.5 to enact an emergency curtailment regulation. The draft regulation was proposed
3 by State Water Board staff. The draft resolution was circulated for public comment. The
4 State Water Board considered the draft regulation, held a public workshop of the draft
5 regulation, made changes to the draft regulation, and adopted the regulation through vote
6 and resolution.

7 The State Water Board's development of Term 91 curtailment was similarly rigorous
8 in process. the State Water Board adopted the methodology that would trigger Term 91
9 through hearings in front of the State Water Board and adopted through a State Water
10 Board Order. (State Water Board Order, 81-15.) During the 1977-78 drought, the State
11 Water Board did not develop curtailment regulations. Staff did not make determinations of
12 water availability. Staff did not issue a general order to groups of water right holders to
13 stop diverting water. Instead, the State Water Board relied on its existing authority to
14 individually review specific diversions and complaints. During this individualized process,
15 the State Water Board handled over 200 complaints and held more than 30 enforcement
16 hearings. These processes allowed individual water right holders the ability to present and
17 question evidence prior to a determination of whether water was available for the individual
18 diversion. In addition, after the hearing, the State Water Board issued a determination that
19 was immediately appealable.

20 The water availability determinations made in 2015 have none of the above-
21 described procedural characteristics; there was no notice, no hearing, no official action or
22 approval, and no opportunity to appeal the determination.

23 **B. Policy Reasons in Support of Motion to Dismiss**

24 In addition to the legal reasons, there are several significant policy reasons the State
25 Water Board should consider dismissing the enforcement actions based on the 2015
26 determination that water was not available for pre-1914 water right holders. One of these
27 policy considerations is the failure of State Water Board staff to follow the express direction
28 of the State Water Board as set forth in Resolution 2014-0031.

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1 The State Water Board adopted emergency curtailment regulations for post-1914
2 diversions in 2014. The State Water Board considered, but declined to adopt, emergency
3 regulations to curtail pre-1914 water rights that same year. During the State Water Board
4 meetings at which the Board considered the curtailment regulations, the State Water Board
5 pledged to develop a methodology for curtailment through a rigorous stakeholder-
6 supported process.

7 During the July 1, 2014 State Water Board meeting, the State Water Board Chair
8 pledged support for a process through which stakeholders have the “opportunity to
9 understand and challenge the basis” for the curtailment methodology. (State Water Board
10 meeting on July 1, 2014, Archived Copy 2 of 3, at 3:54:40.) Board Member Steven Moore
11 also recognized the importance of developing a methodology in a formal setting, stating:
12 “We talked about a stakeholder process or meeting prior to issuance of orders. I hope we
13 can accomplish this through a draft order kind of process, invitation for comment, on
14 specific bases of the decision . . . I would be comfortable with the suggestion of having a
15 hearing on the hydrology concurrent with any decision . . . it would focus us on technical
16 information . . . and be transparent on our knowledge basis on supply and demand.” (State
17 Water Board meeting on July 1, 2014, Archived Copy 3 of 3, at 10:40.) Board Member
18 Tam Doduc similarly understood the need for State Water Board action and a public
19 stakeholder process: “I agree with Board Member D’Adamo, we as a board have an
20 obligation and a responsibility to tackle these issues ourselves and not just delegate it to
21 [staff] . . . as much as I am not fond of touchy and feely discussions, but I think it is
22 important because the magnitude of these topics are so critical and because we do need
23 this to have a level of trust moving forward so that we can achieve the results we want.”
(State Water Board meeting on July 1, 2014, Archived Copy 2 of 3, at 18:10.)

24 Fran Spivey-Weber also prioritized a stakeholder process: “We have a lot of deficits
25 in data collection . . . I see all of these processes as heading toward a more robust system .
26 . . . where everyone knows what is going on and it is quite open . . . working with
27 [stakeholders] . . . to fill in the gaps is a high priority.” (State Water Board meeting on July
28 1, 2014, Archived Copy 2 of 3, at 6:45.)

1 Board Member Doduc requested staff include these procedural protections in the
2 Resolution: "I would suggest that in the resolution we plan ahead, should we find ourselves
3 in similar position next year, and put together some kind of a process involving the
4 stakeholders to develop that information, to develop a process of some kind. . . so that we
5 can be in a better position next year." (State Water Board meeting on July 1, 2014,
6 Archived Copy 2 of 3, at 53:35.)

7 The sentiments of the State Water Board members were memorialized in Resolution
8 2014-0031. Resolution 2014-0031 required State Water Board staff to develop a
9 curtailment methodology with stakeholders to "refine data and gather input on how to most
10 effectively implement and enforce the water rights priority system in future dry years."
11 (Resolution 2014-0031, at para 22.) In addition, Resolution 2014-0031 required that the
12 Executive Director provide a report with recommendations from the stakeholder process to
13 the Board by January 31, 2015.

14 This stakeholder process did not occur. Staff did not work with stakeholders to
15 develop a methodology for curtailment. The Executive Director did not provide a report
16 with recommendations regarding the methodology for curtailment, as required by the
17 Resolution. State Water Board staff did not act in compliance with the direction of the State
18 Water Board.

19 In direct contrast to the sentiments that were repeatedly expressed by board
20 members of a need for due process and stakeholder participation, and in contravention to
21 Resolution 2014-0031 which memorialized the need for stakeholder involvement, the State
22 Water Board staff took unilateral action in this matter. State Water Board staff relied on the
23 regulatory framework that existed in 2014 and simply implemented the same methodology
24 at a staff-level. Thus, not only did staff fail to adopt a new methodology, they used the
25 same methodology from the expired curtailment regulation and failed to properly re-adopt
26 the regulations by providing notice, allowing public comment, and/or obtaining State Water
27 Board approval.

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1 The SJTA respectfully urges the State Water Board dismiss the BBID and WSID
2 enforcement actions and begin the stakeholder process as required by previous State
3 Water Board action.

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5 DATED: February 22, 2016

O'LAUGHLIN & PARIS LLP

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7 By: 

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9 TIM O'LAUGHLIN
10 VALERIE KINCAID, Attorneys for
11 SAN JOAQUIN TRIBUTARIES AUTHORITY
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1 Re: SWB - BBID-ACL/WSID-CDO Consolidated Hearings

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3 **PROOF OF SERVICE BY MAIL**
4 (Government Code §11440.20)

5 I, Linda L. Wood, declare that:

6 I am employed in the County of Sacramento, State of California. I am over the age of
7 eighteen years and not a party to the within cause. My business address is 2617 K Street,
8 Suite 100, Sacramento, CA 95814. On this date, in the following manner, I served the
foregoing document(s) identified as:

9 **SAN JOAQUIN TRIBUTARIES AUTHORITY'S MOTION IN SUPPORT OF BYRON-
10 BETHANY IRRIGATION DISTRICT'S AND WEST SIDE IRRIGATION DISTRICT'S
11 MOTIONS TO DISMISS**

12 **▶▶▶ E-MAIL** [CCP §1010.6]: Based on pending consent of the parties, and/or court order
13 or an agreement of the parties to accept service by e-mail, I caused the documents to
14 be sent to the following persons at the following e-mail address, and did not receive,
15 within a reasonable time after the transmission, any electronic message or other
indication that the transmission was unsuccessful:

16 **PERSONAL DELIVERY** [CCP §415.10] I arranged to have the documents personally
17 delivered to the office of the persons identified below on _____:

18 **SEE ATTACHED SERVICE LIST**

19
20 I declare under penalty of perjury under the laws of the State of California that the
21 foregoing is true and correct. Executed this 22nd day of February, 2016, at Sacramento,
22 California.

23
24
25 By:



26 Linda L. Wood, Legal Assistant

**BYRON-BETHANY IRRIGATION DISTRICT
ADMINISTRATIVE CIVIL LIABILITY HEARING
(09/02/15; Revised 09/10/15; Revised 10/06/16; Revised 10/22/15)**

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**WEST SIDE IRRIGATION DISTRICT
CEASE AND DESIST ORDER
HEARING**

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