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7 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

8	In the Matter of the Administrative Civil	)	<b>PROSECUTION TEAM'S RESPONSE TO PRE-HEARING BRIEFS OF LEGAL ISSUES</b>
	Liability Complaint Against Byron	)	
9	Bethany Irrigation District	)	
		)	
10	In the Matter of the Draft Cease and	)	
	Desist Order Against the West Side	)	
11	Irrigation District	)	

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1           **I. INTRODUCTION**

2           The Prosecution Team submits this brief in response to the January 25, 2016, Pre-  
3 Hearing Briefs of Legal Issues submitted by Central Delta Water Agency, et al, (CDWA;  
4 CDWA Brief) and the City and County of San Francisco (CCSF; CCSF Brief), and in  
5 opposition to the January 25, 2016, Motion to Dismiss Under Water Code Section 1052  
6 submitted by Byron-Bethany Irrigation District (BBID; BBID Motion). The Prosecution Team  
7 has separately moved to strike the San Joaquin Tributaries Authority Brief dated January  
8 25, 2016, as non-responsive to the specific legal issues directed for briefing.

9           The CDWA Brief, CCSF Brief and BBID Motion together total 34 pages, and only  
10 partially address overlapping issues. The Prosecution Team has made every effort to  
11 respond efficiently to the CDWA, CCSF and BBID arguments, and this brief is 16 pages.  
12 The Prosecution Team’s understands from prior rulings that it has up to 20 pages to  
13 respond to the pre-hearing briefs of legal issues. If this understanding is incorrect, then the  
14 Prosecution Team respectfully requests leave to submit this brief in its entirety.

15           **II. CURTAILMENT AUTHORITY**

16           **A. The Board’s curtailment authority is not at issue in these proceedings**

17           Parts II and III of the Prosecution Team’s Brief describe why the Board’s curtailment  
18 authority is not at issue in either the BBID ACL Complaint proceeding or the West Side  
19 Irrigation District (WSID) CDO proceeding. In short, the May 1 and June 12 Unavailability  
20 Notices are not curtailment orders, particularly in light of the July 15 Clarification, and the  
21 enforcement actions do not seek to enforce them as such. BBID concedes this point,<sup>1</sup> and  
22 CCSF does not address it.

23           CDWA acknowledges that “whether or not the SWRCB has the authority to ‘curtail’ is  
24 not an issue in this ACL proceeding,” (CDWA Brief, at 2:5-7), yet argues as though  
25 curtailment authority is an issue. CDWA first argues that any Board generalized curtailment  
26 authority amounts to a due process violation. (CDWA Brief, Part I.A.) CDWA then alleges  
27

28 <sup>1</sup> See, BBID’s Notice of Position Regarding the State Water Resources Control Board Authority to Issue  
Curtailments, submitted January 25, 2016.

1 that any Board generalized curtailment authority violates Article X, section 2 of the California  
2 Constitution, but ultimately argues that generalized curtailment amounts to a due process  
3 violation. (CDWA Brief, Part I.B.) The Board's curtailment authority might be the subject of  
4 the California Water Curtailment Cases litigation (JCCP 4838), but it is not the subject of  
5 these proceedings. Due process is not an issue either, as these proceedings address all of  
6 the allegations made in the ACL Complaint and the WSID CDO.<sup>2</sup> CDWA's assertions  
7 regarding the Board's curtailment authority are straw men that should be ignored.

8 **B. Enforcement against pre-1914 diverters who take in excess of the water**  
9 **available for their right is not regulation**

10 CDWA conflates the Board's authority to enforce against diverters who take in  
11 excess of the water available for their rights with the authority to "regulate" pre-1914 rights.  
12 (CDWA Brief, Part I.C.) This is another straw man attack on general curtailment authority.  
13 Riparian and pre-1914 water rights are within the priority system recognized by Division 2 of  
14 the Water Code, although they are exempt from the permitting and licensing scheme.  
15 (Water Code § 1201; see also PT Brief, Part III.D.) Riparian and pre-1914 claims are subject  
16 to enforcement. (PT Brief, Part IV.) The Unavailability Notices are not "regulation" in any  
17 sense contemplated in the permitting and licensing scheme. The Unavailability Notices are  
18 public announcements that Division of Water Rights staff determined that there was not  
19 enough water to serve certain water right classifications during extreme drought conditions.  
20 Such determinations and announcements are within the Division's authority, and are  
21 necessary to uphold the rule of priority. (PT Brief, Parts III.B-D.) Parties claiming rights  
22 within the scope of the Notices could continue to divert under their claim of right, but they  
23 were on notice that doing so could subject them to this type of enforcement proceeding.

24 CDWA's suggestion that the Board leave for the courts any consideration of drought  
25 water availability for riparian and pre-1914 claimants (CDWA Brief, at 6:22-25) is not  
26 supported by *Millview*<sup>3</sup> or *Young*,<sup>4</sup> which hold that the Board may enforce against

27 <sup>2</sup> CDWA's reliance in Part I.B on Article X, section 2, and *Waterford Irr. Dist. v. Turlock Irr. Dist.* (1920) 50  
28 Cal.App. 213, is nonsensical given that the ACL Complaint does not allege that BBID failed to put that water to  
beneficial use, and the Prosecution Team need not prove the lack of beneficial use in order to prove trespass  
under Water Code section 1052.

<sup>3</sup> *Millview County Water District v. State Water Resources Control Bd.* (2014) 229 Cal.App.4th 879.

1 unauthorized diversions by such claimants. (PT Brief, Part IV.) Such a hands-off approach  
2 could lead to widespread violations of the priority system, as junior claimants may be  
3 tempted to divert in excess of the water available to them on the assumption that few  
4 seniors will bring suit. Moreover, the courts lack the Board's technical expertise, and may  
5 not be able to respond to litigation quickly enough to protect the priority system or to prevent  
6 waste and unreasonable use or harm to public trust resources in periods of drought.

7 **C. Circumstances in the Delta do not expand BBID's water right**

8 CDWA uses the general curtailment authority straw man to present well-trodden  
9 claims by Delta interests regarding their perceived right to divert water in Delta channels  
10 under any circumstances. (CDWA Brief, Part I.D.) Such claims have been repeatedly  
11 rejected, and CDWA is wrong to raise them here to challenge the Board's curtailment  
12 authority. However, these claims relate to potentially relevant issues regarding water  
13 availability, so they deserve closer examination. Factual and legal circumstances in the  
14 Delta do not affect the Division's ability to determine drought water availability. Such  
15 circumstances do not expand BBID's claimed pre-1914 water right, nor make water  
16 available for BBID during the ACL Complaint violations period.

17 **1. Presence of water in Delta channels does not mean water is always**  
18 **available for diversion under BBID's claimed pre-1914 right**

19 The measure of a water right is the amount actually applied to reasonable and  
20 beneficial use, not the amount listed in a notice of appropriation, the capacity of an  
21 appropriator's diversion works, the amount actually diverted, or the amount authorized to be  
22 diverted in a water right permit. (*Millview County Water District v. State Water Resources*  
23 *Control Bd.* (2014) 229 Cal.App.4th 879, 890-891, 896-897; *Haight v. Contanich* (1920) 184  
24 Cal. 426, 431; *Trimble v. Heller* (1913) 23 Cal.App. 436, 443-444; *Akin v. Spencer* (1937) 21  
25 Cal.App.2d. 325, 328; Water Code §§ 1240, 1390, 1610.)

26 CDWA alleges that the "Delta channels are tidally influenced and always have water."  
27 (CDWA Brief, Part I.D.1.) But the Delta channels do not always have water available for  
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<sup>4</sup> *Young v. State Water Resources Control Bd.* (2013) 219 Cal.App.4th 397.

1 appropriation. Because the Delta is open to the San Francisco Bay, when inflow from the  
2 Central Valley is insufficient, saline water from the San Francisco Bay enters the Delta from  
3 the west. (WSID 96, p. 13.) Thus the local water supply depends on both quality and  
4 quantity. (*Id.*) Historically, the needs of almost all Delta users are met almost all of the time,  
5 except for users in the southeast portion (where BBID and WSID are located) where the  
6 quality of water is often unsuitable for its intended beneficial uses. (WSID 98, p.21.)

7 Due to the impact of seawater intrusion on beneficial uses and water rights, high-  
8 salinity inflows from the San Francisco Bay have never been considered water available for  
9 diversion. In assessing the relative impacts of change petitions and new appropriations on  
10 existing water rights in the Delta, the Board has consistently relied on unimpaired freshwater  
11 flow data as a baseline, particularly in relatively recent history with the availability of flow  
12 data, monitoring, and modeling. In Water Right Decision 1379 (D-1379), the Board  
13 determined that diverters in the southern Delta and near the export area had rights only to  
14 divert San Joaquin River water, because under natural conditions Sacramento River water  
15 would not have likely reached these areas. (State Water Board Order 89-08,<sup>5</sup> p. 24.) To the  
16 degree Sacramento River water reaches the southern Delta, the Board has ruled that  
17 southern Delta diverters may lawfully divert that water only to the extent it exceeds the  
18 needs of the Department of Water Resources and the U.S. Bureau of Reclamation for  
19 export or for carriage purposes. (*Id.* at p. 28.)

20 In Decision 1641 (D-1641), the Board approved change petitions for the San Joaquin  
21 River Agreement solely using unimpaired flow data for Vernalis.<sup>6</sup> (*State Water Resources*  
22 *Control Bd. Cases* (2006) 136 Cal.App.4th 676, 735-745 (SWRCB Cases); D-1641, p. 30-  
23 33.) Riparian rights attach only to natural flow. (*Lux v. Haggin* (1884) 69 Cal. 255; *Bloss v.*  
24 *Rahilly* (1940) 16 Cal.2d 70.) As a result, for riparian diverters, the Board compared the  
25 riparian channel depletion requirements only to unimpaired flows at Vernalis. (*Id.* at p. 31.)

26  
27 <sup>5</sup>[http://waterboards.ca.gov/waterrights/board\\_decisions/adopted\\_orders/orders/1989/wro89-08.pdf](http://waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/1989/wro89-08.pdf). The  
28 Prosecution Team requests official notice of this an all subsequently referenced Board decisions and other  
public documents pursuant to 23 CCR § 648.2.  
<sup>6</sup>[http://waterboards.ca.gov/waterrights/board\\_decisions/adopted\\_orders/decisions/d1600\\_d1649/wrd1641\\_1999  
9dec29.pdf](http://waterboards.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1600_d1649/wrd1641_1999dec29.pdf)



1 The Board did not include unlimited high-salinity inflows from the San Francisco Bay, nor did  
2 the Board acknowledge that the Delta channels “always have water.” (*Id.*) The Board  
3 similarly ignored unlimited high-salinity inflows from the San Francisco Bay and the concept  
4 that the Delta channels “always have water” in considering whether the San Joaquin River  
5 Agreement would harm appropriators in the Delta, and instead focused its analysis on  
6 freshwater inflows. (*SWRCB Cases, supra* 136 Cal.App.4th at 737; D-1641, p. 33-34.)

7 Other modern Board decisions regarding the availability of water in the Delta have  
8 not considered unlimited high-salinity inflows from the San Francisco Bay as flows available  
9 for diversion and beneficial use. See, for example, Decisions 1629<sup>7</sup>, 1643<sup>8</sup> and 1650<sup>9</sup> for  
10 the Los Vaqueros Reservoir Project, the Delta Wetlands Properties, and the  
11 Davis/Woodland Water Supply Project, respectively. In these decisions, the Board  
12 calculated water availability based on water needed to satisfy holders of prior rights and  
13 protect other beneficial uses. The water rights were subject to standard water right Standard  
14 Term 80 and other terms to protect prior rights. These projects received either Standard  
15 Term 91 or a special Delta term in lieu of Standard Term 91 where it was deemed that  
16 Standard Term 91 would not adequately protect the rights of the Central Valley Project  
17 (CVP) and State Water Project (SWP) (collectively the “Projects”).<sup>10</sup>

18 Not even the earlier water right decisions cited by CDWA consider unlimited high-  
19 salinity inflows from the San Francisco Bay as water available for appropriation, nor do they  
20 determine that an applicant has water available for appropriation because the Delta  
21 channels “always have water.” In Decision 100 (D-100<sup>11</sup>), the Board’s predecessor  
22 described the hydrologic characteristics of the Delta’s drainage, but acknowledged that  
23 Delta channels lack an adequate water supply in years with low freshwater inflows, stating  
24

25 <sup>7</sup>[http://www.swrcb.ca.gov/waterrights/board\\_decisions/adopted\\_orders/decisions/d1600\\_d1649/wrd1629.pdf](http://www.swrcb.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1600_d1649/wrd1629.pdf)

26 <sup>8</sup>[http://www.swrcb.ca.gov/waterrights/board\\_decisions/adopted\\_orders/decisions/d1600\\_d1649/wrd1643.pdf](http://www.swrcb.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1600_d1649/wrd1643.pdf)

27 <sup>9</sup>[http://www.swrcb.ca.gov/waterrights/board\\_decisions/adopted\\_orders/decisions/d1650\\_d1699/wrd1650.pdf](http://www.swrcb.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1650_d1699/wrd1650.pdf)

28 <sup>10</sup> If the Delta Channels “always have water” there would be no need for Standard Term 80 or 91, let alone any  
need to impose any restrictions on water diversions in the Delta, including restrictions on export pumping by  
the Projects. Similarly, if the Delta Channels do “always have water” then BBID could simply divert as much  
water as it wants whenever it wants and would never need to report a limited quantity in its statement of  
diversion or buy water from the US Bureau of Reclamation. (WR-4, ¶¶ 4-6.)

<sup>11</sup>[http://www.swrcb.ca.gov/waterrights/board\\_decisions/adopted\\_orders/decisions/d0100\\_d0149/wrd100.pdf](http://www.swrcb.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d0100_d0149/wrd100.pdf)

1 “Toward the end of the irrigation season in an average year *or earlier in subnormal seasons*  
2 the flow of fresh water through the delta channels may be so reduced as to permit the  
3 infiltration of salt water into the channels near Suisun Bay.” (D-100, p. 11 [emphasis  
4 added].) The later Decision 805 (D-805<sup>12</sup>) approved an application for diversion from the  
5 Mokelumne River in part because the Delta’s tidal influence would return natural flows and  
6 return flows. (D-805, p. 3.) But the approval in D-805 was not predicated on unlimited high-  
7 salinity inflow from the San Francisco Bay.

8 CDWA unrealistically characterizes water supply in the Delta channels. Even if the  
9 Delta channels “always have water,” they do not always have water available for diversion,  
10 because it is not always suitable for beneficial use. BBID claims a right to divert San  
11 Joaquin River water from the Intake Channel to the Banks Pumping Plant (formerly Italian  
12 Slough), but historically the quality of water in this area of the Delta (the southeast portion)  
13 was often unsuitable for its intended beneficial uses. (WR-4, ¶¶ 4-6, 36; WSID 98, p.21.)  
14 BBID’s water rights are defined not just by its diversion capacity and priority, but also by its  
15 ability to apply water to its intended beneficial use. Before the State and Federal Projects,  
16 BBID would have diverted only San Joaquin River water (Order 89-8, p. 24.). Under severe  
17 drought conditions, even if water was physically available at BBID’s diversion, seawater  
18 intrusion would have made that water unsuitable for diversion and beneficial use. Since a  
19 water right only extends to water diverted and put to beneficial use, BBID’s water right would  
20 not extend to diversion and use of water under severe drought conditions. BBID’s water  
21 right is therefore restricted by its priority and by the amount it could apply under severe  
22 drought conditions. The Board’s approach in assessing drought water availability using only  
23 unimpaired flow was therefore reasonable and justified.

24 **2. The Board’s actions are consistent with Water Code section 7075 and**  
25 **Butte Canal & Ditch Co.**

26 CDWA contends that, because the Delta “always has water,” curtailment was  
27 unnecessary to protect stored water moving through the Delta. (CDWA Brief, Part I.D.2.)

28 <sup>12</sup>[http://waterboards.ca.gov/waterrights/board\\_decisions/adopted\\_orders/decisions/d0800\\_d0849/wrd805.pdf](http://waterboards.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d0800_d0849/wrd805.pdf)

1 Again, whether “curtailment” was necessary is not relevant, because the ACL Complaint  
2 alleges BBID diverted water when there was no water available for its priority of right. (PT  
3 Brief, pp.2-3.) Moreover, CDWA's belief that Delta interests have any right or claim to use  
4 water previously stored or imported by another upstream and then released into the  
5 watercourse for use downstream is simply wrong.

6 No appropriator has a right to use water that was previously stored or imported by  
7 another upstream and then released into the watercourse for use downstream. (*El Dorado*  
8 *Irr. Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937, 962 [*citing*  
9 *Water Code § 1201*].) A senior downstream appropriator can only demand that a reservoir  
10 operator bypass water during the season when water is naturally present in the stream and  
11 is being diverted. (*Lindblom v. Round Val. Water Co.* (1918) 178 Cal. 450, 457.) Water  
12 Code section 7075 therefore provides that "Water which has been appropriated may be  
13 turned into the channel of another stream, mingled with its water, and then reclaimed; but in  
14 reclaiming it the water already appropriated by another shall not be diminished." Rather than  
15 restricting the State Water Board or the Projects, section 7075 recognizes that the Projects  
16 may export water from the Sacramento River into the channels of the San Joaquin River,  
17 commingle it, and then reclaim it. (Order 89-08, p. 25; see *Crane v. Stevinson* (1936) 5  
18 Cal.2d 387, 398-400.)

19 Since the Projects' permits authorize them to draw water to their export diversion  
20 points in the southern Delta, the water the export pumps draw into the southern Delta  
21 remains appropriated water for the purposes of Water Code section 7075. (Order 89-08, p.  
22 27.) Thus, BBID was not entitled to divert any water the Projects imported from the  
23 Sacramento River that was present in the Delta channels during the ACL Complaint  
24 violations period unless such flows exceeded the Projects' export or carriage needs. (Order  
25 89-08, p. 27-28.) Even flows intended for fish and wildlife enhancement and for meeting  
26 water quality objectives were not available for diversion by in-Delta users such as BBID or  
27 WSID, because those flows still had a beneficial use within the Delta. (*El Dorado Irr. Dist.*,  
28 *supra* 142 Cal.App.4th at 962; D-1641, pp. 181-195; Water Code § 1201 ["All water flowing

1 in any natural channel, excepting so far as it... is being applied to useful and beneficial  
2 purposes... is hereby declared to be public water of the State and subject to appropriation in  
3 accordance with the provisions of this code.”].)

4 Citing *Butte Canal & Ditch Co. v. Vaughn* (1858), 11 Cal. 143, 147, CDWA argues  
5 that the Board must demonstrate “no injury” to BBID and that it must leave BBID “in the use  
6 of the full quantity” it is entitled. (CDWA Brief, p. 9.) Legislation has codified the “no injury  
7 rule” in the Civil Code and Water Code, and subsequent case law has further explained the  
8 rule, as meaning no “substantial injury” or action that would “unreasonably affect” another’s  
9 water right. (*SWRCB Cases, supra* 136 Cal.App.4th at 742-743.) The Division’s drought  
10 water availability supply and demand analysis shows that there was no water available for  
11 diversion by BBID at its priority of right during the violations period. The Complaint alleges  
12 only that BBID diverted when it had no right to divert. The “no injury” rule does not apply.

13 **3. The ACL Compliant is consistent with the Delta Protection Act and**  
14 **Federal Reclamation Law**

15 Water Code sections 12200 through 12205 are commonly known as the Delta  
16 Protection Act. (*SWRCB Cases, supra* 136 Cal.App.4th at 767.) Section 12201 sets forth  
17 the Legislature's findings that the “maintenance of an adequate water supply in the Delta  
18 sufficient to maintain and expand agriculture, industry, urban, and recreational development  
19 in the Delta... and to provide a common source of fresh water for export to areas of water  
20 deficiency is necessary to the peace, health, safety and welfare of the people of the State.”  
21 (Water Code § 12201.) CDWA’s reliance on the Delta Protection Act is misplaced. (CDWA  
22 Brief, Part I.D.3.)

23 The Board has the authority to balance “in-Delta needs and export needs” and  
24 determine whether in-Delta needs receive an adequate supply of water. (*SWRCB Cases,*  
25 *supra* 136 Cal.App.4th at 770-771.) In making such a determination, the Board only needs a  
26 reasonable factual basis for its action. (*Id.* at 772.) The Delta Protection Act provides no  
27 clear standard for determining what constitutes an adequate supply of water for users in the  
28 Delta. (*Id.* at 770.) What constitutes an “adequate water supply” under the Delta Protection

1 Act is a matter within the Board's judgment, balancing all of the relevant factors and all of  
2 the competing interests in the water that flows through the Delta. (*Id.* at 771.) Although the  
3 Delta Protection Act precludes diversion of water from the Delta that is necessary for salinity  
4 control or to provide an adequate water supply for users within the Delta, the Board  
5 nonetheless has discretion to decide what level of salinity control should be provided, and  
6 what constitutes an adequate supply of water for users in the Delta. (*Id.* at 772.)

7 The Delta Protection Act creates no new or separate water right for users of water in  
8 the Delta. (*Phelps v. State Water Resources Control Bd.* (2007) 157 Cal.App.4th 89, 110.)  
9 Delta water users must have adequate existing water rights, acquired under the laws that  
10 govern acquisition of water rights, before they can divert and use water from the channels of  
11 the Delta. (*Id.*) If existing water rights are inadequate to supply the needs of in-Delta water  
12 users, the Delta Protection Act does not ensure the Delta water users an adequate supply.  
13 (*Id.*) The Delta Protection Act therefore does not entitle BBID to divert water when its water  
14 right does not entitle it to do so.

15 CDWA also mischaracterizes Federal Reclamation Law. Public Law 99-546 provides  
16 that "the costs associated with providing Central Valley Project water supplies for the  
17 purpose of salinity control and for complying with State water quality standards... shall be  
18 allocated among the project purposes and shall be reimbursed." (PL 99-546 (HR 3113), PL  
19 99-546, October 27, 1986, 100 Stat 3050.) (PL 99-546 (HR 3113), PL 99-546, October 27,  
20 1986, 100 Stat 3050.) However, "the costs of providing water for salinity control and for  
21 complying with State water quality standards above those standards... shall be non-  
22 reimbursable." (*Id.*) The applicable state water quality standards are described in Exhibit A  
23 to PL 99-546.<sup>13</sup> If the standards are updated, the Central Valley Project operates to meet  
24 those standards so long as they are not inconsistent with Congressional directives. The  
25 Projects are therefore only required to provide salinity control and water quality up to  
26 standards set by the State Water Board.

27 <sup>13</sup> Exhibit A, - *Agreement Between the United States of America and the Department Of Water Resources of*  
28 *the State of California for Coordinated Operation of the Central Valley Project and the State Water Project* is  
available at <https://archive.org/details/agreementbetween00wash> and  
<https://ia802604.us.archive.org/16/items/agreementbetween00wash/agreementbetween00wash.pdf>

1 The Delta Protection Act imposes no additional duty on the Projects. It certainly  
2 provides no additional unreimbursed duties on the Projects. As the State Water Board noted  
3 in D-1379, “Nowhere does the Board find any California law which provides that the Delta  
4 users shall be provided with supplies in excess of their vested rights without payment.”  
5 (WSID 98, p. 15.) If Delta diverters want the Projects to provide additional benefits, then  
6 they have to pay for it. (*El Dorado Irr. Dist.*, *supra* 142 Cal.App.4th at 975; *Phelps*, *supra*  
7 157 Cal.App.4th at 107.) BBID is not entitled to any water supply from the Projects in excess  
8 of its rights unless it pays for it.

9 **4. The Board’s actions are consistent with the rule of priority**

10 CDWA argues that the Board violated the rule of priority, citing *El Dorado Irrigation*  
11 *District v. State Water Resources Control Board*, *supra* 142 Cal.App.4<sup>th</sup> at 961. (CDWA  
12 Brief, Part I.D.4.) Again, CDWA’s allegations that the State Water Board issued curtailments  
13 or other orders which “sought to shift, and did in fact shift the Projects’ obligations to meet  
14 the flow and salinity objectives onto the curtailed water users” are not relevant here. Any  
15 temporary urgency change order granting the Projects temporary relief from meeting Delta  
16 flow and water quality objectives is beyond the scope of these proceedings. Whether the  
17 Projects have complied with their permits is similarly not relevant. In any event, CDWA’s  
18 reliance on *El Dorado* is misplaced.

19 The Board must recognize and protect the interests of those with prior and  
20 paramount rights to the use of water. (*El Dorado Irr. Dist.*, *supra* 142 Cal.App.4th at 961;  
21 *Meridian, Ltd., v. San Francisco* (1939) 13 Cal.2d 424, 450, *opinion amended on denial of*  
22 *reh'g*, (1939) 13 Cal.2d 424.) *El Dorado Irrigation District* held that the Board violated the  
23 rule of priority by including Term 91 in El Dorado Irrigation District’s (El Dorado’s) permit  
24 without including that term in the licenses and permits of junior appropriators. (*El Dorado Irr.*  
25 *Dist.*, *supra* 142 Cal.App.4th at 972.) However, regardless of Term 91, El Dorado lacked any  
26 right to take water when no natural or abandoned flow was available according to its priority.  
27 (*Id.* at 972.) When natural or abandoned flows were insufficient for diversion by El Dorado,  
28 downstream riparians, and senior appropriators and also insufficient to meet Delta water

1 quality objectives, the Projects had to release more stored water to meet Delta water quality  
2 objectives. (*Id.* at 969.) However, the rule of priority only applies to the use of natural or  
3 abandoned flow in the watercourse. (*Id.* at 962.) Furthermore, no riparian or appropriator  
4 has a right to use water that was previously stored or imported by another and then  
5 released into the watercourse for use downstream. (*Id.*) El Dorado could continue diverting  
6 not because it had any right to water previously stored or imported by the Projects, but  
7 because natural and abandoned flow remained available for its priority of right. Had natural  
8 flow been unavailable for El Dorado's priority of right, El Dorado would have had to cease  
9 diverting.

10 The Unavailability Notices and these enforcement actions are consistent with the  
11 goal of protecting priority of right and senior rights. Natural and abandoned flow was not  
12 available for BBID at its priority of right during the violations period. BBID had no right to  
13 divert Project storage releases. Regardless, BBID kept diverting.

### 14 **III. WATER CODE SECTION 1052 APPLIES TO BBID'S DIVERSIONS**

#### 15 **A. Water Code section 1052 is not limited to diversions of water subject to the** 16 **permitting and licensing scheme in Division 2 of the Water Code**

17 CDWA, CCSF, and BBID all offer variations on the theme that Water Code section  
18 1052 cannot apply to BBID's diversions during June 13 through June 24, 2015, because  
19 section 1052 only applies to diversions of water subject to the Board's permitting and  
20 licensing authority under Division 2 of the Water Code. (CDWA Brief, at Part II, CCSF Brief,  
21 at Part I.A, and BBID Motion, at Parts III.3-4.) CDWA, CCSF and BBID mischaracterize and  
22 artificially limit Water Code section 1052, subdivision (a), which provides that "[t]he diversion  
23 or use of water subject to this division other than as authorized in this division is a trespass."  
24 For our purposes, the key phrases are "water subject to this division" and "other than as  
25 authorized in this division."

26 By its plain terms, the "water subject to this division" is not limited to water subject to  
27 the permitting and licensing scheme set forth in Part 2 of Division 2 (commencing at section  
28 1200). Had the Legislature intended to limit section 1052 to water subject to the permitting

1 and licensing scheme under Part 2, it would have done so. But Division 2 of the Water Code  
2 encompasses sections 1000 through 5209, and, as even CDWA recognizes (CDWA Brief,  
3 at 15:22-25), several sections apply to riparian and pre-1914 appropriative claims. For  
4 example, Part 5.1 of Division 2 subjects all diverters, regardless of their basis of right, to an  
5 annual reporting requirement tracking the scope of diversion. Section 1202(d)'s definition of  
6 unappropriated water subject to the permitting scheme includes return flows from all water  
7 rights. Section 1011.5 allows pre-1914 appropriative right claimants to claim the benefit of a  
8 conjunctive groundwater use in lieu of surface water, but subjects those water right holders  
9 to a reporting requirement. Section 2501 subjects all water rights to a determination of the  
10 rights of a stream system during a statutory adjudication.

11 The phrase "other than as authorized in this division" should also be read to include  
12 riparian and pre-1914 claims, because Water Code section 1201 expressly recognizes  
13 those rights and exempts them from the permitting and licensing scheme. In that way, even  
14 Part 2 of Division 2 authorizes diversions by riparian and pre-1914 claimants, albeit without  
15 the level of regulation applied to post-1914 appropriative rights. Priority is as much a part of  
16 an appropriator's right, even a pre-1914 appropriator, as the amount diverted or season of  
17 diversion. An appropriator diverting when there is no water available for a priority of right,  
18 even a pre-1914 priority of right, is no different than diverting in excess of the amount  
19 claimed under that right or outside the season claimed by that right.

20 A narrow interpretation of section 1052 would read out sections within Division 2 that  
21 explicitly apply to pre-1914 rights. An interpretation of section 1052 that exempts pre-1914  
22 rights from enforcement of unauthorized diversion would necessarily require exempting  
23 other sections within Division 2. Such a reading does not comply with ordinary principles of  
24 statutory interpretation – chiefly that a statutory construction should construe a statute in the  
25 context of the entire statutory system of which it is a part, in order to achieve harmony  
26 among the parts.

27 BBID and CCSF each cite *People v. Shirokow* (1980) 26 Cal.3d 301 for the  
28 proposition that section 1052 is limited to water subject to the permitting and licensing



1 scheme set forth in Division 2. (BBID Motion at p. 6; CCSF Brief at p. 2.) *Shirokow* does not  
2 provide support, because that decision stands only for the proposition that unappropriated  
3 water is subject to appropriation under the permitting and licensing scheme set forth in  
4 Division 2 of the Water Code. (*Shirokow*, 26 Cal.3d, at 305-306.)

5 **B. *Young* and *Millview* do not require that a pre-1914 claimant divert water**  
6 **subject to permits or licenses for the Board to bring an enforcement action**  
7 **for unauthorized diversion**

8 CDWA, CCSF, and BBID read *Young v. State Water Resources Control Bd.* (2013)  
9 219 Cal.App.4<sup>th</sup> 397, and *Millview County Water Dist. v. State Water Resources Control Bd.*  
10 (2014) 229 Cal.App.4<sup>th</sup> 879, as allowing enforcement against pre-1914 claimants only when  
11 the pre-1914 diverter interferes with or diverts water rightfully subject to a post-1914 permit  
12 or license. (CDWA Brief, pp. 16-17, CCSF Brief, Part I.B, BBID Motion, Part III.4.) CDWA,  
13 CCSF and BBID read these cases too narrowly and ascribe meaning that is not there.

14 BBID cites a portion of the *Young* decision which summarizes the Board's permitting  
15 authority over unappropriated water as if that were the entire holding. (BBID Motion, at 7:12-  
16 17.) CCSF argues that *Young* allows enforcement against pre-1914 claimants "only if there  
17 is a claim that they are diverting or using unappropriated water that would be subject to the  
18 State Water Board's permitting authority." (CCSF Brief, at 4:17-21.) CDWA argues that  
19 *Young* does not allow any enforcement against valid riparian or pre-1914 rights. (CDWA  
20 Brief, at 16:17-20.) None of them cite the actual holding, in which the court rejected similar  
21 arguments and stated the central question as "whether a given diversion claimed to be  
22 authorized is in fact authorized by a valid riparian or pre-1914 appropriative right. If it is not,  
23 the diversion is unauthorized and subject to enforcement pursuant to Water Code sections  
24 1052 and 1831, subdivision (d)(1)." (*Young*, 219 Cal.App.4<sup>th</sup>, at 406.) *Young* thus stands for  
25 the proposition that the Board may enforce against any diversions not authorized by a valid  
26 riparian or pre-1914 appropriative right.

27 CDWA, CCSF and BBID cite the correct *Millview* holding,<sup>14</sup> but artificially tie that

28 <sup>14</sup> "Section 1831 allows the Board to issue an order preventing the unauthorized diversion of water. Unauthorized diversion includes not merely the diversion of water under a claimed but invalid pre-1914 right, but also diversion beyond the proper scope of a valid pre-1914 right, whether because the diversion exceeds the maximum perfected amount of water under the right or because in intervening forfeiture has reduced the

1 holding to water subject to the Board's regulatory authority under the permitting and  
2 licensing scheme under Division 2 of the Water Code. (CDWA Brief, at p. 16-17, CCSF  
3 Brief, at pp. 4-5, BBID Motion, at pp. 7-8.) *Millview*, like *Young*, examines the scope and  
4 extent of water available for regulation by the Board under the Division 2 permitting and  
5 licensing scheme, but nothing in either case stands for the proposition that the Board may  
6 enforce against pre-1914 or riparian claimants only when those diverters take water from  
7 post-1914 permit or license holders.

8 Neither *Young* nor *Millview* address circumstances where no water was available to  
9 serve the priority of a claimed pre-1914 water right, but the *Young* and *Millview* reasoning  
10 applies in such circumstances. Priority is an inherent part of a water right; it is axiomatic that  
11 California's priority system requires a water right holder to cease diverting when there is no  
12 water available to serve that priority, whether riparian, pre-1914, or post-1914. It is  
13 nonsensical to read *Young* and *Millview* to allow the Board to enforce against pre-1914  
14 claimants only when there is water available for post-1914 rights, as that would thwart the  
15 Board's ability to protect the priority system and uphold Article X, section 2 during the times  
16 when this protection is needed the most. Moreover, unauthorized diversions of natural and  
17 abandoned flow *do* impact post-1914 right holders, even during drought periods, by  
18 extending periods of unavailability. Finally, such a reading of *Young* and *Millview* ignores  
19 the practical reality that Delta channels often contain imported water that is subject to  
20 Division 2, in addition to natural and abandoned flow.<sup>15</sup>

21 **C. The ACL Complaint alleges that BBID diverted in excess of its right**

22 BBID purposefully misconstrues the ACL Complaint as accusing BBID of "taking  
23 water needing solely to satisfy more senior pre-1914 appropriative and/or riparian water  
24 rights." (BBID Motion, at 3:9-10.) The ACL Complaint alleges that BBID diverted water under  
25 its claimed pre-1914 right during a period in which there was no water available for that  
26 right. (WR-4, ¶¶ 24, 28, 30, 31, et al.) The ACL Complaint does not, and need not, specify

27  
28 proper scope. The Board therefore possesses the jurisdiction to determine these issues." (229 Cal.App.4<sup>th</sup> at 895.)

<sup>15</sup> Abandoned flow is also subject to Division 2. (Water Code § 1202, subd. (d).)

1 whether BBID only diverted water that should have gone to senior right holders, or whether  
2 BBID diverted stored water releases unavailable for appropriation.

3 The June 12 Unavailability Notice describes why there was no water available for  
4 BBID's claimed pre-1914 right. But that does not mean that the only water in the channel  
5 next to BBID's pumps was natural flow available to riparians or natural and abandoned  
6 flows available to more senior pre-1914 claimants. BBID's carefully worded Motion does not  
7 claim that BBID only diverted water available to riparian and senior pre-1914 claimants,  
8 because BBID cannot make that claim. For one thing, the Delta had been in balanced  
9 conditions since April 30, 2015, meaning the U.S. Bureau of Reclamation and the State  
10 Water Project were releasing Supplemental Project Water to meet water quality standards  
11 and other in-basin entitlements in the Sacramento-San Joaquin Delta Watershed.<sup>16</sup> For  
12 another, BBID's pumps are located on the Intake Channel to the State Water Project  
13 pumps, which contained Project storage releases as evidenced by Project pumping during  
14 the BBID violations period. There can be no question that Supplemental Project Water and  
15 storage releases are subject to Division 2, and are not available to BBID's pre-1914 right.

16 **D. The BBID/DWR agreements do not expand or supplement BBID's claimed**  
17 **pre-1914 right**

18 BBID argues that a 1964 Agreement and a 2003 Agreement between BBID and the  
19 Department of Water Resources (DWR) gives BBID a right to divert up to 50,000 acre-feet  
20 of DWR water annually, and that BBID's diversions during the violations period should be  
21 left as a contract dispute between BBID and DWR. (BBID Motion, at Part IV.) BBID  
22 dramatically mischaracterizes the DWR agreements. The 1964 Agreement (BBID Exh. 206)  
23 is a right-of-way agreement allowing BBID to move its points of diversion and construct  
24 facilities after construction of the State Water Project pump Intake Channel obliterated  
25 BBID's former diversion channel. The 1964 Agreement expressly provides that

26 It is further understood that [BBID's] rights to quantity and quality of water  
27 may or may not be undetermined at the present time. Nothing contained in

28 <sup>16</sup> See [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/docs/term91\\_2015\\_curtailnotice.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/term91_2015_curtailnotice.pdf)

1 this agreement nor in State's consent to change in District's points of  
diversion shall either enlarge or restrict [BBID's] present water rights.

2 (1964 Agreement (BBID Exh. 206), at ¶ 4.) Thus, the 1964 Agreement does not expand or  
3 restrict BBID's claimed pre-1914 right, nor does it grant BBID a new right.

4 The 2003 Agreement (BBID Exh. 208) "describe[d] the nature and extent of the  
5 District's rights as between the District and the Department for the diversion of water from  
6 the Delta for agricultural, municipal and industrial uses within the District" [BBID Exh. 208,  
7 Recital F], following the 1964 Agreement and a 1993 agreement relating to an exchange  
8 between DWR and BBID to allow for municipal diversions outside of BBID's pre-1914  
9 season of diversion. The 2003 Agreement does not change BBID's pre-1914 rights:

10 The District maintains that water diverted by the District under this Agreement  
11 shall be deemed diverted under the District's present water rights. ***This***  
12 ***Agreement neither enlarges nor restricts the District's present water***  
13 ***rights.*** This Agreement shall constitute the full and sole agreement between  
14 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 the provisions in this Agreement so long as this  
Agreement remains in full force and effect.

15 (2003 Agreement (BBID Exh. 208), at ¶ 8 [Emphasis added].)

16 Nothing in either Agreement can be construed as a promise by DWR to provide water  
17 to BBID during times of unavailability for BBID's claimed pre-1914 right. Even if either  
18 Agreement did so promise, the State Water Board is not bound by those Agreements, and  
19 must enforce against BBID.

#### 20 **IV. CONCLUSION**

21 The Prosecution Team respectfully requests that the Hearing Officers reject the  
22 arguments in the CDWA and CCSF Briefs, and deny the BBID Motion to Dismiss.

23 Date: February 22, 2016

Respectfully Submitted,

24 

25 Andrew Tauriainen  
26 **OFFICE OF ENFORCEMENT**  
27 Attorney for the Prosecution Team  
28