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and PATTERSON IRRIGATION DISTRICT

BEFORE THE STATE WATER RESOURCES CONTROL BOARD

9 ENFORCEMENT ACTION ENFO1951)	WRITTEN OPENING STATEMENT OF
10 ADMINISTRATIVE CIVIL LIABILITY)	BANTA-CARBONA IRRIGATION
11 COMPLAINT REGARDING)	DISTRICT AND PATTERSON
12 UNAUTHORIZED DIVERSION OF)	IRRIGATION DISTRICT
13 WATER FROM THE INTAKE CHANNEL)	
14 TO THE BANKS PUMPING PLANT)	
(FORMERLY ITALIAN SLOUGH) IN)	Hearing Date: March 21, 2016
CONTRA COSTA COUNTY)	Hearing Officer: Frances Spivy-Weber

15 Banta-Carbona Irrigation District and Patterson Irrigation District file this Written
16 Opening Statement in the above Enforcement Actions against Byron-Bethany Irrigation District
17 (“**BBID**” or “**District**”).

18 When imposing curtailments, the State Water Resources Control Board (“**Board**”) is
19 acting under Water Code §1052 against the unauthorized diversion or use of water, which, by its
20 own terms, applies only to “the diversion or use of water subject to this division other than as
21 authorized in this division,” which does not include pre-1914 appropriations. The courts have
22 confirmed that the Board must have the authority to *initially* determine the validity of a riparian
23 or pre-1914 appropriative right in order to determine whether or not water is being lawfully
24 diverted; however, if it is determined that the diversion is authorized by a riparian or pre-1914
25 appropriative right, the board lacks jurisdiction to regulate – it cannot determine the rights of pre-
26 1914 appropriators viz-a-viz one another.

27 Prior to 1914, there was no comprehensive permit system available to establish
28 appropriative water rights in California, and the establishment of such a right required simply

1 posting and recording a notice of intended diversion and the construction and use of actual
2 diversion facilities. This is how BBID obtained its Rights. The measure of such a “pre-1914”
3 right is determined by the nature and scope of the use of the water diverted. *Wells v. Mantes*
4 (1893) 99 Cal. 583. In 1914, a comprehensive permit system was established in California and
5 all new appropriative uses (both for diversion and storage) subsequent to that year require
6 application to what is now the Board.

7 As the Board has stated:

8 Although several provisions of the Water Code imply the existence of pre-1914
9 rights, they are essentially the product of the decisional law of the courts of this
10 State. Generally the superior courts continue to be the forum of first instance for
11 resolution of conflicts involving pre-1914 and riparian rights, although some
12 administrative procedures established under the Water Code apply to pre-1914
13 and riparian water rights (See California Water Code Sec. 275, 1707). high degree
14 of certainty and security of right. State Water Resources Control Board *Statutory*
15 *Water Right Law* January 2015 (updated April 28, 2015)
16 http://www.waterboards.ca.gov/laws_regulations/docs/wrlaws.pdf

17 As quite simply stated in *Young v. State Water Resources Control Board* (2013) 219 Cal
18 App.4th 397, 404, the Water Board has no jurisdiction to regulate pre-1914 water rights. Water
19 Code Section 1831(e) provides “**This article shall not authorize the board to regulate in any**
20 **manner, the diversion or use of water not otherwise subject to regulation of the board**
21 **under this part.**” (Bolding added.)

22 The Prosecution Team argues that the Board is not “regulating” the pre-1914 rights of
23 BBID because the Unavailability Notices “are not ‘regulation’ in any sense contemplated in the
24 permitting and licensing scheme.” Merriam-Webster defines regulate as “to bring (something)
25 under the control of authority.” <http://www.merriam-webster.com/dictionary/regulate> This
26 statement is disingenuous, as this Enforcement Action stemming from the Unavailability Notice
27 is certainly regulation.

28 While the Board has “the power or authority to make the threshold determinations”
necessary to determine if a diversion is made pursuant to a valid pre-1914 right (*Young*, supra at
p. 406), after making this threshold determination, water diverted under a valid pre-1914 right is
protected from Water Board regulation. *Millview County Water Dist. v. State Water Resources*
Control Bd. (2014) 229 Cal.App.4th 879, 894. In bring this Enforcement Action, the Board

1 substantially exceeds a narrow “threshold determination” and unlawfully intrudes into pre-1914
2 rights by seeking to regulate the rights of valid pre-1914 appropriators viz-a-viz one another.

3 The Prosecution Team acknowledges that neither *Young* nor *Millview* address
4 circumstances where no water was available to serve the priority of a claimed pre-1914 water
5 right, but then asserts that the *Young* and *Millview* “reasoning” would apply in such
6 circumstances. This extension of *Young* and *Millview* does not hold. In *Young*:

7 The court acknowledged the long-standing rule that the Board “does not have jurisdiction
8 to regulate riparian and pre-1914 appropriative rights.” (Id. at p. 404.) Yet it also noted
9 the Board “does have authority to prevent illegal diversions and to prevent waste or
10 unreasonable use of water, regardless of the basis under which the right is held.” (Ibid.)
11 The court harmonized these potentially conflicting principles by noting a permit is
12 required for the diversion of certain categories of water and the Board has the authority
13 under section 1831 to issue a CDO against the unpermitted diversion of such water.
14 Included among the categories requiring a permit are “water subject to a pre-1914 right
15 but that was not perfected by putting the water to beneficial use with due [894] diligence
16 [citation], and water for which a right had been perfected by putting the water to use
17 under a pre-1914 right but where the use later ceased” (Young, at p. 404.)
18 **Accordingly, Young reasoned, “to determine whether the diversion and use of water
19 is unauthorized, it is necessary to determine whether the diversion and use that the
20 diverter claims is authorized by riparian or pre-1914 appropriative rights.**

21 *Millview*, supra at pp. 893-894. *Millview* found *Young*’s reasoning persuasive, concluding “[i]n
22 order to exercise the authority given to it under section 1831 to prevent unauthorized diversion of
23 water, the Board necessarily must have jurisdiction to determine whether a diverter’s claim under
24 a pre-1914 right of appropriation is valid”. *Millview* at p. 894.

25 *Millview* and *Young*, therefore, allow the Board to determine the validity of a pre-1914
26 right. However, *Millview* put a finer point on “regulation” when it reconciled the *Young* holding
27 with the plain language of Water Code §1831(e), which states: “This article shall not authorize
28 the board to regulate in any manner, the diversion or use of water not otherwise subject to
regulation of the board under this part.” It noted that “only water diverted under a valid pre-1914
water right is protected from such regulation; a permit is required to divert water appropriated
pursuant to a claimed pre-1914 water right that was never perfected, or has been forfeited, or is
otherwise invalid. (Young, at p. 404.) *Millview*, then, concluded that the Board can (1) make the
preliminary determination of whether a claimed pre-1914 right of appropriation was validly
established, as well as (2) determine the scope of a claimed right. Noting that Section 1831

1 allows the Board to issue an order preventing the unauthorized diversion of water, and that
2 unauthorized diversion includes “not merely the diversion of water under a claimed but invalid
3 pre-1914 right, but also diversion beyond the proper scope of a valid pre-1914 right, whether
4 because the diversion exceeds the maximum perfected amount of water under the right or
5 because an intervening forfeiture has reduced the proper scope.”

6 What neither *Millview* nor *Young* before it concluded was that the Board has the
7 jurisdiction to determine the priority and rights of one pre-1914 right holder against another, or
8 against a riparian right holder; such a determination of the priority of right holders viz a viz one
9 another is regulation, and not within the jurisdiction of the Board, even in light of *Millview* and
10 *Young*.

11 Date: February 29, 2016 _____

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