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7 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

8 In the Matter of the Administrative Civil
Liability Complaint Against Byron
9 Bethany Irrigation District

**PROSECUTION TEAM'S OPPOSITION
TO MOTION FOR NONSUIT**

10 In the Matter of the Draft Cease and
Desist Order Against the West Side
11 Irrigation District

12 **I. INTRODUCTION**

13 The Prosecution Team requests that the Hearing Officers deny the motion for
14 nonsuit. As will be outlined herein, such a motion has no place in an administrative
15 proceeding before the Board. Such a motion has no place in this proceeding because the
16 Hearing Officers, on February, 18 specifically ruled that they will not entertain such motions
17 during these proceedings. But even if the motion is entertained, the law requires a denial of
18 the motion because the relevant civil procedure standards that might inform this process are
19 deferential to the Prosecution Team. The Hearing Officers must disregard all conflicting
20 evidence and give the Prosecution Team's evidence every legitimate inference, and the
21 Hearing Officers must allow the Prosecution Team to present curative evidence on the
22 Prosecution's Request and on offer of proof.

23 Accordingly, the Prosecution Team hereby requests that, should the Hearing Officers
24 find defects in its Case-in-Chief witness testimony, that it be given an opportunity to correct
25 any such defects. As outlined more fully herein, the Prosecution Team makes this request
26 with a specific offer of proof that redirect of Mr. Yeazell, and of Mr. Coats, will demonstrate
27 that the supply inputs and the demand adjustments, with or without cross-examination,
28 support a finding that there was no water available to serve BBID during June 13 through

1 June 24, 2015, and that there was no water to serve WSID after May 1, 2015. The
2 Prosecution Team requested redirect examination during the hearing that would have cured
3 the defects now alleged by the moving parties, and that request was denied. The Hearing
4 Officers cannot now grant this motion for nonsuit without first allowing the Prosecution Team
5 the opportunity to conduct the requested redirect examination. Moreover, all other
6 anticipated defects raised by the diverters are addressed in the Prosecution Team's
7 rebuttal. Accordingly, the Prosecution Team hereby additionally offers the entire rebuttal
8 testimony as an offer of proof regarding any such defects.

9 The motion is based on a number of fundamental mischaracterizations, some of law
10 and some of fact. The moving parties misstate the law by imputing a harm standard into the
11 Water Code section 1052 definition of trespass, when there is no such standard.

12 Harm is one of many factors that the Board may consider under section 1055.3 when
13 setting a liability amount, but it is not required in order to find BBID or WSID liable for
14 trespass or threatened unauthorized diversion under Water Code section 1052. The liability
15 amount is a Phase 2 issue in the BBID proceeding.

16 The moving parties misstate the facts by mischaracterizing the Key Issues in this
17 Phase, and by focusing on evidence relating to days outside of the alleged violation days.
18 Ms. Spaletta knows what the violation days are. Yet in what may be charitably described as
19 a remarkable lack of candor, she focused her cross examination entirely on the full natural
20 flow available on June 7, 2015, in another attack on the June 12 Notice as a final
21 determination of the Board. The Prosecution Team pointed this out during its request for re-
22 direct examination of Jeff Yeazell, and counsel made an offer of proof that redirect would
23 focus on the unavailability for the correct days – June 13 through June 24, 2015 – but was
24 denied the opportunity.

25 The moving parties, and particularly Mr. O'Laughlin, also mischaracterize the
26 Prosecution Team's opening statement presentation. By necessity, the Prosecution Team's
27 opening presentation discussed the evidence that would be submitted during the Case-in-
28 Chief and Rebuttal in each Phase. In summarizing the evidence supporting the Prosecution

1 Team's Phase 1 recommendations, the Prosecution Team's Opening Statement by
2 necessity referred to all of the evidence, including that to be submitted by other parties.

3 Moreover, Mr. O'Laughlin displayed an extreme lack of candor when he suggested to
4 Kathy Mrowka during cross examination that Prosecution Team counsel indicated that the
5 Prosecution Team would demonstrate injury or harm to any party. The Prosecution Team
6 has reviewed the transcript of the Opening Statement. Counsel never said any such thing.
7 In fact, according to the March 22, 2015, rough transcript, only Mr. O'Laughlin and Ms.
8 Zolezzi ever mentioned the words "injury" or "harm," except for an occasion when the
9 Hearing Officer says "harm" while clarifying a cross-examination question.

10 But it does not even matter what the Prosecution Team said or did not say in the
11 Opening Statement. It only matters what the law is. Section 1052 does not require the
12 Prosecution Team to demonstrate harm in order to prove a trespass. There is a long list of
13 Board authority on this point. To that end, the Prosecution Team's Opening Statement
14 stated that the Phase 1 evidence would show that there was no water available for BBID's
15 diversions from June 13 through June 24, 2015, and for WSID's actual or threatened
16 diversions after May 1. And the evidence does make these showings.

17 **II. NONSUITS HAVE NO PLACE IN THESE PROCEEDINGS**

18 These proceedings are administrative enforcement proceedings brought under Water
19 Code section 1052, and Water Code section 1831. According to the most recent Notice of
20 Revised Schedule, dated January 8, provides that the Key Issues for this Phase 1 are as
21 follows:

- 22 1. *Was the water diverted by BBID from June 13 through June 25, 2015, if*
23 *any, unavailable under its claimed pre-1914 appropriative right and all*
24 *other claims of right by BBID?*
- 25 2. *Was the water diverted by WSID after May 1, 2015, if any, unavailable*
26 *under License 1381 and all other claims of right by WSID?*

27 A "nonsuit" has no place in a State Water Board adjudicative hearing. Nonsuits and
28 dismissals are governed by Title 8 of the Code of Civil Procedure, which applies to "actions"

1 and "special proceedings." (Cal. Code Civ. Proc. §§22-23.) An "action" is an "ordinary
2 proceeding in a court of justice." (Cal. Code Civ. Proc. § 22.) A "special proceeding" is every
3 other proceeding of a civil nature under the Code of Civil Procedure. (Cal. Code Civ. Proc. §
4 23.) An administrative proceeding by definition is neither a "civil action" nor a "special
5 proceeding" of a civil nature. (*City of Oakland v. Public Employees' Retirement System*
6 (2002) 95 Cal.App.4th 29, 48.) Nonsuits and dismissals do not apply in administrative
7 proceedings.

8 State Water Board adjudicative proceedings are administrative proceedings. They
9 incorporate certain elements of the Code of Civil Procedure, Evidence Code, and
10 Administrative Procedures Act, yet they differ in important respects. For the State Water
11 Board, an "adjudicative proceeding" means "an evidentiary hearing for determination of
12 facts pursuant to which the State Board or a Regional Board formulates and issues a
13 decision." (Cal. Code Regs., tit. 23, § 648, subd. (a).)

14 Except as otherwise provided, all adjudicative proceedings before the State Water
15 Board shall be governed by regulations in title 23, chapter 1.5 of the Code of Regulations,
16 chapter 4.5 of the Administrative Procedure Act (commencing with section 11400 of the
17 Government Code), sections 801-805 of the Evidence Code, and section 11513 of the
18 Government Code. (Cal. Code Regs., tit. 23, § 648, subd. (b).)

19 The State Water Board's regulations and applicable sections of the Government
20 Code governing the State Water Board's adjudicative proceedings do not provide for
21 dismissals, nonsuits, or similar motions. Since there is no procedure for dismissals and
22 nonsuits, granting a motion to dismiss or for nonsuit would be arbitrary and capricious and
23 without basis in law.

24 Entertaining a motion to dismiss or for nonsuit is similarly a tremendous waste of time
25 for the State Water Board and for the parties. We have delayed these proceedings by more
26 than one full day for this motion so far.

27 The Hearing Officers even issued a ruling on procedural matters, on February 18,
28 stating on page 7 that "We will not allow the parties to submit a motion for judgment as a

1 matter of law during the hearing. Any such motion may be made in writing either in the
2 party's written opening statement or after the close of the hearing in the party's closing
3 brief."

4 Given all this, the Prosecution Team asks, "why are we here," arguing this motion?

5 Granting a motion for nonsuit would therefore violate the hearing procedures that the
6 Hearing Officers issued for this hearing. To change the ruling would similarly be arbitrary
7 and capricious and demonstrate that the Hearing Officers are instead proceeding arbitrarily
8 and in the absence of any procedures.

9 There is no basis to even entertain this motion, so again, the Prosecution Team asks
10 "Why are we here?"

11 **III. THE CIVIL STANDARD FOR NONSUITS REQUIRES DEFERENCE TO THE**
12 **PROSECUTION TEAM'S EVIDENCE**

13 If we're going to do this, let's do it right. There are no guiding standards for nonsuit
14 motions in these proceedings. But the Code of Civil Procedure and interpreting cases are
15 instructive.

16 The Code of Civil Procedure, at section 581c, governs nonsuit motions in covered
17 proceedings. Section 581c, subdivision (a), provides that, only after, and not before, the
18 plaintiff has completed his or her opening statement, or after the presentation of his or her
19 evidence in a trial by jury, the defendant, without waiving his or her right to offer evidence in
20 the event the motion is not granted, may move for a judgment of nonsuit. (Code Civ. Proc.,
21 § 581c, subd. (a).) The court's power to grant a nonsuit or to direct a verdict are analogous
22 to the power to grant a motion for judgment notwithstanding the verdict. (*Beavers v. Allstate*
23 *Ins. Co.* (1990) 225 Cal.App.3d 310, 327.) While made at different times, these three
24 motions are analytically the same and governed by the same rules. (*Fountain Valley*
25 *Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs* (1998) 67
26 Cal.App.4th 743, 750.) The function of these motions is to prevent the moving defendant
27 from the necessity of undergoing any further exposure to legal liability when there is
28 insufficient evidence for an adverse verdict.

1 That being said, long-settled case law provides that granting a motion for nonsuit is
2 warranted “when, *and only when*, disregarding conflicting evidence, and giving plaintiff’s
3 evidence all the value to which it is legally entitled, indulging in every legitimate inference
4 which may be drawn from that evidence, the result is a determination that there is no
5 evidence of sufficient substantiality to support a verdict in favor of the plaintiff.” (*Keller v.*
6 *Pacific Turf Club* (1961) 192 Cal.App.2d 189, 190 (emphasis added); *Campbell v. Security*
7 *Pac. Nat. Bank* (1976) 62 Cal.App.3d 379, 384.)

8 In considering such a motion for nonsuit, the court must accept as proved all of the
9 facts counsel says he or she expects to prove, and must indulge in all favorable inferences
10 reasonably arising from those facts. (*Smith v. Roach* (1975) 53 Cal.App.3d 893, 897.) A
11 court may properly enter a nonsuit only if the evidence, viewed most favorably to the plaintiff
12 with all conflicts resolved and all legitimate inferences drawn in the plaintiff’s favor, does not
13 support a verdict for the plaintiff. (*Ayer v. Boyle* (1974) 37 Cal.App.3d 822, 828.) All conflicts
14 must be resolved in favor of the plaintiff, and if different conclusions or inferences can be
15 reasonably drawn from the evidence the court still must adopt those conclusions and
16 inferences which are favorable to the plaintiff. (*Libby v. Conway* (1961) 192 Cal.App.2d 865,
17 868.)

18 The evidence most favorable to plaintiff must be accepted as true. Conflicting
19 evidence must be disregarded, including *evidence brought out on cross-examination of*
20 *plaintiff’s own witnesses*. [*Miller v. Los Angeles County Flood Control Dist.* (1973) 8 C3d
21 689, 700, 106 CR 1, 8, fn. 10]

22 So, if we are going to do this right, the Hearing Officers must disregard any conflicting
23 evidence proffered during the cross-examination, and give every indulgence to the
24 Prosecution Team’s Case-in-Chief evidence.

25 The Prosecution Team’s Phase 1 Case-in-Chief evidence easily meets this standard
26 with respect to the relevant questions, that is, whether water was available for BBID’s
27 diversions under its pre-1914 rights from June 13 through June 24, 2015, and for WSID’s
28 diversions and threatened diversions starting May 1, 2015.

1 **IV. THE PROSECUTION TEAM MUST BE GRANTED THE OPPORTUNITY TO**
2 **CORRECT DEFECTS UPON THIS REQUEST**

3 According to the California Practice Guide, Civil Trials & Evidence, Chapter 12-B,
4 Section 12:223, "In response to a motion for nonsuit, plaintiffs have the *right*, upon request,
5 to *reopen* to remedy defects raised by the nonsuit motion: '(I)t is the trial court's *duty*, if so
6 requested, to permit the plaintiff to reopen his case and introduce further evidence ...'
7 [*Charles C. Chapman Building Co. v. California Mart* (1969) 2 CA3d 846, 858, 82 CR 830,
8 838 (emphasis added); *Huang v. Garner* (1984) 157 CA3d 404, 416, 203 CR 800, 807
9 (disapproved on other grounds in *Aas v. Sup.Ct. (William Lyon Co.)* (2000) 24 C4th 627,
10 648-649, 101 CR2d 718, 734); *R & B Auto Ctr., Inc. v. Farmers Group, Inc.* (2006) 140
11 CA4th 327, 340, 44 CR3d 426, 437 (citing text)]"

12 So, if we're going to do this right, and if the Hearing Officers are even remotely
13 inclined to grant the motion, the Prosecution Team must be given an opportunity to cure any
14 purported defects in the evidence.

15 To that end, the Prosecution Team hereby renews its request for redirect
16 examination of Jeff Yeazell, Brian Coats and Kathy Mrowka, in order to correct any such
17 defects and to introduce further evidence demonstrating that there was not water available
18 for these defendants' right during the relevant violations periods.

19 The Prosecution Team makes this request with a specific offer of proof that redirect
20 of Mr. Yeazell will demonstrate that the 740 cfs of demand reduction in Ms. Spaletta's cross-
21 examination hypothetical is not based in any fact presented by the evidence. More
22 importantly, the Prosecution Team will show that the addition of 2,252 cfs to the Daily FNF
23 calculated data, whether combined with Ms. Spaletta's proffered 740 cfs demand reduction,
24 or whether combined with the actual demand reduction requested by outside commenters,
25 will not provide supply to BBID's pre-1914 priority during June 13 through June 24, and will
26 not provide supply to WSID at all after May 1.

27 The same evidence will demonstrate that these adjustments, if made to the June 7
28 Full Natural Flow calculation that was the subject of Ms. Spaletta's cross-examination

1 hypothetical, would not have changed the analysis or determinations regarding
2 unavailability after June 12.

3 In addition, the Prosecution Team makes the following offer of proof that its rebuttal
4 testimony also demonstrates that using the actual 2015 Information Order demand data
5 provided by the respondents to that Order, will not move the needle sufficiently to show that
6 BBID or WSID had water available for their actual or threatened diversions.

7 And, the Hearing Officers cannot now grant this motion based on any defects alleged
8 by the cross-examining parties, because those alleged defects are all addressed in the
9 Prosecution Team's rebuttal. The Prosecution Team hereby offers the entire rebuttal
10 testimony as an offer of proof regarding any such defects.

11 **V. WATER CODE SECTION 1052 DOES NOT REQUIRE HARM FOR TRESPASS**

12 The moving parties' primary mischaracterization of the standards governing these
13 proceedings is the claim that the Prosecution Team must demonstrate harm to some
14 specific senior water right holder in order to demonstrate trespass against BBID. That is
15 simply not required under Water Code section 1052.

16 Water Code section 1052, subdivision (a) prohibits unlawful diversions: "The
17 diversion or use of water subject to this division other than as authorized in this division is a
18 trespass." Harm to other diverters is not an element. "Trespass" is subject to penalty "as
19 defined in this section." (Water Code § 1052(c).) Common law definitions of trespass do
20 not apply.

21 As directed in the BBID matter, the Prosecution Team has briefed the applicability of
22 this section to even pre-1914 rights. The recent court decisions in *Millview County Water*
23 *District v. State Water Resources Control Board* (2014) 229 Cal.App.4th 879, and in *Young*
24 *v. State Water Resources Control Board* (2013) 219 Cal.App.4th 397, demonstrate that
25 although the Board may not regulate pre-1914 rights, it may take enforcement action
26 against such right claimants who divert in excess of their rights.

27 The San Joaquin Tributaries Authority (SJTA) alleges at page 6 of its Pre-Hearing
28 Brief of Legal Issues that "the State Water Board cannot step into the shoes of a water right

1 holder and represent their interests against other pre-1914 water right holders,” citing *Young*
2 *v. State Water Resources Control Board*, (2013) 219 Cal.App.4th 397, 405 (as modified
3 (Sept. 20, 2013).)

4 The *Young* case does not support SJTA’s proposition. To the contrary, on the very
5 page of the opinion the SJTA cites, the court agreed with the State Water Board that “Put
6 simply, the claim that a diversion is authorized under riparian or pre–1914 right is no
7 different from any other argument that there has been no unauthorized diversion; the
8 argument does not deprive the State Water Board of the authority to determine whether an
9 unauthorized diversion has in fact occurred or is threatened.” (*Id.*)

10 The unauthorized diversion or use of water is a trespass against the state. (*People v.*
11 *Shirokow* (1980) 26 Cal.3d 301, 304.) No specific showing of harm against a specific party
12 is required. In an ACL involving the diversion and use of water during Term 91 curtailments,
13 the State Water Board was not required to make an express finding that the water users’
14 diversions would cause the Projects to release stored water to offset the impact of their
15 diversions on water quality in the Delta. (*Phelps v. State Water Resources Control Bd.*
16 (2007) 157 Cal.App.4th 89, 105.) On appeal, the Third District Court of Appeal observed
17 that nothing suggested the State Water Board intended to condition imposing Term 91 on
18 the possible impact of a particular permittee’s or licensee’s diversion on water quality during
19 the curtailment period. (*Id.*)

20 All State Water Board decisions following hearings on administrative civil liability
21 complaints going back at least ten years have consistently held that harm or injury to
22 specific parties is not a factor in determining whether or not a diverter has committed a
23 trespass, and have appropriately limited any discussion of harm to considering factors
24 setting the amount of administrative civil liability. These cases are:

- 25 • *In the Matter of Draft CDO and ACLC Against Lake Arrowhead Community*
26 *Services Dist.*, WR-2006-001, p. 18. In this case, the Board found that the
27 unauthorized diversion *may* have resulted in injury to water users in the
28 Mojave watershed, although there was no evidence of specific injury. The

1 Board applied harm only in calculating the penalty.

- 2 • *In the Matter of Draft CDO and ACLC Against North San Joaquin Water*
- 3 *Conservation Dist.*, WR-2008-0017, p. 15;
- 4 • *In the Matter of Draft CDO and ACLC Against The Vineyard Club, Inc.* , WR-
- 5 2008-0015, p. 10);

6 *Vineyard Club and North San Joaquin Water Conservation District* both held that

7 permit term violations are unauthorized diversions, and thus trespasses, even though there

8 was no evidence of specific injury to anyone.

- 9 • *In the Matter of Draft CDO and ACLC Against Robert Mann.* , WR-2015-0025,
- 10 p. 7. In this case, the Prosecution Team specifically alleged that unauthorized
- 11 diversion is a trespass against the state, and the Board agreed. The Board
- 12 only looked to harm for the penalty calculation, and even then noted that there
- 13 was no evidence of actual harm to any senior right holders. The Board
- 14 properly took official notice of the existence of senior rights in the watershed
- 15 by noting that such records were publicly available on the Board's Electronic
- 16 Water Rights Information Management System.

17 None of these cases addressed injury or harm to a specific party when determining

18 liability. In its search, the Prosecution Team has been unable to find any administrative civil

19 liability requiring proof of injury or harm to a specific party as an element of trespass under

20 Water Code § 1052.

21 The only relevant section of the Water Code addressing harm in this matter is section

22 1055.3, which states, "In determining the amount of civil liability, the Board shall take into

23 consideration all relevant circumstances, including but not limited to, the extent of harm

24 cause by the violation, the nature and persistence of the violation, the length over which the

25 violation occur factors, and the corrective action, if any, taken by the violator.

26 But Water Code section 1055.3 is not relevant for this motion because the *amount* of

27 civil liability is a BBID Phase 2 issue. The Prosecution Team has not presented any

28 evidence to that point, and we were instructed that we did not even need to make a minimal

1 showing of BBID's actual diversions and the proposed penalty in Phase 1.

2 Protecting the "priority system" is not just something in the abstract. Protecting the
3 priority system protects all of the right holders senior to BBID and WSID, it protects the
4 State water supply, and preserves the orderly administration of water rights.

5 **VI. ALL EVIDENCE DEMONSTRATES THAT THERE WAS NO WATER AVAILABLE**
6 **TO SERVE BBID'S RIGHT FROM JUNE 13 THROUGH 24, 2015, OR WSID'S**
7 **RIGHT AFTER MAY 1, 2015**

8 Even if a motion for a nonsuit were applicable to this proceeding (and it is not) as
9 outlined above, the relevant standard holds that in considering such a motion, the court
10 must accept as proved all of the facts the Prosecution Team has offered or expects to
11 prove, and must indulge in all favorable inferences reasonably arising from those facts.
12 (*Smith, supra, (1975) 53 Cal.App.3d 893 at 897.*) The consequence of this is that the
13 Hearing Officers must assume to be true all facts that are both offered by the Prosecution
14 Team, and all facts expected to be offered by the Prosecution Team. That is, the Hearing
15 Officers must allow both for the redirect examination of Jeffrey Yeazell and Brian Coats on
16 the adjustments to the Daily Full Natural Flow and demand data on which he was cross
17 examined, and the Hearing Officers also must allow consider the Prosecution Team's
18 rebuttal evidence.

19 All of the evidence offered by the Prosecution Team, both in its written direct and
20 rebuttal testimony, demonstrates that under any manipulation of the data suggested by
21 BBID or WSID and the other parties, there was still not enough water to satisfy BBID and
22 WSID's rights during the June 13-15 time period.

23 The written evidence presented demonstrates the following:

24 As testified by Brian Coats in his direct written testimony (WR-9):

- 25 • For the supply curve in each watershed, staff relies upon DWR's full natural
26 flow Bulletin 120 forecasts which are forecasts that predict full natural flow of
27 water at stations that provide the largest impact to a river's supplies. (WR-
28 9/WSID-171, para. 30)

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- This is to be contrasted with DWR's Daily full natural flow data which are not forecasts of future water availability, but calculations performed by DWR of the amount of available water on days past using stream gage values, known upstream diversions and reservoir data such as changes in storage and posted evaporation numbers. Staff only use DWR to determine which FNF monthly forecast is tracking closest to reality for purposes of predicting future full natural flows, or when the Daily FNF values are higher than the monthly forecast, since a higher water supply is of more benefit to the diverters. (WR-9/WSID-171, paras. 34, 38, 45)
 - For example, for the San Joaquin tributary analysis in the summer of 2015, the May B120 monthly forecast (WR-109, page 4) for the Stanislaus, Tuolumne and Merced Rivers in August and September was zero for the 50% through the 99% exceedance percentages. However, the daily FNF, while low, was above zero for some days so staff used the daily trend as a supply estimate. (WR-9/WSID-171, para. 41)
 - Division staff held a meeting with Delta stakeholders on May 12, 2015 (WR-80) to consider proposals for the addition of data on return flows and other additional supply sources. During that meeting, stakeholders, some of whom are supporting the SJTA's motion, indicated that applying a 40% reduction to the reported irrigation demand for the Delta would be appropriate to address net irrigation demand. In order to give every benefit to the diverters, staff applied this 40% demand reduction by either increasing the available supply, through an adjustment, or by reducing the reported demand. (WR-9/WSID-171, para. 47)
 - In addition, following direction in the 1977 Dry Year Report (WR-79), staff added additional supply owing to return flows from the valley floor. Page 6 of the Appendix to the 1977 Drought report specifies varying percentages by month of return flow for the San Joaquin River watershed. Page 4 of WR-79

1 shows that the 1977 Report did not allocate any return flows for the
2 Sacramento River. (WR-9/WSID-171, para. 48)

- 3 • Additional supply was further added for smaller tributaries pursuant to DWR's
4 Bay Delta Office 2007 Report titled "California Central Valley—Unimpaired
5 Flow Data". (WR-9/WSID-171, para. 49)
- 6 • Using the reported demands for either 2014 for the informational order
7 recipients or the 2010-2013 four-year average for all others, WR-78 is the
8 supply demand analysis for the San Joaquin River watershed with the pro-
9 rated Delta demand dated August 19, 2015. As shown, after June 12, 2015,
10 the daily full natural flow dropped quickly into the riparian demand confirming
11 the lack of available water. (WR-9/WSID-171, para. 49)
- 12 • WR-47 dated April 29, 2015, depicts the conditions at the time of the May 1,
13 2015 Notice applicable to WSID. There is insufficient supply to serve all post-
14 1914 water rights between the 90% and 99% forecast points (blue and violet
15 dots) with the daily FNF trending closer to the 99% forecast line, which means
16 there is only a 1% chance that the forecast may be wetter. (WR-9/WSID-171,
17 para. 69)
- 18 • WR-48 dated June 10, 2015, depicts the conditions at the time of the June 12,
19 2015 Notice applicable to BBID and demonstrates the combined daily FNF
20 data trending downward at ~11,000 cfs and the B120 monthly forecast even
21 lower at ~9,000 cfs. Since the daily FNF was higher, staff based its decision
22 to issue the notice on the daily FNF supply trend, which was about 2,000 cfs
23 less than the demand reported through the 1902 priority year, never mind the
24 1914 priority year. (WR-9/WSID-171, para. 70)
- 25 • WR-52 dated August 19, 2015, also depicts the conditions in the combined
26 Sacramento/San Joaquin watersheds, but just over two months later. It shows
27 that the daily FNF [to which Ms. Spaletta argues 2,252 cfs should be added]
28 dropped precipitously in mid-June down to the riparian level of demand before

1 July 1. The abrupt mid-June drop in daily FNF into the riparian demand area
2 shows nowhere near enough water to satisfy the remaining pre-1903 water
3 right demands; thus confirming no water was available for BBID from June 12
4 onwards. (WR-9/WSID-171, para. 70)

- 5 • WR-81 dated October 7, 2015, further confirms staff's analysis by comparing
6 the upstream flow at Vernalis, as measured by a gage, to the pro-rated
7 downstream senior Delta demand which included the 1902 and earlier pre-
8 1914 and riparian users. The comparison showed that measured flow at
9 Vernalis was insufficient to serve the pro-rated remaining senior demand for at
10 least the June 13 through June 25 time period. This same chart demonstrates
11 that no water was available to serve WSID at any time after May 1, 2015.
12 (WR-9/WSID-171, paras. 72, 73)

13 Mr. Coats' written rebuttal testimony (WR-210) confirmed that BBID and WSID either
14 misunderstand staff's analysis, or their criticisms do not change the result:

- 15 • Daily FNF values are used by staff to determine which B120 forecast to use,
16 and are not ordinarily used as supply data since it only provides data for the
17 day in question, and does not provide a forecast of water to be expected. An
18 exception would be in the case where the Daily FNF is greater than the
19 forecasted B120 value, in which case the Daily FNF trend is used as the total
20 supply so as to give the diverters all benefit of the doubt. (WR-210, p. 3)
- 21 • While staff may not have added downstream contributions to FNF values, staff
22 also did not subtract from FNF values to account for downstream depletions
23 such as evapotranspiration and seepage losses. (WR-210, p. 3). Thus, while
24 Ms. Spaletta or Mr. Bonsignore argue that additions should be made to Daily
25 FNF values, they ignores the reality that nature also requires depletions to be
26 accounted for, which staff omitted from the accounting so as to benefit the
27 diverters. (WR-210, p. 6).
- 28 • While staff could have adjusted the Daily FNF levels with a daily-averaged

1 return flow credit, it would have also had to counter with daily-averaged
2 depletion losses. Since the Daily FNF was trending between the 50-90%
3 forecasts, and staff based its decision using the more generous 50% supply
4 forecast, any net adjustments to the Daily FNF, after taking into consideration
5 downstream depletion losses, would unlikely be greater than the next higher
6 B120 supply forecast (25% exceedance). (WR-210, p. 7)

- 7 • With respect to agricultural return flows, Mr. Coats testified that Mr.
8 Bonsignore provided no additional data to augment supply under this
9 category, and that the evidence of prominent Sacramento River diverters
10 shows that the Sacramento receives minimal return flows, as tailwater is often
11 restricted or recirculated for reuse. (WR-210, p. 5)
- 12 • Moreover, Mr. Coats testified that for a true demand reduction of 40% to be
13 warranted, as the result of pumping excess diverted water back into the
14 source, the returned water must be of the same water quality or better than
15 that diverted so that it is useable by another party. Mr. Bonsignore, and Ms.
16 Spaletta, merely assume that all return flow is of sufficient quality to be usable.
17 (WR-210, p. 7)
- 18 • Mr. Coats' Appendix A and Appendix B removed all alleged excess demands
19 identified by Mr. Bonsignore pursuant to his criticisms relating to the spatial
20 aspects of supply and demand. As shown in Appendix A, which is the May
21 2015 analysis applicable to WSID, an excess of 426 cfs is available only if a
22 hypothetical 40% return flow credit is applied. Without that credit, which was
23 only applied at the request of stakeholders without any backup data, there
24 would be a shortfall of water for WSID of 647 cfs. As shown on Appendix B,
25 which is the June 2015 analysis applicable to BBID, even with all alleged
26 excess demands removed, there is still not enough supply to satisfy Delta
27 demand through a 1913 priority level with or without the 40% Delta return flow
28 credit; water supply was that low. (WR-210, p. 4)

- 1 • Finally, with respect to return flows, Mr. Coats testified that if return flows were
2 so substantial, there should be evidence of a large return flow component
3 registered at a downstream gage and available for use, but there is not (WR-
4 251). (WR-210 at p. 8)

5 As testified by Jeffrey Yeazell (WR-11) in his direct testimony:

- 6 • His function on the Prosecution Team was to analyze the data and generate
7 the water availability graphs. (WR-11/WSID-0172 at para. 5)
- 8 • He created the graph, WR-47, depicting the analysis supporting the May 1,
9 2015 Notice of Water Unavailability applicable to WSID, as well as WR-48,
10 depicting the analysis supporting the June 12, 2015 Notice applicable to BBID
11 (WR-11/WSID-0172 at para. 5).
- 12 • Both WR-47 and WR-48 show that by May 1 or June 12, respectively, water
13 was insufficient to meet the demands of either post-1914 appropriative rights
14 throughout the Sacramento River watersheds and Delta, or the demands of
15 appropriative rights with priority dates of 1903 and later throughout the
16 Sacramento, and San Joaquin River watersheds and Delta. (WR-11/WSID-
17 0172 at paras. 42, 57)
- 18 • Demand data used in the analysis was collected from the diverters
19 themselves, and run through a rigorous quality control analysis to remove
20 access demand due to over-reporting, power-only use or duplicate data. (WR-
21 11/WSID-0172 at paras. 8-19)
- 22 • Up to date demand data for 2014 was collected from the diverters through the
23 Informational Order WR 2015-0002-DWR (WR-30) and incorporated into the
24 analysis. (WR-11/WSID-0172 at paras. 21-23)
- 25 • Supplements to the Full Natural Flow forecasts were made by adding tributary
26 contributions from the Sacramento Valley Floor, Putah Creek, Stony Creek,
27 East and West-side Sacramento Valley, and Bear River per DWR's 2007
28 Unimpaired Flow Data Report (WR-76) or by crediting riparian flows pursuant

1 to DWR's 1977 Drought Report. (WR-11/WSID-0172 at paras. 41, 54)

2 Mr. Yeazell's written rebuttal testimony (WR-211) confirmed that every single one of
3 the criticisms raised by the experts hired by WSID or BBID failed to change the end-result of
4 the analysis because the water supply in the summer of 2015 was too low:

- 5 • Mr. Yeazell replaced 2014 Information Order Data representing demand in
6 WR-47 and WR-48 with 2015 Information Order Data. The result is depicted
7 in Figure 1 to Mr. Yeazell's Written Rebuttal Testimony (WR-211) and the
8 outcome is no change to the analysis: as indicated on Figure 1, the water
9 supply represented by the June adjusted 50% exceedance FNF forecast
10 (green point) is well below the June cumulative senior demand through the
11 1902 priority level (the red dashed line). The difference between the June
12 adjusted 50% forecast and the 1913 priority level (the red dashed line) is even
13 greater. The difference in demand by replacement of the values was a
14 reduction of 1,801 cfs, or 15% (WR-211, at p. 2).
- 15 • [Katherine Mrowka of the Prosecution Team testified during the hearing that
16 Division did review the 2015 Informational Order data to determine whether it
17 would make a difference to the analysis and had determined that it would not.
18 (Hrg. Trns. (draft, Mar. 22, 2016), p. 189:11-25.) This fact, that substitution of
19 the 2015 Informational Order data makes no difference to the end result of
20 water unavailability, is shown in the Prosecution's Written Rebuttal Testimony.]
- 21 • Mr. Yeazell addressed every alleged excess demand identified by BBID's and
22 WSID's experts Mr. Bonsignore and Mr. Young, and removed them from his
23 spreadsheets so as to re-run all analyses for purposes of considering whether
24 they would have changed the results relied on by staff when making decisions
25 concerning unavailability, including alleged duplicate demands, data entry
26 mistakes or demands that could not be met with supply in local or sub-
27 watersheds. Mr. Yeazell's rebuttal testimony (WR-211 at Figures 2, 3) shows
28 that even when Mr. Young's identification of alleged excess demands are

1 removed, there is still not enough water supply to meet demand for either
2 WSID or BBID.

3 The exercise engaged in during cross-examination of Jeffrey Yeazell (Hrg. Trns.
4 (draft, Mar. 22, 2016), p. 214:07-221:20) was yet another attempt by those aligned with the
5 diverters to manipulate the data and focus on the wrong dates to attempt to show that water
6 might have been available to the diverters during the alleged violation period. Had the
7 Hearing Officer allowed a redirect examination of Mr. Yeazell, the Prosecution Team would
8 have been shown that both the water supply forecast, as well as the Daily FNF data,
9 dropped so precipitously after June 7, and particularly after June 12, that the addition of
10 2,252 cfs of return flow to the supply would have made no difference to the analysis
11 underlying the June 12 Notice, even if demand was reduced by 740 cfs. And the
12 Prosecution Team's rebuttal evidence will show, and does show, that all critiques offered by
13 the diverters, including the suggestion of replacing 2014 Informational Order with data from
14 2015, similarly has no effect on the bottom line because the water supply during the 2015
15 drought was that low.

16 **VII. CONCLUSION**

17 For these reasons, the Prosecution Team respectfully requests that the Hearing
18 Officers reject the motion for nonsuit.

19 Date: March 23, 2016

Respectfully Submitted,

20 

21 Andrew Tauriainen

22 **OFFICE OF ENFORCEMENT**
23 Attorney for the Prosecution Team
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