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20 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

21 ENFORCEMENT ACTION ENF01949
22 DRAFT CEASE AND DESIST ORDER
23 REGARDING UNAUTHORIZED
24 DIVERSIONS OR THREATENED
25 UNAUTHORIZED DIVERSIONS OF
26 WATER FROM OLD RIVER IN SAN
27 JOAQUIN COUNTY

28 ENFORCEMENT ACTION ENF01951
DRAFT ADMINISTRATIVE LIABILITY
COMPLAINT REGARDING
UNAUTHORIZED DIVERSIONS BY
BYRON-BETHANY IRRIGATION
DISTRICT

**CENTRAL DELTA WATER AGENCY and
SOUTH DELTA WATER AGENCY LEGAL
ISSUES BRIEF; JOINDER OF THE WEST
SIDE IRRIGATION DISTRICT, BANTA-
CARBONA IRRIGATION DISTRICT,
PATTERSON IRRIGATION DISTRICT**

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1 Central Delta Water Agency and South Delta Water Agency respectfully present this brief
2 on legal issues in response to the Hearing Officer's questions:

3 *Whether, and in what circumstances: (1) does the State Water Resources Control Board have*
4 *the authority to curtail, and (2) does Water Code section 1052 apply to diversions made under*
5 *claim of a pre-1914 or riparian water right?*

6 **I. DOES THE STATE WATER RESOURCES CONTROL BOARD HAVE THE**
7 **AUTHORITY TO CURTAIL THE BBID PRE-1914 DELTA DIVERSIONS**
8 **WHICH ARE THE SUBJECT OF THIS ACL COMPLAINT?**

9 The State Water Resources Control Board ("SWRCB" or "Board") does not have the
10 authority to "curtail" BBID's pre-1914 rights. By "curtail" we understand the hearing officer to
11 refer only to the SWRCB's 2015 (1) determination, albeit erroneous, that water was unavailable
12 for BBID to divert under its pre-1914 appropriative right and (2) direction, via letter dated to June
13 12, 2015, to cease diversions under threat of enforcement and penalties. There is no allegation
14 that BBID's diversions were wasteful or unreasonable or any dispute regarding the validity of
15 BBID's pre-1914 water right.

16 The term "curtail" is not defined in the Water Code, nor is there any statutory or common
17 law authority describing how the SWRCB would "curtail" a water right. There is no provision of
18 the Water Code that grants the SWRCB the authority to tell a water right holder, by letter, they
19 must stop diverting water because of a unilateral determination of water availability made by
20 SWRCB staff. As we explain in more detail below, any perception that this authority exists
21 implicitly is belied by application of fundamental constitutional doctrines.

22 Also, as the Sacramento Superior Court in *West Side Irrigation District et al. v. SWRCB*
23 Case No. 34-2015-80002121 ruled in July 2015:

24 **"The Curtailment Letters, including the requirement that recipients sign a**
25 **compliance certification confirming cessation of diversion, result in a taking of**
26 **Petitioners' property rights without a pre-deprivation hearing, in violation of**
27 **Petitioners' Due Process Rights."**

28 See BBID Exhibit BBID 301 at p. 5.

No such pre-deprivation hearing was provided to BBID in advance of the period of
curtailment which is the subject of this ACL. Recognizing this error, the SWRCB rescinded its

1 “curtailment” letters and has since represented in the continued trial court proceedings that the
2 SWRCB would have to fully meet its burden of proof in the ACL hearing to establish that water
3 was not available for BBID during the relevant time period, without any reliance on the unlawful
4 June 12, 2015 “curtailment” letter.

5 In other words – whether or not the SWRCB has the authority to “curtail” is not an issue
6 in this ACL proceeding because the SWRCB cannot rely on its prior unlawful “curtailment”
7 efforts. Thus, any discussion of the issue is largely academic.

8
9 **A. General SWRCB Curtailment Authority Would Violate Due Process.**

10 The legislature has not and cannot grant the SWRCB general “curtailment” authority (as
11 to any type of water right) because such a power would violate fundamental due process rights.
12 The due process clauses of the state and federal constitutions impose constraints on governmental
13 decisions that deprive individuals of life, liberty, or property. (U.S. Const., Amends. V, XIV;
14 Cal. Const., art. I, § 7.) The fundamental requirement of these clauses is that the government
15 must provide individuals with the opportunity to be heard “at a meaningful time and in a
16 meaningful manner” before taking their property. (See, e.g., *Mathews v. Eldridge* (1976) 424
17 U.S. 319, 333.)

18 The mechanics of how due process is guaranteed in a pre-deprivation hearing relate to
19 **who** has the burden to prove **what**. For the “who” - “[t]he party claiming that a person is guilty
20 of crime or wrongdoing [here, the SWRCB] has the burden of proof on that issue.” (Evid. Code,
21 § 520; *Lane & Pyron, Inc. v. Gibbs* (1968) 266 Cal. App.2d 61, 67 [the law “plac[es] upon the
22 party claiming illegality the burden of proof on that issue”]; see also *Farr v. County of Nevada*
23 (2010) 187 Cal. App. 4th 669, 682 [“the burden of proof remains with the party on which it is
24 placed by law”].)

25 For the “what” - the default “burden of proof” is “proof by a preponderance of the
26 evidence,” but the particular burden in a given case “varies in proportion to the gravity of the
27 consequences of an erroneous resolution.” (Evid. Code, § 115; *In re Marriage of Peters* (1997)

1 52 Cal.App.4th 1487.) And when important interests are at stake, courts have applied a higher
2 burden of proof—clear and convincing evidence. (*Conservatorship of Wendland* (2001) 26
3 Cal.4th 519, 546 [“courts have applied the clear and convincing evidence standard when
4 necessary to protect important rights”].)

5 Important interests are at stake in water rights cases - here, BBID’s ability to exercise
6 century-old water rights essential for municipal water supplies and commercial agricultural
7 operations. Water rights are “valuable property rights” that “cannot be infringed or taken by
8 governmental action without due process and just compensation.” (*Los Angeles County FC Dist.*
9 *v. Abbot* (1938) 24 Cal. App. 2d 728, 736 [water rights are “valuable property rights” that can be
10 “necessary and essential to the use of their property”]; *United States v. State Water Resources*
11 *Control Bd.* (1986) 182 Cal. App. 3d 82 [it is “axiomatic” that water rights “cannot be infringed
12 or taken by governmental action without due process and just compensation”].)

13 Thus, any authority to “curtail” a water diversion, can only be exercised after providing
14 notice and an opportunity to be heard, and satisfying a burden of proof “so clear as to leave no
15 substantial doubt” that water was unavailable for that particular diverter. This standard can only
16 be met with evidence that is “sufficiently strong to command the unhesitating assent of every
17 reasonable mind.” (*In re Michael G.* (1998) 63 Cal.App.4th 700, 709 fn.6 [quoting (*In re Angelia*
18 *P.* (1981) 28 Cal.3d 908, 919].) Given the variety of circumstances impacting the availability of
19 water for any particular diverter and any particular location, this evidentiary standard, along with
20 the required notice and opportunity to be heard, cannot be met with a generalized approach and
21 mass mailing.

22 Further, the SWRCB must meet its burden of proof as to each fact supporting each
23 element of its claim that a particular diversion is unlawful. (Evid. Code § 500 [“Except as
24 otherwise provided by law, a party has the burden of proof as to each fact the existence or
25 nonexistence of which is essential to the claim for relief or defense that he is asserting”]). For
26 example, to the extent the SWRCB is claiming BBID unlawfully diverted stored water to which
27 the state or federal Projects had a prior right, the SWRCB must prove the existence of the stored
28

1 water, and the Projects purported “prior right.” In other words, the SWRCB cannot simply
2 assume that any water stored and released by the Projects was done so properly and is entitled to
3 protection from subsequent diversion. Water detained by the Projects in violation of the terms of
4 their permits or in violation of statutory obligations is not water to which the Projects are entitled.
5 Further, as we explain more below, water which the Projects are obligated to release for the
6 benefit of Delta diverters is not water to which the Projects can claim a “senior” right. Of course,
7 no effort was made to meet this burden of proof before the SWRCB undertook its unlawful
8 “curtailment” effort in 2015.

9 **B. General SWRCB Curtailment Authority Would Violate Article X Section 2 of the**
10 **California Constitution.**

11 Vesting a general curtailment authority in the SWRCB would also violate Article X,
12 section 2 of the California Constitution, which requires that the water resources of the state “be
13 put to beneficial use to the fullest extent of which they are capable”.

14 The constitutional mandate to maximize beneficial use is reflected in historic court cases,
15 where interference with water right diversions has been strongly disfavored absent proof of injury
16 to a senior right. Courts have explained that senior water right holders can protect their rights
17 against invasion or unlawful interference. (See, e.g., *Kimball v. Gearhart* (1859) 12 Cal. 27, 47.)
18 But senior water right holders have no recourse against acts that cause them no injury. (See
19 *Nevada County & Sacramento Canal Co. v. Kidd* (1869) 37 Cal. 282, 313.) And to have any
20 entitlement to relief, “[t]here must be a substantial, as distinguished from a mere technical or
21 abstract, damage to the right.” (*Waterford Irr. Dist. v. Turlock Irr. Dist.* (1920) 50 Cal.App. 213,
22 221.)

23 Contrary to these fundamental rules, the SWRCB undertook generalized “curtailment” in
24 2015 without any proof of injury to senior rights. Rather, the SWRCB relied on theoretical
25 potential injury - which is precisely the type of theoretical damage that courts have found
26 insufficient to justify an injunction or curtailment. (See *Waterford Irr. Dist., supra*, 50 Cal.App.
27 at 221.)

1 The obligation to show “substantial, as distinguished from a mere technical or abstract,
2 damage” to a senior water user is founded on principles enshrined in our constitution: “in this
3 State the general welfare requires that the water resources of the State be put to beneficial use to
4 the fullest extent of which they are capable.” (Cal. Const., Art. X § 2; see *Waterford Irr. Dist.*,
5 *supra*, 50 Cal. App. at 220-221.) As the *Waterford* court explained, the requirement that a water
6 user demonstrate substantial damage before enjoining another’s diversions “harmonizes with the
7 policy of the state that none of the waters of its streams, available for the purposes of a beneficial
8 use, shall be wasted or not used, but shall be employed to the fullest extent.” (*Waterford Irr.*
9 *Dist.*, *supra*, 50 Cal. App. at 221.)

10 Clearly, in protecting senior water rights, the SWRCB has no broader right than that held
11 by a senior water right holder. Yet, by trying to impose generalized curtailments without
12 satisfying due process or the required burden of proof regarding injury to senior rights, that is
13 precisely what the SWRCB unlawfully attempted to achieve in 2015.

14 **C. The SWRCB Lacks Jurisdiction to Regulate Riparian or Pre-1914 Rights.**

15 The SWRCB does not have the authority to “curtail” rights that are outside of its jurisdiction
16 to regulate.¹ And the SWRCB ““does not have jurisdiction to regulate riparian and pre-1914
17 appropriative rights.’ ” (*Millview County Water Dist. v. State Water Resources Control Bd.*
18 (2014) 229 Cal.App.4th 879, 893, as modified on denial of reh'g (Oct. 14, 2014); see also Wat.
19 Code, § 1831.) Authority to regulate riparian and pre-1914 rights is instead left exclusively to the
20 courts. (*Ibid.*; see also *Frey v. Lowden* (1886) 70 Cal. 550, 551-52 [explaining that “[t]here is no
21 doubt of the power of a court of equity to ascertain and determine the extent of the rights of
22 property in water . . . and to regulate . . . the use of the flow of the water . . .”].)

23 The SWRCB’s 2015 curtailment effort involved ranking of all pre-1914 and riparian
24 water rights and an informal determination of their order of priority. But “fix[ing]” and
25

26 _____
27 ¹ This does not mean that the SWRCB has the authority to curtail post-1914 rights in the manner
28 in which it attempted in 2015. At a minimum, the SWRCB must satisfy due process before trying
to curtail a post-1914 right as well.

1 “establish[ing]” the value and priority of BBID’s pre-1914 water right relative to other pre-1914
2 and riparian water right holders is classic regulation. (See, e.g., (*Morrison v. Viacom, Inc.* (1997)
3 52 Cal. App. 4th 1514, 1523 [the term “ ‘regulate’ means ‘[t]o fix, establish, or control; to adjust
4 by rule, method, or established mode; to direct by rule or restriction; to subject to governing
5 principles or laws.’ (Black’s Law Dict. (6th ed. 1990) p. 1286, col. 1.)”].) The Prosecution Team
6 effectively concedes this point, agreeing that the Board’s curtailment notices—on which this
7 enforcement action is based—are an attempt to “manage[] . . . water rights.” (WSID Draft CDO
8 at 3.) But the management of water rights is no different than the regulation of water rights.
9 Indeed, as courts have recognized, the power to “manage” is synonymous with the power to
10 control and regulate. (See *In re Marriage of Barneson* (1999) 69 Cal.App.4th 583, 590 [“
11 ‘control’ is defined as ‘[p]ower or authority to *manage*, direct, superintend, restrict, *regulate*,
12 govern, administer, or oversee.’ ”].)

13 In *Millview, supra*, and in *Young v. State Water Resources Control Board* (2013) 219
14 Cal. App. 4th 397, the court determined the SWRCB has jurisdiction to determine whether a
15 claimed pre-1914 right is valid—jurisdiction that is directly tied to the SWRCB’s authority to
16 regulate new diversions of surplus waters as regulator of all post-1914 appropriative rights. But
17 neither court suggested that the SWRCB also had general jurisdiction to manage pre-1914 and
18 riparian rights in times of shortage—an exercise of power that is in no way tethered to the
19 SWRCB’s jurisdiction over post-1914 water rights. To the contrary, both *Millview* and *Young*
20 maintained that “the Board ‘does not have jurisdiction to regulate riparian and pre-1914
21 appropriative rights.’ ” (*Millview, supra*, 229 Cal.App.4th at 893; *Young, supra*, 219 Cal.App.4th
22 at 404.) If this limitation is to have any meaning, it must be that the SWRCB does not have
23 authority to define and regulate the relative priorities of pre-1914 and riparian water rights to
24 divert in the dynamic, day-to-day, exercise of those rights. This matter is left exclusively for the
25 courts.

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27 //

1 **D. General Curtailment Efforts Cannot be Applied to the Delta due to Unique**
2 **Factual and Legal Circumstances.**

3 One of the most frustrating aspects of the SWRCB’s 2015 curtailment effort was the
4 complete disregard for the unique factual and legal circumstances in the Delta. These unique
5 circumstances are cemented in SWRCB precedent. Yet, they were wholly disregarded in 2015,
6 without justification. The following basic legal principles are critical to understanding why
7 “curtailment” of senior rights in the Delta defies law and logic.

8 **1. The Delta Channels are Tidally Influenced and Always Have Water.**

9 There is little factual dispute regarding how the SWRCB determined water availability
10 and issued its curtailment letters in 2015. SWRCB staff admittedly omitted in their consideration
11 of available supply the more than one million acre-feet of water that naturally resides in the Delta
12 Channels, acting like a reservoir, moving back and forth with the tide. The SWRCB, instead,
13 focused only on the derived calculation of “Full Natural Flow” of major tributaries, measured at
14 locations several hundred miles upstream of the Delta. This method, employed by SWRCB staff
15 without the approval of the SWRCB Board Members in a public meeting, or vetting in a public
16 process, directly conflicts with factual findings in prior SWRCB decisions regarding how the
17 Delta works.

18 Most glaringly, in the past the SWRCB has refused to find that a senior water right with
19 points of diversion in the tidally influenced Delta could even be harmed by upstream diversions
20 because of the constant availability of water in the Delta. In Decision 805, for example, the
21 Board’s predecessor rejected a water right holder’s claim that an applicant’s proposed diversions
22 on the Mokelumne River would leave him with insufficient water, because it found the protester
23 would continue to have tidewater available at his intake. (D. 805 at 14 [“According to testimony .
24 . . . tidewater extends upstream as far as the applicant’s lowermost point of diversion, making
25 available at that point ‘all the water that reaches the Sacramento-San Joaquin Delta.’ . . . The rise
26 and fall of the tide at that intake, according to the report of the inspection of the protestant’s
27 project on July 26, 1951 is of the order of 4 feet. The protestant does not assert nor does the
28

1 available information indicate that supply, thus far, has been insufficient for his needs plus the
2 applicant’s estimated needs.”].) The Board then went on to find that water was available for the
3 applicant to divert even though river flows “may entirely fail,” because “seepage and return flow
4 entering the river . . . [around] the applicant’s lowermost point of diversion are substantial and . . .
5 Sacramento-San Joaquin delta waters back up the Mokelumne River channel as far as the
6 applicant’s lowermost and possibly his intermediate point of proposed diversion.” (D. 805 at 18.)

7 The Board and its predecessors’ have long recognized that river inflow is a poor gauge of
8 water availability in the Delta. The Division of Water Rights explained in Decision 100 in 1926:

9 These delta channels form a network of waterways through which the water flows
10 sometimes one way and sometime another, depending upon the percentages of the various
11 main tributaries – Sacramento, San Joaquin and Mokelumne Rivers – and the influence of
12 the tides. It is difficult if not impossible to estimate the influence of a diversion at any one
13 point in these delta channels upon the available water supply at other points or the
14 influence of a diversion from one of the tributary streams upon the available water supply
15 at any particular point in the delta. The fact is that the delta channels form a **vast
reservoir** through which the drainage from Sacramento and San Joaquin Rivers pours to
16 form a barrier in the upper end of San Francisco Bay, Suisun Bay and the lower delta
17 against the salt water which would otherwise enter through Golden Gate and San
18 Francisco Bay.

15 (D. 100 at 11.)

16 The Board reaffirmed these findings in Decision 1379, explaining “that the quantity needs of
17 almost all of the Delta users are met almost all the time and depletion of inflow will not affect this
18 availability. With the exception of periods during extraordinary low tides, at which time the
19 southeast portion of the Delta is particularly affected, water is generally available at the intakes of
20 the numerous pumps of Delta users (DWR 519).” (Decision 1379 at 21.) For these reasons, the
21 Board concluded, “quantitative determinations of the extent of vested rights are meaningless.”
22 (*Ibid.*)

23 The California Department of Water Resources echoed this factual reality in its 1969
24 Memorandum Report titled “The Delta and the State Water Project”: “Actually, in the Delta, the
25 question of quantity is of little concern, since the Delta is never short of water. If flow from the
26 tributary streams were insufficient to meet Delta use, water from the Pacific Ocean would flow
27 through the San Francisco Bay system and fill the Delta channels.” See WSID Exhibit
28

1 WSID0096 at p. 35.

2 In spite of the obvious geography of the Delta, the SWRCB’s 2015 water availability
3 determination completely ignored the “vast reservoir” of the Delta where the “depletion of inflow
4 will not affect availability” articulated by its predecessors in Decision 100 and 1379. This unique
5 factual circumstance in the Delta - and the undisputed fact that it was entirely ignored in the
6 SWRCB staff’s 2015 determinations of water availability for purposes of curtailment - highlights
7 why a general authority “to curtail” makes no sense. A more formal process, with procedural
8 safeguards, could have addressed this glaring omission and provided aggrieved parties a means of
9 recourse sufficient to satisfy due process. At a minimum, given the existing factual findings by
10 the SWRCB and its predecessors regarding constant water availability in the Delta, the SWRCB
11 should have held an evidentiary hearing before allowing its staff to simply assume - without any
12 proof - that there is no water available in the Delta absent contemporaneous “Full Natural Flow”
13 from upstream tributaries.

14 **2. To the extent the Board’s curtailment of senior rights was intended to**
15 **protect stored water moving through the Delta, it was inconsistent with**
16 **Water Code Section 7075, *Butte Canal & Ditch Co. v. Vaughn* (1858) 11**
17 **Cal. 143 and Water Code Section 12205.**

18 Because the Delta always has water, the concept that curtailment is necessary to protect
19 stored water moving through the Delta is legally indefensible. The Projects utilize the Delta
20 channels to convey stored water. The water released by the Projects into the Delta commingles
21 with the water naturally present and available for BBID and other senior rights to divert under
22 their respective rights. The Projects’ ability to utilize the natural channels of the Delta is
23 expressly conditioned on the lack of infringement of these senior diverters: a water user may
24 release water into another stream, allow the released water to mingle with water already present
25 in the stream, and then reclaim the water; but only if doing so did not diminish the rights of
26 another. (*Butte Canal & Ditch Co. v. Vaughn* (1858) 11 Cal. 143, 152-153.) Care must be taken
27 to ensure that “no injury is done the innocent party,” and thus efforts to protect commingled water
28 flowing through a stream “must leave the opposite party in the use of the full quantity to which he

1 was originally entitled.” “The burden of proof rests with the party causing the mixture. He must
2 show clearly to what portion he is entitled. He can claim only such portion as is established by
3 decisive proof. The enforcement of his right must leave the opposite party in the use of the full
4 quantity to which he was originally entitled.” (*Ibid.*, italics added) The Legislature codified this
5 principle in Water Code Section 7075.

6 The water physically present in the Delta Channels was available for diversion under
7 senior rights. Therefore, to the extent the SWRCB curtailed senior rights in the Delta to protect
8 the Projects stored water, it expressly violated Water Code section 7075 and California Supreme
9 Court’s mandate in *Butte Canal*.

10 The curtailment also violated Water Code section 12205, which is part of the Delta
11 Protection Act, by ignoring the Projects obligation to integrate releases of stored water with the
12 obligation to provide salinity control and an adequate water supply. Section 12205 provides:

13 “It is the policy of the State that the operation and management of releases from storage into the
14 Sacramento-San Joaquin Delta of water for use outside the area in which such water originates
15 shall be integrated to the maximum extent possible in order to permit the fulfillment of the
16 objectives of this part.” The SWRCB made no findings, before undertaking curtailment of senior
17 Delta diversions in 2015, that the Projects were satisfying Water Code section 12205.

18 **3. The SWRCB’s general “curtailment” in the Delta is Inconsistent with the**
19 **Delta Protection Act and Federal Reclamation Law.**

20 The Delta Protection Act, Water Code Section 12200 et seq., recognizes the unique
21 “salinity intrusion” problems of the Delta and provides “for the protection, conservation,
22 development, control and use of the waters in the Delta for the public good.” (Wat. Code, §
23 12200.) To address salinity issues and protect Delta water users, the Act provides that “[a]mong
24 the functions to be provided by the State Water Resources Development System, in coordination
25 with the activities of the United States in providing salinity control for the Delta through
26 operation of the Federal Central Valley Project, shall be the provision of salinity control and an
27 adequate water supply for the users of water in the Sacramento-San Joaquin Delta. . . .” (Wat.
28 Code § 12202, italics added.) The Delta Protection Act further bars the Projects from exporting

1 water from the Delta unless they first comply with their obligations to provide salinity control and
2 an adequate water supply. (Wat. Code, § 12204.)

3 These obligations serve to further the Delta Protection Act’s primary goal: “maintaining
4 and expanding agriculture, industry, urban, and recreational development in the Delta.” (*State*
5 *Water Resources Control Board Cases* (2006) 136 Cal.App.4th at 768.) In *United States v. State*
6 *Water Resources Control Board* (1986) 182 Cal. App. 3rd 82 at page 139 the court determined:

7 “In 1959, when the SWP was authorized, the Legislature enacted the Delta Protection Act.
8 (Wat. Code §§ 12200-12220.) The Legislature recognized the unique water problems in the Delta,
9 particularly “salinity intrusion,” which mandates the need for such special legislation “for the
10 protection, conservation, development, control and use of waters in the Delta for the public
11 good.”(Wat. Code § 12200.) The act prohibits project exports from the Delta of water necessary
12 to provide water to which the Delta users are “entitled” and water which is needed for salinity
13 control and an adequate supply for Delta users. (Wat. Code §§ 12202, 12203, 12204.)”

14 The Delta Protection Act represents the California legislature’s mandate that satisfaction
15 of Delta water entitlements, the provision of water for salinity control and an adequate supply for
16 Delta users, are prerequisites to allowing the Projects to export water from the Delta. Further, the
17 legislature expressly declared in Water Code section 12200 “that a general law cannot be made
18 applicable to said Delta and that the enactment of this law is necessary for the protection,
19 conservation, development, control and use of the waters of the Delta for the public good.” Yet,
20 the SWRCB ignored the mandates of the Delta Protection Act when approaching its curtailments
21 in 2015, and did exactly what the legislature said it should not - it tried to apply a “general” rule
22 to the Delta when it made no sense to do so.

23 Federal law echoes these same concerns and requirements. The express purposes of the
24 federal CVP include salinity control and compliance with water quality standards for the Delta.
25 And the costs associated with fulfilling these purposes are not chargeable to Delta diverters and
26 are non-reimbursable costs of the CVP. (See PL 99-546, 100 Stat. 3050 (Oct. 27, 1986).)

27 The Delta Protection Act and federal law, in sum, require the Projects to mitigate the
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1 impacts of the Projects and protect the Delta and Delta water users. The SWRCB has no
2 authority to ignore these legal mandates by curtailing senior Delta water rights to facilitate Delta
3 exports or protect Project water. In other words, the Board cannot require those who the
4 Legislature intended to protect and benefit from the Delta Protection Act—“the users of water in
5 the Sacramento-San Joaquin Delta”—to provide the protection and benefits the Legislature
6 mandated the Projects to provide.

7 The Board’s attempt to require WSID and BBID, senior diverters, to satisfy salinity
8 requirements is particularly inappropriate. WSID has no term in its license that requires it to
9 address salinity conditions, and BBID holds a pre-1914 water right that is entirely independent
10 from the Board’s regulation. These diverters are included in the types of diverters the Legislature
11 sought to protect when it adopted the Delta Protection Act, and the Board must respect the
12 Legislature’s decision.

13 The Board may have a strong desire to protect the Projects’ stored water, but “[r]egardless
14 of how serious the problem an administrative agency seeks to address it may not exercise its
15 authority ‘in a manner that is inconsistent with the administrative structure that [the Legislature]
16 enacted into law.’ ” (See *FDA v. Brown & Williamson Tobacco Corp.* (2000) 529 U. S. 120, 125
17 (2000) [quoting *ETSI Pipeline Project v. Missouri* (1988) 484 U. S. 495, 517]; see also *Coors
18 Brewing Co. v. Stroh* (2001) 86 Cal.App.4th 768, 774 [a state agency’s “exercise of its rule-
19 making authority must be consistent with a delegation of authority from the Legislature”; it
20 “cannot promulgate a valid rule that is inconsistent with any statute of this state”].)

21 **4. To the extent the Board’s curtailment of senior rights was intended to**
22 **protect stored water needed for flow and salinity objectives in the Delta, it**
23 **violated *El Dorado* and the rule of priority by shifting some of the burden**
24 **for meeting those objectives to the senior Delta diverters.**

25 The Projects are required to release stored water to meet various flow and salinity
26 objectives in the Delta. (See Decision 1641; Decision 1485; see also *State Water Resources
27 Control Board Cases, supra*, 136 Cal.App.4th at 710-711; *United States v. State Water Resources
28 Control Bd., supra*, 182 Cal.App.3d at 110-111.) Assuming for the sake of argument (and

1 ignoring the salvage and saving of water resulting from Delta uses) that the continued diversions
2 by water rights in the Delta, such as BBID or WSID, caused the Projects to release more stored
3 water to meet water quality objectives, it is still unlawful for the SWRCB to “curtail” these
4 diverters. To the extent the SWRCB sought to curtail Delta water rights to protect these Project
5 releases, or even to reduce the need for the Projects to make these releases, the SWRCB
6 improperly shifted the burden of meeting these objectives to the senior water right holders in
7 violation of the rule of priority (and to all Delta diverters in violation of statutory mandates as
8 described above).

9 “Priority of right is the essence of the appropriation doctrine.” (*El Dorado Irr. Dist. v.*
10 *State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937, 962 [quoting Hutchins, *The*
11 *California Law of Water Rights* (1956) p. 130].) In recognition of this principle, over 70 years
12 ago “our Supreme Court stated with respect to the Board’s predecessor, the Department of Public
13 Works, that ‘[i]t should be the *first* concern of the court in any case pending before it and of the
14 department in the exercise of its powers . . . to recognize and protect the interests of those who
15 have prior and paramount rights to the use of the waters of [a] stream.’ (*Meridian, Ltd. v. San*
16 *Francisco* (1939) 13 Cal.2d 424, 450, 90 P.2d 537, italics added.)” (*Id.* at 961.)

17 The Projects are junior water right holders and hold rights of varying priority dates: the
18 earliest right appears to date back to 1927, but the majority have much later priority dates. The
19 Projects rely on these water rights to divert and export large quantities of water from the Delta.
20 The resulting harm to the Delta is substantial, and to mitigate these harms and protect the public
21 trust the Board has among other things conditioned the Projects’ water rights on meeting salinity
22 and outflow objectives which vary with water availability in anticipation of drought such as
23 experienced in 2015. These objectives serve to protect agricultural uses in the western, interior,
24 and southern Delta—users like BBID—and to protect estuarine habitat for anadromous fishes and
25 other estuarine-dependent species.

26 Yet, SWRCB staff issued temporary urgency changes relaxing such conditions and
27 “curtailed” senior water rights in the Delta in an effort to limit the amount of water the Projects
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1 would need to release to satisfy their salinity and outflow requirements under the theory that these
2 Delta water right diverters, by diverting the water in the Delta, were reducing flows or increasing
3 salinity in a manner that would require the Projects to release more water to meet those
4 objectives. In other words, the Board sought to shift, and did in fact shift, the Projects' obligations
5 to meet the flow and salinity objectives onto the curtailed water users.

6 The Board cannot require BBID, as a senior diverter, to reduce its diversions to benefit the
7 Projects' junior rights. The court's decision in *El Dorado Irr. Dist. v. State Water Resources*
8 *Control Bd.* (2006) 142 Cal.App.4th 937 makes this point plain. The *El Dorado* court considered
9 whether the Board violated the rule of priority by imposing in El Dorado Irrigation District's
10 permit a standard term (Term 91) that required the district to curtail its diversions when the
11 Projects released stored water to meet water quality objectives in the Delta. (*El Dorado Irr. Dist.*,
12 *supra*, 142 Cal.App.4th at 943.) The Board included Term 91 in El Dorado's permit, but it did
13 not include the term in all water rights with priority dates junior to the district. As a result, many
14 appropriators with priority dates junior to El Dorado's right were able to continue their diversions
15 under Term 91 conditions when El Dorado was required to curtail its diversions. The court found
16 the Board violated the rule of priority as a result. (*Id.* at 964-65.)

17 In reaching this decision, the court also acknowledged but ultimately dismissed the
18 Board's objection that El Dorado's diversions would require the Projects to release more water to
19 meet Delta water quality objectives. The court recognized that El Dorado was of course "bound
20 by the rule of priority to bypass natural flow when it is needed by downstream riparians and
21 senior appropriators," but it was "under no obligation . . . to bypass natural flow . . . needed to
22 meet Delta water quality objectives." (*El Dorado Irr. Dist.*, *supra*, 142 Cal.App.4th at 968-69.)
23 This was the Projects' obligation, and "the Board's interest in protecting the projects' stored
24 water for export does not trump the rule of priority." (*Id.* at 969.)

25 Because the Delta always has water, there is always flow available to satisfy BBID's
26 senior right. BBID and other rights in the Delta are likewise "under no obligation . . . to bypass
27 natural flow . . . needed to meet Delta water quality objectives" - even if BBID's diversions make
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1 it more onerous for the Projects to meet those objectives. (*El Dorado Irr. Dist.*, *supra*, 142
2 Cal.App.4th at 968-69.)

3 **II. DOES WATER CODE SECTION 1052 APPLY TO DIVERSIONS MADE**
4 **UNDER CLAIM OF A PRE-1914 OR RIPARIAN RIGHT?**

5 Water Code section 1052 only applies to diversions made under a claim of pre-1914 right
6 in certain limited circumstances which do not include diversions within the maximum limit of a
7 valid pre-1914 appropriative right.

8 Water Code section 1052 declares “[t]he diversion or use of water subject to this division
9 other than as authorized in this division is a trespass.” WC 1052(a). Section 1052 also provides
10 penalties for “trespass” and “unauthorized diversion and use” and allows the Attorney General to
11 pursue injunctive relief. Water Code section 1055 permits the State Board to pursue an
12 administrative civil liability complaint against anyone subject to the civil penalties described in
13 section 1052. Section 1831 also permits the State Board to issue a cease and desist order (after
14 following the required procedure) in response to a violation or threatened violation of Section
15 1052’s prohibition against the “unauthorized diversion or use of water subject to this division.”

16 Water Code section 1052’s scope is limited to “*diversion or use of water subject to this*
17 *division other than as authorized in this division.*” Section 1052 is found in Division 2 of the
18 Water Code. Part 2 of Division 2 contains the provisions for appropriation of otherwise
19 unappropriated water after December 19, 1914 and is the only part of Division 2 that authorizes
20 the diversion or use of water. Water Code sections 1201 and 1202 clarify that water subject to
21 appropriation under Part 2 does not include water used under riparian rights (section 1201) or
22 water diverted under valid pre-1914 appropriative rights (section 1202).

23 Other parts of Division 2 relate to riparian and pre-1914 appropriative rights. For
24 example, Part 5.1 addresses Statements of Diversion and Use for diversions made under riparian
25 and pre-1914 appropriative rights and Part 3 provides for adjudicatory processes to determine all
26 types of water rights, including riparian and pre-1914 rights. Yet, none of these other parts of
27 Division 2 “authorize the diversion of water” as contemplated in Section 1052(a). Rather, the
28 only part of Division 2 that “authorizes the diversion of water” is Part 2, relating to the process
for obtaining a post-1914 appropriative permit or license.

1 Because Water Code section 1052 declares “[t]he diversion or use of water *subject to this*
2 *division other than as authorized in this division* is a trespass,” it can only be water subject to
3 appropriation under Part 2 of Division 2 that can trigger section 1052 liability. Thus, water
4 diverted under an admittedly valid riparian or pre-1914 right, and that does not exceed the
5 perfected amount of the right, cannot form the basis of section 1052 liability. Similarly, water
6 diverted under a valid riparian or pre-1914 right that does not adversely impact water subject to
7 appropriation under Part 2 of Division 2 cannot trigger section 1052 liability.

8 Two recent appellate cases have delineated the limited circumstances in which water
9 diverted under a “claim” of riparian or pre-1914 right can be a “trespass” as defined in Water
10 Code section 1052(a):

- 11 1. *Young v. State Water Resources Control Bd.* (2013) 219 Cal.App.4th 397. The court
12 considered whether the Board has jurisdiction to determine the validity of a water
13 user’s claimed pre-1914 water rights in a CDO proceeding. The court found it did.
14 The court reasoned that the Board is authorized to regulate the diversion and use of
15 unappropriated water, and that to effectively exercise this authority, it cannot be
16 deprived of its regulatory authority whenever a water user claims a pre-1914 right.
17 (*Id.* at 406.) The court was clear, however, that if a water user’s diversion is
18 authorized under a riparian or pre-1914 right, then the Board’s task is at its end. As
19 the court explained, “the Water Board does not have jurisdiction to regulate riparian
20 and pre-1914 appropriative rights.” (*Id.* at 404.)
- 21 2. *Millview County Water Dist. v. State Water Resources Control Bd.* (2014) 229
22 Cal.App.4th 879. The *Millview* court similarly agreed that the Board has jurisdiction
23 to determine whether a water user diverted more water than was allowed under its
24 claimed pre-1914 water rights. (*Id.* at 894.) But like the *Young* court, the *Millview*
25 court maintained that “the Board ‘does not have jurisdiction to regulate riparian and
26 pre-1914 appropriative rights.’ ” (*Id.* at 893.) With this limitation in mind, the court
27 went on to explain that the Board’s authority over unauthorized diversions covers
28 three situations involving pre-1914 rights: (1) when a water user diverts “water under

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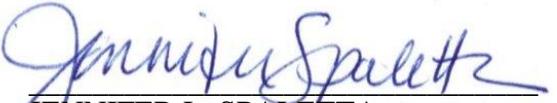
a claimed but invalid pre-1914 right,” (2) when a water user’s “diversion exceeds the maximum perfected amount of water under the right,” and (3) when a water user diverts in excess of a pre-1914 right because of “an intervening forfeiture.” (*Id.* at 895.) But, as the court explained, the Board cannot regulate diversions that do not exceed the maximum perfected amount of a pre-1914 right: “water diverted under a valid pre-1914 water right is protected from . . . regulation” in an administrative enforcement action. (*Id.* at 894.)

Both the *Young* and *Millview* courts agreed the Board could determine whether a water user’s diversions exceeded the perfected amount of a claimed pre-1914 right—jurisdiction that is directly tied to the Board’s authority under Division 2 to regulate new diversions of surplus waters as regulator of all post-1914 appropriative rights. But neither suggested that the Board could also determine whether one pre-1914 water user’s diversions interfered or threatened to interfere with another pre-1914 right or a riparian right. Such an exercise of power is in no way tethered to the Board’s jurisdiction over post-1914 water rights under Division 2.

Respectfully submitted,

Dated: January 25, 2016

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JOINDER OF WSID, BCID AND PID

The West Side Irrigation District, Banta-Carbona Irrigation District and Patterson Irrigation District hereby join in the Central Delta Water Agency and South Delta Water Agency Legal Issues Brief.

Dated: January 25, 2016

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