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9 AUTHORITY, Real Party in Interest

10 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

11 In the Matter of: ) **SAN JOAQUIN TRIBUTARIES**  
12 ) **AUTHORITY’S LEGAL BRIEF**  
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25 **I. INTRODUCTION**

26 The State Water Resources Control Board (State Water Board) issued an Administrative  
27 Liability Complaint (ACL Complaint) against the Byron Bethany Irrigation District (BBID) on June  
28 20, 2015. The ACL Complaint is based primarily on allegations that BBID continued to divert after  
receiving the June 12, 2015 Notice of Unavailability (Curtailment Notice). Both the ACL Complaint  
and the Curtailment Notice were based on the State Water Board staff’s water availability analysis  
(WAA). There are several fundamental legal issues with the ACL Complaint, including, but not  
limited to: (a) the ACL Complaint amounts to a regulation of a pre-1914 water rights, which is  
beyond the jurisdiction of the State Water Board; (b) the ACL Complaints’ reliance of the WAA and  
its pre-determination of water rights violates the requirements of due process; (c) the State Water  
Board does not have authority to represent the interests of unidentified senior water right holders  
who, themselves, have not claimed injury; (d) the WAA is arbitrary and capricious; and (e) the  
delegation authorizing State Water Board staff to issue the ACL Complaint is improper.

29 **II. THE STATE WATER BOARD LACKS JURISDICTION OVER THIS MATTER**

30 **A. Jurisdiction to Regulate Pre-1914 Water Rights**

31 The ACL Complaint is unlawful because it is based on the unauthorized regulation of pre-  
32 1914 water rights. The ACL Complaint alleges its administrative authority in this matter is rooted in

1 Water Code sections 1052 and 1055. (ACL Complaint, at ¶¶ 2, 3, 18, 30, 32, 42.) However, the  
2 ACL Complaint is not truly based on Water Code 1052. Rather, the ACL Complaint is unlawfully  
3 based on a pre-determined regulation that expands beyond the State Water Board’s authority.

4 The State Water Board alleges it has the jurisdiction to prevent unlawful diversions of water  
5 under Water Code section 1052, even if the water is diverted pursuant to pre-1914 water right.  
6 However, an action pursuant to 1052 requires the State Water Board to make an investigation  
7 regarding the specific diversions at issue and make preliminary findings supporting the State Water  
8 Board’s allegations that the water user diverted water without a valid right. (*Young v. State Water*  
9 *Resources Control Bd.* (2013) 219 Cal. App. 4th 397, 405 [recognizing the Board’s responsibility to  
10 “investigate water use and to ascertain whether water is being diverted other than as authorized in  
11 the code.”]; *see also* Water Code, § 1051.) In this case, the State Water Board did not make such a  
12 site-specific investigation. Neither did the State Water Board make other determinations specific to  
13 BBID in support of the ACL Complaint. Instead, the allegations of unlawful diversion are based on  
14 the State Water Board’s watershed-wide availability analysis and Curtailment Notice. (ACL  
15 Complaint, at 4-6.) The determination of availability of pre-1914 water rights and subsequent  
16 watershed-wide Curtailment Notice amount to regulatory actions because (a) the State Water Board  
17 intended the limitations to apply generally on a watershed-wide basis and (b) the purpose of the ACL  
18 Complaint was to implement and interpret the regulatory Curtailment Notice issued by the Board.  
19 (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, 571 [describing the two-part  
20 test to identify a regulation as general application and implementation of law].) The regulation of  
21 pre-1914 water rights is outside the State Water Board’s authority and jurisdiction. (*Millview Cnty.*  
22 *Water Dist. v. State Water Resources Control Bd.* (2014) 229 Cal. App. 4th 879, 893  
23 [acknowledging the “long-standing rule that the Board does not have jurisdiction to regulate riparian  
and pre-1914 appropriative rights.”].)

24 Thus, the ACL Complaint does not represent a specific investigation of potential unlawful  
25 use and findings that a specific water user is diverting unlawfully, as required under a 1052 action.  
26 Rather, the ACL Complaint represents an enforcement action an alleging BBID violated of the  
27 Curtailment Notice regulation. For these reasons, the ACL Complaint is beyond the authority of the  
28 State Water Board and cannot be validly pursued.

1           B.       Jurisdiction to Initiate a Water Availability Analysis

2           The State Water Board initiated the WAA to determine the amount of water in the system  
3 available for post-1914 water right holders, pre-1914 water right holders, and riparians. The State  
4 Water Board has not disclosed the basis for its authority to initiate and make such a determination.

5           The State Water Board does not have jurisdiction to initiate a WAA outside the context of  
6 determining whether water is available for appropriation. (*See* Water Code, §§ 179, 1375(d)  
7 [granting Board authority to conduct a WAA only within the context of the availability of  
8 unappropriated water].) The authority to determine water availability in adjudicated water systems  
9 resides with an appointed watermaster. (Water Code, §§ 4992, 4025, 4151.) Thus, it is not the State  
10 Water Board that retains the authority to oversee appropriated water in adjudicated systems. In  
11 systems that are not adjudicated, the State Water Board has authority to determine when water is  
12 available for appropriation in response to an application for a permit. However, the State Water  
13 Board does not have authority to regulate already appropriated water outside this limited  
14 determination of availability for permitting. For this reason, the State Water Board did not have the  
15 authority to commence the WAA. The ACL Complaint, which is based on the WAA, is similarly  
16 without any valid authority.

17 **III.   THE ACL COMPLAINT VIOLATES THE DUE PROCESS RIGHTS OF BBID**

18           A.       Due Process Protections Are Required Prior to Actions that Take Property

19           Prior to performing the WAA, and making the resulting determination of water availability as  
20 expressed in the Curtailment Notice, the State Water Board did not provide notice to water right  
21 holders subject to the WAA. Furthermore, the State Water Board failed to allow affected parties the  
22 opportunity to be heard, test evidence, or employ other due process protections during the process of  
23 developing the WAA. The WAA resulted in a water right determination that affected the property  
24 rights of water right holders with the priority of 1903 and later. (ACL Complaint, at ¶¶ 17, 18, 24.)  
25 Prior to making any decision that affects the property rights of water right holders, the State Water  
26 Board is required to provide due process to such water right holders. (*United States v. State Water*  
27 *Resources Control Bd.* (1986) 182 Cal. App. 3d 82, 101 [“[O]nce rights to use water are acquired,  
28 they become vested property rights. As such, they cannot be infringed by others or taken by  
governmental action without due process and just compensation.”].) The failure of the State Water

1 Board to provide the opportunity to be heard violates the due process of the water right holders  
2 receiving the Curtailment Notice. (*Id.*) This violation voids the WAA and Curtailment Notice,  
3 which are the basis of the ACL Complaint.

4 B. Comparison to Previous Curtailment Actions Highlight Due Process Violations

5 The State Water Board has previously been faced with the need to curtail water use. The  
6 State Water Board developed Term 91 in response to the need to protect stored water releases.  
7 Comparing the Curtailment Notice process with the Term 91 process highlights the severe due  
8 process violations that occurred in 2015.

9 Term 91 is a provision that curtails water right holders that are junior to the Department of  
10 Water Resources and the United States Bureau of Reclamation (Projects) when the Projects are  
11 releasing stored water to meet water quality objectives. Term 91 was developed by the State Water  
12 Board in response to the Projects protesting new permit applications. Specifically, in October of  
13 1980, the Projects developed a proposed method for determining when Term 91 should take effect.  
14 In March of 1981, the State Water Board held a hearing on this method, at which all affected parties  
15 were provided the opportunity to test information through cross-examination and presentation of  
16 opposing evidence. (WR Order 81-15, at 1.) The State Water Board deliberated on the evidence and  
17 adopted Order 81-15 which established a final method for determining when Term 91 curtailment  
18 would be instituted. (*See* WR Order 81-15.) Upon issuance of Order 81-15, which represented a  
19 final decision of the State Water Board, any party had the opportunity to challenge the Order. After  
20 the State Water Board adopted Order 81-15, it included Term 91 in all permits issued after 1978.  
(WR Order 81-15, at 11.)

21 The curtailment actions in 2015 starkly contrast with the above approach. The WAA was  
22 developed by State Water Board staff, rather than a group of water users claiming injury and  
23 requesting curtailment. The State Water Board did not hold a hearing or otherwise provide an  
24 opportunity for any potentially affected parties to review or challenge the proposed WAA methods.  
25 The State Water Board did not adopt the methodology through an Order or other final decision; it is  
26 unclear if any of the State Water Board members understood or authorized the methods used by  
27 staff. Finally, the WAA was not applied to post-1914 permit holders, but also applied to regulate the  
28 diversion of water pursuant to pre-1914 water rights.

1           When comparing the vastly different approach the State Water Board took when developing  
2 the Term 91 curtailment, it is clear that the WAA was developed in violation of the due process  
3 requirements. The State Water Board must, as it has done previously, provide due process  
4 protections when developing methods to restrict the property rights of water right holders.

5 **IV. THE STATE WATER BOARD LACKS STANDING TO ISSUE THE ACL**  
6 **COMPLAINT**

7           As noted above, the State Water Board does not have jurisdictional authority to bring an  
8 ACL Complaint against BBID in this matter. Outside its regulatory authority, the State Water Board  
9 has not demonstrated that it is a party that has been injured by BBID’s diversions. Additionally, the  
10 State Water Board lacks authority to represent other allegedly-injured water users in this matter.

11 A. No Injury to the State Water Board

12           The State Water Board is not, itself, injured by the alleged unlawful diversion of BBID. The  
13 State Water Board has the authority to oversee and protect unappropriated water. (Water Code, §§  
14 1250 *et seq.*) However, this authority does not extend to water that has been appropriated, especially  
15 when the water is appropriated pursuant to a pre-1914 right. (*See id.*) After the State Water Board  
16 appropriates water, the rights and interests in that water become the responsibility of the water right  
17 holders. (*Millview Cnty. Water Dist. v. State Water Resources Control Bd.* (2014) 229 Cal. App. 4th  
18 879, 894 [recognizing the Board’s lack of authority over pre-1914 water disputes].) If water that  
19 belongs to a senior water right holder is diverted unlawfully by a junior water right holder, it is the  
20 senior water right holder’s responsibility to protect its senior right. The State Water Board has no  
21 responsibility to allege injury on behalf of the senior water right holder. (*Id.*)

22           The facts in the present matter, as alleged by the State Water Board in the ACL Complaint,  
23 indicate that BBID’s alleged unlawful diversion does not involve unappropriated water; instead, the  
24 State Water Board alleges BBID unlawfully diverted water that was appropriated and belonged to  
25 more senior water right holders. For example, the State Water Board alleges there is not sufficient  
26 water to satisfy BBID’s water rights because other, more senior, water right holders have the right to  
27 appropriate the water BBID is alleged to have diverted. (ACL Complaint, at ¶ 18.) Thus, the ACL  
28 Complaint is based on the allegation that BBID has taken water that is appropriated and belongs to a  
more senior water right holder. These allegations indicate that it is not the State Water Board that is

1 being injured, but rather, the alleged injury would belong to unidentified senior water right holders  
2 who have not made any claims of injury. For this reason, the State Water Board is not the proper  
3 party to bring this matter.

4 B. No Ability to Represent Injured Water Users

5 The ACL Complaint is based on alleged injuries to unidentified senior water right holders.  
6 (ACL Complaint, at ¶ 18 [“Drought management of water rights is necessary to ensure that water to  
7 which senior right holders are entitled is actually available to them.”].) However, the ACL  
8 Complaint never specifically identifies the individual water right holders who have incurred injury.  
9 (*See id.*) Further, at no point has the State Water Board alleged that the unidentified injured water  
10 users have delegated authority to the State Water Board to represent their interests in this matter. In  
11 fact, the State Water Board cannot step into the shoes of a water right holder and represent their  
12 interests against other pre-1914 water right holders. (*Young v. State Water Resources Control Bd.*  
13 (2013) 219 Cal. App. 4th 397, 406; *see also* Water Code, § 1831(e).)

14 C. No Continuing Jurisdiction

15 The State Water Board may be able to assert that it has continuing jurisdiction over a post-  
16 1914 water right. Indeed, because the State Water Board issues all post-1914 water rights it could  
17 make the argument that it has an interest in ensuring the terms and limitations of that right are  
18 followed. However, the same continuing jurisdiction does not exist with a pre-1914 water right.  
19 (*See, e.g.,* Water Code § 1831(e).) The State Water Board did not issue BBID’s pre-1914 water right  
20 and has no regulatory authority over this right. For this reason, the State Water Board cannot assert  
21 its authority to issue the ACL Complaint is derived from its general right to oversee water rights.

22 V. **THE ACL COMPLAINT IS NOT SUPPORTED BY A VALID WATER**  
23 **AVAILABILITY ANALYSIS**

24 An action that takes or restricts property rights must be supported by evidence and cannot be  
25 arbitrary and/or capricious. (*Associated Builders & Contractors, Inc. v. San Francisco Airports*  
26 *Comm’n* (1999) 21 Cal.App.4th 352, 361; *20<sup>th</sup> Century Ins. Co. v. Garamendi* (1994) 8 Cal.App.4th  
27 216, 272; *Golden Cheese Co. v. Voss* (1991) 230 Cal.App.3d 547, 556.) The WAA determined there  
28 was not sufficient water available to support the diversions of water right holders with the water  
right priority of 1903 and later. This determination affected the rights of water right holders with the

1 water right priority of 1903 and later. The right to divert water is a property right. (*Fullerton v.*  
2 *State Water Resources Control Bd.* (1979) 90 Cal. App. 3d 590, 598.) The WAA is arbitrary,  
3 capricious, and lacks evidentiary support. For these reasons, the ACL Complaint cannot supported  
4 and should not proceed.

5 A. The WAA Calculation of Water Supply Was Arbitrary and Capricious

6 The ACL Complaint states BBID diverts water from the intake channel to the Banks  
7 Pumping Plant. (ACL Complaint, at ¶¶ 4, 36.) In determining the water available for diversion at  
8 this location, the State Water Board must consider all factors that affect the actual water available for  
9 appropriation at that location in order to properly “ascertain whether or not water . . . is appropriated  
10 under the laws of this State.” (*See* Water Code, § 1051.) The State Water Board failed to make such  
11 a site-specific investigation.

12 Further, the State Water Board’s demand analysis only considered full natural flows into the  
13 system. It failed to consider the other water sources such as released stored water, return flows,  
14 accretions, recirculated flows, and other potential sources of water available for appropriation. The  
15 State Water Board failed to consider return flows. Return flows may significantly add to the volume  
16 of water available for diversion. (*E.g., Salton Bay Marina v. Imperial Irrigation Dist.* (1985) 172  
17 Cal. App. 3d 914, 927.) Given BBID’s location, which is downstream of several diversions which  
18 return flow to the San Joaquin River and its tributaries, the State Water Board cannot properly assess  
19 the supply of water available for BBID without evaluating the quantity of return flow available for  
20 appropriation.

21 The State Water Board did not account for accretions. BBID’s point of diversion is  
22 significantly downstream of gauge locations. In addition, the BBID point of diversion is at the end  
23 of several tributaries that are historically gaining rivers. Because of the location of BBID’s diversion  
24 points, the State Water Board should have considered system accretions in determining water supply  
25 available for BBID.

26 The State Water Board did not rely on actual measured inflow of water available to BBID at  
27 the point of diversion. Rather, the State Water Board relied on estimated supply by using numbers  
28 calculated by the Department of Water Resources. It is unclear whether these estimates provide

1 accurate accounting of water actually available at the point of diversion. Therefore, the State Water  
2 Board arbitrarily and capriciously employed an inaccurate water-supply analysis.

3 B. The WAA Calculation of Water Demand Was Arbitrary and Capricious

4 Similar to the supply analysis, the State Water Board’s demand analysis is not sufficient to  
5 support the ACL Complaint for several reasons. First, the State Water Board calculates demand by  
6 assuming all claims to divert water represented by Statements of Diversion and Use are valid,  
7 without otherwise verifying those claims. Claims to divert water recorded in Statements of  
8 Diversion and Use do not amount to valid water rights. Such a claim “is simply a statement made by  
9 the person or organization who diverted and used the water. Division of Water Rights Staff do not  
10 analyze the contents of a Statement, or research the legal water right status of the diverter at the time  
11 of receipt . . . [and] they are not systematically audited for accuracy.” (SWRCB, *Water Rights:  
12 Statement of Water Diversion and Use Program, available at*  
13 [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/diversion\\_use/](http://www.waterboards.ca.gov/waterrights/water_issues/programs/diversion_use/) ) Accordingly,  
14 the State Water Board’s estimate of water demand includes all claims, not rights, which vastly  
15 overestimates demand and cannot serve as a proper basis for issuing a curtailment of water rights.

16 Second, the WAA failed to properly account for pre-1914 and riparian demand separately.  
17 To the extent a diverter claims its diversion is supported by both a riparian and pre-1914 water right,  
18 the State Water Board treated the entire right as a riparian right. This is improper because it fails to  
19 consider the priority date of the pre-1914 right and elevates pre-1914 water rights to a riparian  
20 priority. This assumption vastly over-estimates senior water demands.

21 Third, the State Water Board assumed all riparian water right holders were senior to any pre-  
22 1914 demand. Although riparian rights holders are generally the most senior water right holders in  
23 the system, there are exceptions to this general rule. Riparian rights do not attach to lands held by  
24 the government until such land has been transferred to private ownership; in these cases, the date of  
25 priority for the riparian right is the date of transfer to private ownership. The State Water Board’s  
26 demand analysis failed to consider that riparian water right holders may be junior in priority to some  
27 pre-1914 water right holders due to patent dates. Riparian water rights may also be prescribed by  
28 appropriative water users upstream. The WAA failed to consider the effect of prescription on  
demand.

1 Fourth, the allocation of demand is unclear. Specifically, it is not clear which portion of the  
2 system demand is allocated to the Sacramento and San Joaquin Rivers, and the tributaries thereto,  
3 respectively. Without understanding how the WAA allocates demand, it is not possible know  
4 whether the approach is arbitrary and/or capricious.

5 Finally, the demand analysis did not take into consideration that several claimed senior water  
6 right holders in the Delta participated in a Voluntary Cutback Program. This program reduced  
7 demand. Because the WAA did not take the reduced demand into consideration, it overestimated  
8 demand, and curtailed too many water users.

9 C. Protection of Stored Water Released to Meet Water Quality Objectives

10 One of the fundamental threshold issues in determining water availability is the legal  
11 protection of stored water. The State Water Board has not taken an official position regarding the  
12 extent to which, if at all, water released from storage should be protected from in-Delta diversion. If  
13 the State Water Board's WAA took the position that in-Delta diverters were allowed to divert stored  
14 water released to meet water quality objectives, the WAA would include in-Delta demands  
15 regardless of stored water releases. On the other hand, if the WAA took the position that in-Delta  
16 diverters are not allowed to divert previously stored water released to meet water quality objectives,  
17 the demand for in-Delta diversions would be reduced. The various interested parties have divergent  
18 views regarding the protection of stored water.

19 It appears the State Water Board staff is also divided on the issue of the extent to which  
20 stored water released to meet water quality objectives should be protected. Tom Howard testified  
21 that he understood stored water released to meet water quality objectives is protected from in-Delta  
22 diversion. (Howard Deposition, at 27.) On the other hand, Kathy Mrowka testified water released  
23 for water quality objectives has been abandoned and not protected from Delta diversion. (Mrowka  
24 Deposition, at 261.) Whereas John O'Hagan testified he simply did not know if this water was  
25 protected or treated as abandoned. (O'Hagan Deposition, at 57.)

26 The issue of when and how previously stored water is protected is fundamental to the  
27 management of water, the authority to appropriate water, and the determination of unlawful  
28 diversion of water throughout the state. Certainly the State Water Board and its staff should develop  
a consistent approach regarding this issue. To the extent parties disagree and challenge the State

1 Water Board's position, a court may ultimately decide the legal issue. However, the State Water  
2 Board's avoidance of the issue will not make it go away or otherwise resolve the dilemma.

3  
4 **VI. THE ACL COMPLAINT IS VOID DUE TO UNLAWFUL DELEGATION**  
5 **TO THE STATE WATER BOARD'S ASSISTANT DEPUTY DIRECTOR**

6 The ACL Complaint was issued by the Assistant Deputy Director. The issuance of an ACL  
7 Complaint is outside the duties and authority of the Assistant Deputy Director and therefore is  
8 unlawful. The Water Code allows the Executive Director to issue an ACL Complaint. (Water Code,  
9 § 1055 ["The executive director of the board may issue a complaint to any person or entity on which  
10 administrative civil liability may be imposed pursuant to Section 1052."].) The State Water Board  
11 delegated the authority to the Deputy Director to issue an order imposing an ACL, but only when a  
12 complaint has been issued and no hearing has been requested. (SWRCB, *Delegation of Authority to*  
13 *SWRCB Members Individually and to the Deputy Director for Water Rights*, Resolution No. 2012-  
14 0029, at 10, § 4.9.2.) This delegation is limited to allowing the deputy director to issue an order  
15 finalizing the ACL Complaint if no hearing has been requested. The delegation does not provide the  
16 deputy director or assistant deputy director with the authority to initiate a proposed enforcement  
17 order. BBID has requested a hearing; this is not an uncontested matter. The difference between  
18 issuing an administrative order in an uncontested matter is vastly different from initiating an  
19 enforcement action. The two procedures are distinct and should not be confused. Neither the deputy  
20 director nor the assistant deputy director has the authority to issue a proposed ACL Complaint.

21 For the foregoing reasons, the ACL Complaint should be dismissed.

22 DATED: January 25, 2016

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