

June 23, 2014

Via Electronic and U.S. Mail

Thomas Howard
Executive Director
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814
Tom.Howard@waterboards.ca.gov

Re: Byron-Bethany Irrigation District – Notice of Unavailability of Water and
Need for Immediate Curtailment

Mr. Howard:

This firm serves as General Counsel to the Byron-Bethany Irrigation District (BBID). Last week, BBID, along with other pre-1914 appropriative water right holders in the Delta and Sacramento-San Joaquin watersheds, received a letter from the State Water Resources Control Board (SWRCB) styled as a “Notice of Unavailability of Water and Need for Immediate Curtailment” (Curtalement Notice). The Curtalement Notice, among other things, purports to direct BBID “to immediately stop diverting water,” and further mandates that BBID complete an “online Curtalement Certification Form.” Mandated reporting includes identification of any water diverted for health and safety needs in the face of curtailments. The apparent purpose of this mandated reporting is so that the SWRCB can consider these “non-exempt continued diversions” to determine whether enforcement action is warranted.¹

While there is no authority stated in the Curtalement Notice supporting the curtailment of pre-1914 rights or to otherwise requiring various certifications and reporting, BBID understood the Curtalement Notice to be action by the SWRCB directing BBID to cease diverting and to otherwise comply with the mandatory reporting requirements contained in the Curtalement Notice. Thus, and although it believes for several reasons it should not be curtailed under applicable law, BBID has been diligently pursuing alternate water supplies for lands within BBID. BBID has proposed various voluntary agreements to significantly reduce

¹ The Curtalement Notice is quite clear, however, that there are *no* exceptions for the continued diversion of water for basic health and safety needs and therefore, any diverter who continues to divert water, even for basic health and safety needs, would ostensibly be subject to the SWRCB’s enforcement authority and exposed to significant financial penalties.

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diversions while being able to continue to provide minimal water supplies to lands within BBID. BBID has also sought water on the transfer market, attempted to acquire much-needed water supplies from the California Department of Water Resources, and has recently attempted to acquire water from a State Water Project contractor through an exchange, most of which were rejected or otherwise denied. Having exhausted all of those efforts, BBID began preparing to cease diversions consistent with the directives contained in the Curtailment Notice, while reserving all legal options related to the authority and validity of the Curtailment Notice.

Yesterday, BBID became aware of pleadings filed by the Attorney General's Office on behalf of the SWRCB in San Joaquin County Superior Court in the case of *Banta-Carbona Irrigation District v. California State Water Resources Control Board, et al.*, San Joaquin County Superior Court Case No. 39-2015-00326421. That case involves, among other things, Banta-Carbona Irrigation District's (Banta-Carbona) challenge to the Curtailment Notice. In response to Banta-Carbona's request for a temporary restraining order or stay of the Curtailment Notice, the SWRCB filed an Opposition and a sworn Declaration, signed under penalty of perjury, both of which are attached.

Among other things, the SWRCB represents to the Court that the Curtailment Notice is not a final decision or Order of the SWRCB, nor is it enforceable. (Opposition, at p. 3.) Instead, according to the SWRCB, the Curtailment Notice is "an *informational notice* that the taking of certain actions may be violative of already existing law . . ." (Opposition, at p. 3.) In the Opposition, the SWRCB casts the Curtailment Notice as a "general courtesy notice," "merely an advisory notice that does not in itself render any determination that any individual diverter . . . is taking water without authorization" and that "noncompliance" with the Curtailment Notice itself will not result in any enforcement. (Opposition, at pp. 3, 7.) Oddly, while the Curtailment Notice was addressed and sent to BBID and other water right holders, the SWRCB represents to the Court that the Curtailment Notice "is not directed at [any particular diverter]." (Opposition, at p. 8.) Further, in the Opposition the SWRCB represents to the Court that anyone that receives the Curtailment Notice suffers no injury – because receipt of the Curtailment Notice does not subject a diverter to fines or penalties for failure to comply. (Opposition, at p. 8.)

² The pleadings appear to be inconsistent with a Press Release issued by the SWRCB on the same day the Curtailment Notice is dated. In the Press Release, the SWRCB stated, "Notices are being sent to water right holders that direct recipients to stop diversions of water to protect more senior water rights and releases of previously stored water, as required by state law" and that "[t]he senior water rights affected by today's notice add to the growing number of water rights restricted by the State's ongoing drought as demand far outstrips supply in key Northern California watersheds." The SWRCB's Press Release is attached.

Thomas Howard

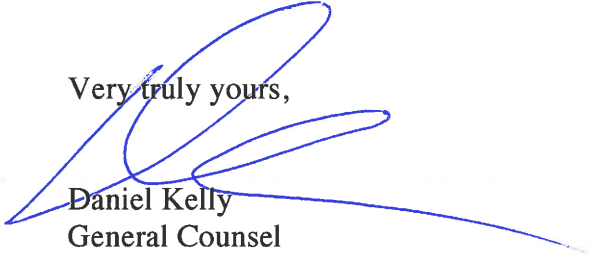
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Based upon the SWRCB's Opposition and sworn testimony before the San Joaquin County Superior Court, BBID now construes the Curtailment Notice precisely how the SWRCB has explained it to the Court. It is *not an actual curtailment* of BBID's pre-1914 appropriative water right and was issued *solely* for informational purposes to BBID and the general public. Because the Curtailment Notice does not actually require a cessation in diversions and does not, as the SWRCB's Opposition provides, mandate any action by BBID, BBID will independently assess the water supply situation and determine appropriate next steps. Moreover, because the Curtailment Notice is solely a courtesy notice and is neither directed to, nor creates obligations on, BBID, BBID understands the reporting mandate simply as a courtesy request.

Very truly yours,



Daniel Kelly
General Counsel
Byron-Bethany Irrigation District

Enclosures

cc: Felicia Marcus, Chair, SWRCB
Francis-Spivy-Weber, Vice Chair, SWRCB
Dorene D'Adamo, SWRCB Board Member
Steven Moore, SWRCB Board Member
Tam M. Doduc, SWRCB Board Member
San Joaquin County Office of Emergency Services
Senator Cathleen Galgiani, Senate District 05
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8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN JOAQUIN
11

12 **BANTA-CARBONA IRRIGATION**
13 **DISTRICT,**

14 Plaintiff and Petitioner,

15 v.

16 **CALIFORNIA STATE WATER**
17 **RESOURCES CONTROL BOARD;**
18 **THOMAS HOWARD, EXECUTIVE**
19 **DIRECTOR OF CALIFORNIA STATE**
20 **WATER RESOURCES CONTROL**
21 **BOARD; and DOES 1 through 1000**
22 **inclusive,**

23 Defendants and
24 Respondents.

Case No. 39-2015-00326421

25 **OPPOSITION TO EX PARTE**
26 **APPLICATION FOR STAY OR**
27 **TEMPORARY RESTRAINING ORDER**

28 Date: June 23, 2015
Time: 9:15 a.m.
Dept: 41
Judge: Honorable Carter P. Holly
Action Filed: June 18, 2015

By Fax

1 ascertain compliance with water rights laws and regulations where there is cause to
2 believe such laws and regulations have been violated. When access is not granted
3 by a property owner, the Water Board may obtain an inspection warrant pursuant
4 to the procedures set forth in Title 13 (commencing with section 1822.50) of Part 3
of the Code of Civil Procedure for the purposes of conducting an inspection
pursuant to this directive.

5 (*Id.*, ¶ 10.)

6 In April and May of this year, the State Water Board issued curtailment notices to all post-
7 1914 appropriative water rights in the Sacramento and San Joaquin River watersheds, due to
8 insufficient projected water supplies.

9 On June 12, 2015, Thomas Howard, the State Water Board's Executive Director, issued a
10 "Notice of Unavailability of Water and Need for Immediate Curtailment for Those Diverting
11 Water in the Sacramento-San Joaquin Watersheds and Delta with a Pre-1914 Appropriative
12 Claim Commencing During or After 1903" (Notice).

13 The Notice informed the public that, based on water supply projections provided by the
14 Department of Water Resources, there was only sufficient water to supply water right holders
15 with a priority of 1902 or earlier. The Notice does not impose liability on any diverter, or
16 determine that any diverter is in violation of the law. The Notice does not expand any law. The
17 Notice is not independent authority for imposition of a cease and desist order or liability on any
18 diverter.

19 Banta-Carbona Irrigation District (Banta-Carbona) asserts that it holds a pre-1914 water
20 right with a priority date of 1911. (Petition for Writ of Mandate, ¶ 25.) Such a right would
21 authorize Banta-Carbona to divert water only so long as there was sufficient water to service all
22 senior water rights, i.e., all water rights with a priority date of 1910 or earlier. (*People v.*
23 *Shirokow* (1980) 26 Cal.3d 301, 307-308 [for appropriative water rights, first in time is first in
24 right].) If there is not sufficient water for all senior rights, Banta-Carbona's 1911 water right
25 would not authorize it to divert any water at all. (*Ibid.*) In such a circumstance, any water Banta-
26 Carbona diverted would be an unauthorized deprivation by Banta-Carbona of the rights of those
27 senior water rights holders, a trespass subject to liability and a cease and desist order following
28

1 trial or a full administrative hearing. (Wat. Code, §§ 1052, 1831; *Young v. State Water Resources*
2 *Control Board* (2013) 219 Cal.App.4th 397.)

3 The Notice is not a cease and desist order, nor does it impose civil liability. The Notice is
4 simply that: an informational *notice* that the taking of certain actions may be violative of already
5 existing law, subjecting any such violator to future enforcement proceedings.

6 STANDARD OF REVIEW

7 Banta-Carbona applies to this court for a stay, or alternatively, for a temporary restraining
8 order or preliminary injunction, staying the Notice. As an initial matter, there should be no
9 review at this time because the State Water Board's filing of a motion to transfer under Code of
10 Civil Procedure section 394 has divested the Court of jurisdiction. (*County of Riverside v. Super.*
11 *Ct. (Desert Outdoor Advertising, Inc. (1968) 69 Cal.2d 828, 831.)* Should the Court nonetheless
12 consider the application, the appropriate standards for review are set forth below. Neither a stay,
13 preliminary injunction, nor temporary restraining order are available to Banta-Carbona.

14 A. A Stay is Not Available.

15 Banta-Carbona seeks a stay of the Notice under Code of Civil Procedure section 1094.5,
16 subdivision (g). (Ex Parte Application at p. 5.) Based upon this, Banta-Carbona contends that the
17 trial court standard of review for issuance of the stay is whether the absence of the stay is "against
18 the public interest." (Code Civ. Proc, § 1094.5, sub. (g).) However, Banta-Carbona wrongly
19 assumes that the State Water Board's issuance of the curtailment notice is an action that falls
20 within section 1094.5 of the Code of Civil Procedure. It does not. The appropriate standard for
21 review is the traditional standard for considering motions for temporary restraining orders and
22 preliminary injunctions.

23 As the declaration of John O'Hagan discloses, the curtailment notice at issue in this
24 litigation is not a decision or order of the State Water Board. (O'Hagan Decl., filed herewith, ¶6.)
25 It is merely an advisory notice that does not in itself render any determination that any individual
26 diverter, including Banta-Carbona, is taking water without authorization under sections 1052 et
27 seq. of the Water Code. (Wat. Code, § 1052, et seq.) "Violation" or "noncompliance" with the
28 notice will not, in itself, result in any punishment or sanction against Banta-Carbona. Instead,

1 through the curtailment notice process, the State Water Board has provided the notice to a broad
2 category of diverters informing them that the existing water supply in the Sacramento-San
3 Joaquin watersheds and the Delta is insufficient to meet the needs of pre-1914 appropriators with
4 a priority date of 1903 or later. (Ex Parte Application, Exhibit A at p. 1.) The State Water Board
5 will not determine that Banta-Carbona, or any other diverter who has received the Notice, has
6 engaged in an unauthorized diversion of water, if at all, until such time as the State Water Board
7 commences a wholly separate enforcement proceeding under section either 1052 or 1831 of the
8 Water Code, proceedings that would provide Banta-Carbona with an opportunity for a hearing.

9 Actions under section 1094.5 of the Code of Civil Procedure only apply where “the final
10 administrative order or decision reviewed was ‘made as the result of a proceeding in which *by*
11 *law a hearing is required to be given*, evidence is required to be taken, and discretion in the
12 determination of facts is vested in the inferior tribunal.” (*Mahdavi v. Fair Employment Practice*
13 *Com.* (1977) 67 Cal.App.3d 326, 333, emphasis in original.) Where no hearing is required to be
14 given, the proper method for judicial review of an agency action is not section Code of Civil
15 Procedure section 1094.5, but section 1085 for reviewing ministerial or legislative administrative
16 actions. (*Id.* at p. 335.)

17 In the present case, Banta-Carbona has not identified any specific statutory provision that
18 requires the State Water Board to conduct a hearing before issuing the Notice. As such, section
19 1094.5 of the Code of Civil Procedure does not apply to these proceedings. This Court may
20 therefore not invoke the stay authority set forth in that section in ruling upon Banta-Carbona’s ex
21 parte application. The traditional standards for temporary restraining orders and preliminary
22 injunctions must therefore apply.

23 **B. Neither a Preliminary Injunction or a Temporary Restraining Order Is Available.**

24 A preliminary injunction may be granted, *inter alia*, where 1) it appears the plaintiff is
25 entitled to the relief demanded; 2) some act during the litigation would produce waste, or great or
26 irreparable injury, to a party to the action; 3) the restrained act is in violation of a party’s rights
27 and would tend to render the judgment ineffectual; 4) when pecuniary compensation would not
28 afford adequate relief. (Code Civ. Proc., § 526, subd. (a).)

1 However, an injunction cannot be granted to prevent the execution of a public statute by
2 officers of the law for the public benefit, or to prevent the exercise of a public office in a lawful
3 manner. (*Id.*, subd. (b).) As such, a preliminary injunction could not, for example, enjoin the
4 State Water Board from carrying out Water Code section 1052 or 1831.

5 "In deciding whether to issue a preliminary injunction, a court must weigh two 'interrelated'
6 factors: (1) the likelihood that the moving party will ultimately prevail on the merits and (2) the
7 relative harm to the parties from issuance or nonissuance of the injunction." (*Butt v. State of California*
8 (1992) 4 Cal.4th 668, 677-678.) The burden is on the party seeking injunctive relief to show all
9 elements necessary to support the issuance of a preliminary injunction. (*O'Connell v. Superior Court*
10 (*Valenzuela*) (2006) 141 Cal.App.4th 1452, 1481.) Injunction is an extraordinary power and is to be
11 exercised with great caution and only in those cases where it fairly appears that the moving party
12 will suffer irreparable injury. (*Tiburon v. Northwestern R.R. Co.* (1970) 4 Cal.App.3d 160, 179.)
13 "The power, therefore, should rarely, if ever, be exercised in a doubtful case. 'The right must be
14 clear, the injury impending and threatened, so as to be averted only by the protective preventive
15 process of injunction.'" (*Ibid.*) Banta-Carbona cannot satisfy either prong.

16 Here, Banta-Carbona did not simply file a noticed motion for preliminary injunction but
17 instead filed an ex parte application for a restraining order. "A temporary restraining order is
18 issued to prohibit the acts complained of, pending a hearing on whether the plaintiff is entitled to
19 a preliminary injunction." (6 Witkin, *California Procedure* (5th ed. 2008) Provisional Remedies,
20 §284, p. 224.) The purpose of a temporary restraining order is to preserve the status quo pending
21 an evidentiary hearing. (*Scripps Health v. Marin* (1999) 72 Cal.App.4th 324, 334.) Regardless of
22 what Banta-Carbona would be able to demonstrate at a preliminary injunction hearing, it cannot
23 demonstrate that this ex parte order is required to maintain the status quo, as the status quo is that
24 the State Water Board has the authority to enforce the Water Code, including issuing civil
25 liability and cease and desist orders under sections 1052 and 1831, respectively.

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ARGUMENT

I. THE APPLICATION SHOULD NOT BE GRANTED BECAUSE THE MOTION TO CHANGE VENUE MUST BE DECIDED BEFORE THIS COURT TAKES ANY OTHER ACTION.

On June 22, 2015, the State Water Board filed a motion pursuant to Code of Civil Procedure section 394 to change venue out of San Joaquin County. Filing of that motion to change venue suspended this Court's jurisdiction to entertain any other motions in the case, including the ex parte application for stay, preliminary injunction, or temporary restraining order. (*Pickwick Stages System v. Superior Court in and for Los Angeles County* (1934) 138 Cal.App. 448, 449.) A motion to transfer venue "operates as a supersedeas or stay of proceedings, and ... must be disposed of before any other step can be taken." (*Ibid*; *County of Riverside v. Super. Ct. (Desert Outdoor Advertising, Inc.)* (1968) 69 Cal.2d 828, 831 [court does not have authority to issue TRO after motion for transfer of venue filed]; see Cal. Civ. Courtroom Handbook and Desktop Reference, §4:5.) Assuming the transfer is granted, the court to which the case is transferred will decide the application for stay or temporary restraining order and any other future motions. (*Nolan v. McDuffie* (1899) 125 Cal. 334, 336-337.)

II. THE APPLICATION SHOULD BE DENIED BECAUSE THE CLAIMS ARE NOT RIPE.

A basic prerequisite to judicial review of administrative acts is the existence of a ripe controversy. (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 169.) The ripeness requirement, a branch of the doctrine of justiciability, prevents courts from issuing purely advisory opinions. (*Id.* at p. 170.) The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. (*Id.* at p. 171.) A controversy is ripe when it has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made. (*Id.* at p. 172.) The ripeness requirement prevents courts from issuing purely advisory opinions, or considering a hypothetical state of facts in order to give general guidance rather than to resolve a specific legal dispute. (*Id.* at pp. 170-171.) The basic rationale of the ripeness doctrine is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies; and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete

1 way by the challenging parties. (*Abbot Laboratories v. Gardner* (1967) 387 U.S. 136, 148-149;
2 *PG&E Corp. v. Public Utilities Com'n* (2004) 118 Cal.App.4th 1174, 1216.) Generally, courts
3 "will not decide the correctness of an administrative agency's construction of a statute unless the
4 party requesting relief has been cited or in some way concretely penalized by the agency based on
5 that purportedly erroneous construction." (*California Assn. of Health Facilities v. Department of*
6 *Health Services* (1997) 16 Cal.4th 284, 290 fn. 3.)

7 In *Pacific Legal Foundation, supra*, 33 Cal.3d 158, the plaintiffs argued that their facial
8 challenge to the validity of the Coastal Commission's guidelines interpreting certain Coastal Act
9 provisions was by itself a sufficient "actual controversy" admitting of declaratory relief. (*Id.* at p.
10 168.) The court applied a two-pronged test, which required it to evaluate both (1) the fitness of
11 the issues for judicial decision and (2) the hardship to the parties of withholding court
12 consideration. (*Id.* at p. 171.) In applying the test, the court found that the issues were not yet
13 appropriate for immediate judicial resolution because of the hypothetical nature of the plaintiff's
14 inquiry. (*Id.* at p. 172; *Aetna Life Ins. Co. v. Haworth* (1937) 300 U.S. 227, 240-241.) The
15 plaintiffs were in essence inviting the court to speculate as to the type of developments for which
16 access conditions might be imposed under the Coastal Act, and then to express an opinion on the
17 validity and proper scope of such hypothetical exactions. (*Pacific Legal Foundation, supra*, 33
18 Cal.3d at p. 172.) The court also found that the plaintiffs did not meet the requirements of the
19 second prong. (*Ibid.*) The plaintiffs were not immediately faced with the dilemma of either
20 complying with the guidelines or risking penalties for violating them; as that situation would not
21 arise unless and until they applied for a development permit and suffered the imposition of invalid
22 dedication conditions. (*Id.* at p. 172-173.)

23 As was the case in *Pacific Legal Foundation*, the claims alleged by Banta-Carbona are not
24 ripe for judicial review. Under the first prong of the test used in *Pacific Legal*, the issues here are
25 not yet appropriate for immediate judicial resolution due to the hypothetical nature of Banta-
26 Carbona's injury. The Notice issued by the State Water Board is merely a general courtesy
27 notice. Before actually taking enforcement action, the State Water Board must conduct an initial
28 analysis of how much water is available under this year's drought conditions, and which water

1 rights are legally authorized to divert under such conditions. Until it has done this, the State
2 Water Board cannot make reasoned decisions about which diverters to bring enforcement actions
3 against. It is a necessary first step, not a final action. The Notice is a statement to the regulated
4 community to let it know what the agency is considering, to help diverters avoid enforcement
5 proceedings should they so choose. The fact that it was made public, as a courtesy to the
6 regulated community, does not create a concrete dispute. It is entirely hypothetical at this point
7 whether the State Water Board will take enforcement against anyone in particular, including
8 Banta-Carbona. The Notice is not directed at Banta-Carbona in particular, nor does it constitute a
9 legal finding that Banta-Carbona is diverting without authorization. The Notice does not create or
10 affect liability. Such potential liability either exists or not based on facts and law entirely separate
11 from the Notice. The Notice simply informs the public that diverters with priorities later than
12 1902, who continue diverting, will be considered as possible enforcement targets. This remains
13 true with or without the Notice, and the Notice in no way changes any party's legal position or
14 obligations.

15 For much the same reason, Banta-Carbona does not meet the requirements of the second
16 prong elucidated in *Pacific Legal Foundation*. Banta-Carbona would not suffer harm if the court
17 withheld its consideration, because the Notice does not impose on Banta-Carbona the immediate
18 dilemma of being subject to administrative penalties, a cease and desist order, or prosecution in
19 court. The State Water Board has yet to institute enforcement proceedings against Banta-
20 Carbona, and if it were to do so, such proceedings would not be predicated on the Notice. To the
21 extent Banta-Carbona may be subject to enforcement, that is true regardless of the Notice. If
22 anything, staying the Notice will work a detriment to Banta-Carbona or others who might confuse
23 such a stay with a ruling that the State Water Board is precluded from exercising its legislatively
24 granted authority under Water Code sections 1052 and 1831.

25 The court considered a similar situation in *Stonehouse Homes v. City of Sierra Madre*
26 (2008) 167 Cal.App.4th 531. There, the plaintiff's filed for declaratory judgment challenging a
27 city council resolution requesting recommendations for an ordinance extending planning
28 requirements to an area including the plaintiff's land; the court held this was not sufficiently

1 concrete for declaratory relief, and was thus not ripe. (*Id.* at p. 541.) The city council resolution
2 merely gave *notice* to the public of potential legislation that might be adopted in the future with
3 respect to zoning provisions that would apply to the plaintiff's property. (*Ibid.*) The resolution
4 did not refer to any of the plaintiff's development applications and would not have any
5 consequence for such an application unless and until the legislation was proposed, reviewed
6 under CEQA, subject to public hearings and formally adopted. (*Ibid.*) Under the second prong,
7 the court found that it would not result in imminent and significant hardship to withhold judicial
8 consideration of the plaintiff's action, because plaintiff's contention that entitlement to a statutory
9 safe harbor provision ensuring the city would approve his application was purely conjectural
10 absent a final application, a newly adopted ordinance, and the application of such ordinance to the
11 plaintiff's application. (*Id.* at p. 542.)

12 Like the city council resolution in *Stonehouse Homes*, the Notice merely gives *notice* to
13 the public of the general need for curtailment under certain circumstances. It does not impose any
14 new liability above what would exist absent the Notice. Under the second prong, Banta-Carbona
15 also will not face imminent and significant hardship if the court withheld judicial consideration of
16 its claims, because, like the plaintiff in *Stonehouse Homes*, Banta-Carbona's demand for relief is
17 premised on hypothetical diversion by Banta-Carbona and subsequent hypothetical enforcement
18 by the State Water Board. Thus, under the court's rationale in *Pacific Legal Foundation* and
19 *Stonehouse Homes*, Banta-Carbona would fail both prongs of the ripeness test.

20 Finally, the court in *Wilson & Wilson v. City Council of Redwood City* (2011) 191
21 Cal.App.4th 1559, 1582 also applied the *Pacific Legal* two-pronged test. Under the first prong,
22 the court found that the plaintiff's claim for declaratory relief to protect its property from future
23 condemnation, which the plaintiff brought as a challenge to the city's downtown retail-cinema
24 redevelopment, was not ripe for immediate judicial resolution. (*Id.* at p. 1583.) Although the city
25 stated that it would use its best efforts and legally available means to acquire the remaining
26 parcels on the block at issue, the court found that this statement was merely a general outline of
27 basic terms to be negotiated in the future, and that the city had taken no steps to acquire the
28 property and might never do so. (*Id.* at pp. 1583-1584.) The court found that whether any part of

1 the plaintiff's land would be condemned by the city depended upon unpredictable future events,
2 and that it could not speculate on the future intention of a public agency. (*Id.* at p. 1584.) Under
3 the second prong, the court found that the plaintiff landowner would not suffer any hardship from
4 a court's refusal to entertain its challenge to the city's potential future use of its eminent domain
5 powers, because it was undisputed that the city had not yet sought to condemn the plaintiff's
6 property. (*Id.* at p. 1854.) If the city should determine in the future that the plaintiff's property
7 was needed, the law required the city to adopt a resolution of necessity to condemn the property,
8 which would require giving the plaintiff notice and an opportunity to be heard on whether the
9 property was truly needed for any proposed project. (*Ibid.*) Thus, the court held that the
10 plaintiff's challenge to the city's possible use of its eminent domain authority was not ripe. (*Id.* at
11 p. 1855.)

12 Like in *Wilson*, Banta-Carbona's challenge to the Notice is not ripe. Whether the State
13 Water Board commences enforcement actions against Banta-Carbona for diverting water depends
14 upon unpredictable future events, including whether Banta-Carbona does indeed divert the water,
15 whether the State Water Board believes that Banta-Carbona, specifically, is diverting without
16 authorization, including the exceptions noted in the Notice, and whether the State Water Board
17 decides, regardless, to use its resources to instead take action against other more egregious
18 violators. Further, as was noted in *Wilson*, the court should not speculate as to the future
19 intention of the State Water Board in taking any action pursuant to the Notice. (*Ibid.*; *Selby*
20 *Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 117 [court should not be drawn
21 into disputes which depend for their immediacy on speculative future events].)

22 Further, under the second prong, like the plaintiffs in *Wilson*, and as already discussed,
23 Banta-Carbona will not suffer hardship from a court's refusal to entertain its challenge to the
24 Notice. The Notice explicitly provides that "if the State Water Board finds *following an*
25 *adjudicative proceeding* that a person or entity has diverted or used water unlawfully, the State
26 may assess penalties..." (Notice, p. 2 [emphasis added].) Thus, as was the case in *Wilson*, if, in
27 the future, the Water Board takes action as to Banta-Carbona, it will be provided with full and fair
28 due process.

1 In sum Banta-Carbona's challenge to the Water Board's general Notice does not present a
2 justiciable controversy.

3 **III. THE STATE WATER BOARD IS LIKELY TO PREVAIL AND THE BALANCE OF**
4 **HARDSHIPS TIPS IN FAVOR OF THE STATE WATER BOARD.**

5 **A. The State Water Board Has Authority to Take Enforcement Action**
6 **Against Pre-1914 Right Holders Who are Diverting in Excess of Their**
7 **Right.**

8 Banta-Carbona incorrectly asserts that the State Water Board has no authority to regulate
9 unauthorized diversions. To the contrary, it is well settled that the State Water Board has
10 authority to bring an enforcement action to prevent holders of pre-1914 water rights from
11 diverting water in excess of the scope of those rights. (*Young v. State Water Resources Control*
12 *Board* (2013) 219 Cal.App.4th 397.)

13 In *Young*, as in the instant case, the petitioners contended the State Water Board lacks
14 authority to adjudicate the validity and extent of riparian pre-1914 appropriative rights. They,
15 like Banta-Carbona, attempted to rely on Water Code section 1831, subdivision (e) for their
16 assertion.

17 The court in *Young* observed that "the Water Board 'does have authority to prevent illegal
18 diversions and to prevent waste or unreasonable use of water, regardless of the basis under which
19 the right is held.'" (*Young, supra*, 219 Cal.App.4th at p. 404, citing *California Farm Bureau*
20 *Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 429.) As the *Young*
21 court went on to explain:

22 The Legislature expressly vests authority in the Water Board to determine if any
23 person is unlawfully diverting water; to determine whether the diversion and use
24 of water is unauthorized, it is necessary to determine whether the diversion and use
25 that the diverter claims is authorized by riparian or pre-1914 appropriative rights.
26 The Customers' argument that the Water Board lacks jurisdiction to adjudicate
27 claims of riparian or pre-1914 appropriative rights is flawed because it begs the
28 question central to the appeal, namely, whether a given diversion claimed to be
authorized is in fact authorized by a valid riparian or pre-1914 appropriative right.
If it is not, the diversion is unauthorized and subject to enforcement pursuant to
Water Code sections 1052 and 1831, subdivision (d)(1). As the Water Board aptly
concluded in its order granting reconsideration, "Put simply, the claim that a
diversion is authorized under riparian or pre-1914 right is no different from any
other argument that there has been no unauthorized diversion; the argument does
not deprive the State Water Board of the authority to determine whether an
unauthorized diversion has in fact occurred or is threatened."

1 (*Young v. State Water Resources Control Bd.*, *supra*, 219 Cal. App. 4th at p. 406; *Millview*
2 *County Water District v. SWRCB* (2014) 229 Cal.App.4th 879, 894-895 [Board has
3 authority to determine both existence and scope of pre-1914 water right, and to prevent
4 unauthorized diversions].)

5 The *Young* decision also expressly rejects Banta-Carbona's assertion (Ex Parte Application
6 at p. 11) that Water Code section 1831, subdivision (e) prevents the State Water Board from
7 bringing enforcement against a holder of a pre-1914 right who is diverting in excess of the
8 amount authorized by that right. (*Young, supra*, 219 Cal.App.4th at pp. 406-407 [holding that
9 while "the Customers insist that Water Code section 1831, subdivision (e) trumps section 1831,
10 subdivision (d)(1) and Water Code section 1052. . . We disagree"].)

11 The *Young* decision squarely states that the State Water Board has authority to bring an
12 enforcement action against a holder of a pre-1914 right who is diverting water in excess of the
13 amount permitted by that pre-1914 right.

14 **B. The Balance of Hardships and the Public Interest Support the State Water**
15 **Board's Issuance of the Curtailment Notice.**

16 California has adopted a dual system "which distinguishes between the rights of 'riparian'
17 users, those who possess water rights by virtue of owning the land by or through which flowing
18 water passes, and 'appropriators,' those who hold the right to divert such water for use on
19 noncontiguous lands." (*Light v. SWRCB* (2014) 226 Cal.App.4th 1463, 1478.) For historical
20 reasons, California further subdivides appropriators into those whose water rights were
21 established before and after 1914. (*Id.*) Post-1914 appropriators may possess water rights only
22 through a permit or license issued by the State Water Board, whereas riparian users and pre-1914
23 appropriators do not need any express permission of a state agency to exercise their water rights.
24 (*Millview County Water Dist. v. SWRCB* (2014) 229 Cal.App.4th 879, 889.)

25 As the First Appellate District recently explained in *Millview*, the key legal principle
26 in allocating water in times of shortage is the rule of priority:

27 Under the "rule of priority," which governs water use in such circumstances, the
28 rights of riparian users are paramount. Although riparian users must curtail their
use proportionately among themselves in times of shortage, they are entitled to
satisfy their reasonable needs first, before appropriators can even begin to divert.

1 water. (*United States, supra*, 182 Cal.App.3d at p. 104.) *As a result,*
2 *appropriators may be deprived of all use of water when the supply is short. In*
3 *turn, senior appropriators—those who acquired their rights first in time—are*
4 *entitled to satisfy their reasonable needs, up to their full appropriation, before*
5 *more junior appropriators are entitled to any water.*

6 (*Id.* at pp. 890, emphasis added.)

7 The curtailment notice at issue in this case reflects the State Water Board's assessment of
8 water availability based upon the Board's estimates of the water availability in the watershed and
9 the demand of the various water rights holders. As the Declaration of John O'Hagan explains, the
10 State Water Board estimates water availability from multiple sources, including the calculation of
11 natural flow provided by the California Department of Water Resources in its published bulletins.
12 The State Water Board determines water demand based upon information provided by water right
13 holder in their annual or triennial reports of water diversion and use. (O'Hagan Decl. at ¶¶ 10-
14 12.)

15 The petitioner diverts water from the San Joaquin River. (Petition at ¶ 15.) Attached as
16 Exhibit 1 to the Declaration of John O'Hagan is a supply and demand chart prepared by the State
17 Water Board for the San Joaquin River basin. The bar graph data in the chart discloses the
18 anticipated demand for water by riparian and pre-1914 water users for the period of March
19 through September, 2015. The chart further displays the anticipated full natural flow in the San
20 Joaquin River basin through September 2015. As the chart indicates, there is insufficient natural
21 flow in the watershed to satisfy all pre-1914 water right claimants. Based upon this data and
22 information and other data, the State Water Board has determined that at present there is
23 inadequate supply in the watershed to meet water right demands with priorities of 1903 or later.
24 (O'Hagan Decl. at ¶16.)

25 In light of the "rule of priority" discussed in the *Young, Light, and Millview* cases, the
26 diversion by water rights holders with priority dates of 1903 or later is in effect a trespass by
27 those water users on water right holders with more senior water rights. Both the balance of
28 hardships and the public interest demand that the State Board take steps to inform diverters that
the "rule of priority" requires diverters to comply with the priority dates of their respective water
rights. It is to that end that the State Water Board has issued the Notice.

1 **IV. IF THE COURT ISSUES A STAY OR TEMPORARY RESTRAINING ORDER, IT SHOULD**
2 **BE LIMITED IN SCOPE.**

3 The Notice does not create any penalty or fine for continued diversion of water. The
4 liability amounts mentioned in the Notice, and by Banta-Carbona (Petition for Writ of Mandate
5 ¶¶ 5-6), have not been imposed. Those amounts are taken directly from Water Code section
6 1052, subdivision (c)(1). Before the State Water Board can impose civil liability under Water
7 Code section 1052, or issue a cease and desist order under Water Code section 1831, against
8 Banta-Carbona, it must file a complaint in superior court or hold an evidentiary administrative
9 hearing, providing due process. (Wat. Code, §§ 1052, subd. (d); 1831, subd. (c).) At those
10 proceedings, the Notice would not be evidence of unauthorized diversion.

11 Prior to issuance of the Notice, the State Water Board was fully authorized to bring an
12 enforcement action against an unauthorized water diverter. The Notice had no effect on that
13 authority. If the court were to issue the requested stay or injunction, it should be limited solely to
14 staying the effect of the Notice. It should not go further and restrain the State Water Board's
15 entirely independent enforcement authority under the Water Code. (Wat. Code, §§ 1052, 1831.)

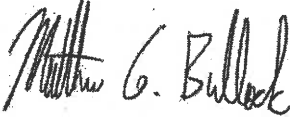
16 **CONCLUSION**

17 The State Water Board has moved for a transfer of venue under Code of Civil Procedure
18 section 394. Pending transfer, this court is divested of jurisdiction to rule on other matters in the
19 case. Further, the claims in this case are not ripe for adjudication. The State Water Board is
20 likely to prevail on the merits. For all these reasons, the court should not grant the application for
21 stay, preliminary injunction, or temporary restraining order. If the court were to grant the
22 application, the stay should be limited solely to the actual effects of the Notice.

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Dated: June 22, 2015

Respectfully Submitted,
KAMALA D. HARRIS
Attorney General of California
GAVIN G. MCCABE
Supervising Deputy Attorney General



MATTHEW G. BULLOCK
Deputy Attorney General
*Attorneys for Defendant-Respondent
State Water Resources Control Board*

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DECLARATION OF SERVICE BY E-MAIL and OVERNIGHT COURIER

Case Name: **Banta-Carbona Irrigation District v. Calif. State Water Resources Control Board**

No.: **39-2015-00326421**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for overnight mail with the **Golden State Overnight**. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the overnight courier that same day in the ordinary course of business.

On June 22, 2015, I served the attached:

RESPONDENT' REQUEST FOR JUDICIAL NOTICE

OPPOSITION TO EX PARTE APPLICATION FOR STAY OR TEMPORARY RESTRAINING ORDER

DECLARATION OF JOHN O'HAGAN IN OPPOSITION TO PETITIONER/PLAINTIFF'S APPLICATION FOR STAY AND/OR IN THE ALTERNATIVE TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, for overnight delivery, addressed as follows:

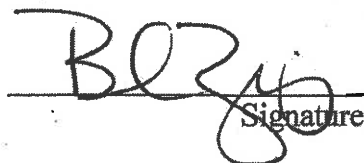
Jeanne M. Zolezzi
Herum/Crabtree/Suntag
5757 Pacific Avenue, Suite 222
Stockton, CA 95207
Tel: (209) 472-7700

JZOLEZZI@herumcrabtree.com

Attorney for Banta-Carbona Irrigation District

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 22, 2015, at San Francisco, California.

Brenda Zuniga
Declarant


Signature

1 KAMALA D. HARRIS
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2 GAVIN G. MCCABE
Supervising Deputy Attorney General
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7 *Attorneys for Respondent and Defendants State
Water Resources Control Board, et al.*

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF
9 SAN JOAQUIN

12 BANTA-CARBONA IRRIGATION
DISTRICT,

13 Petitioner/Plaintiff

14 vs,

15 CALIFORNIA STATE WATER
16 RESOURCES CONTROL BOARD;
THOMAS HOWARD, EXECUTIVE
17 DIRECTOR OF THE CALIFORNIA STATE
WATER RESOURCES CONTROL BOARD

18 Respondents/Defendants
19
20
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Case No. 39-2015-00326421-CU-WM-WTK

**Declaration of John O'Hagan in
Opposition to Petitioner/Plaintiff's
Application for Stay and/or in the
Alternative Temporary Restraining Order
and/or Preliminary Injunction**

Hearing Date: June 23, 2015

Time: 9:15 a.m.

Dept: 41

Judge: The Honorable Carter P. Holly

Trial Date: TBA

Action Filed: June 18, 2015

By Fax

1 I, John O'Hagan, declare:

2 1. I have been an employee of the State Water Resources Control Board (State Water
3 Board) for the past 34 years, and I am currently employed by the Board. Since May 2003 I have
4 overseen the Enforcement Section of the State Water Board's Division of Water Rights
5 (Division). Since April 2014, I have been the Division's Assistant Deputy Director overseeing the
6 Enforcement Section and the Permitting and Licensing Section. As Assistant Deputy Director, I
7 supervise the State Water Board's analyses for determining if water supplies are sufficient to
8 meet current water use demands in critical watersheds during the 2014 and 2015 drought. I am
9 responsible to meet with stakeholders of the watershed and ensure our information is transparent
10 and I provide monthly updates to the Board at its monthly Board Meetings. I have a 1980
11 Bachelor of Science Degree in Civil Engineering from California State University at Sacramento,
12 and I have been registered as a Professional Civil Engineer in California since 1984.

13
14
15 2. As part of my responsibility for overseeing the Enforcement Section, I am
16 responsible for the work of the Enforcement Section that includes, but is not limited to, statewide
17 compliance and complaint investigations of water diversion projects and initiating formal
18 enforcement actions. Part of these activities is monitoring diversions to ensure compliance with
19 the state's water rights priority system. These activities include monitoring for the purpose of
20 determining whether any diversion and use of water is authorized under the Water Code.
21

22 3. The State Water Board has been vested by the Legislature with the authority to
23 prevent unauthorized diversions and supervise the water right priority system. (See, e.g. Wat.
24 Code §§ 174, 186, 1050, 1051, 1051.5, 1052, 1825.)

25 4. The water right priority system provides the primary basis for determining which
26 users may divert, and how much, when there is insufficient water in the stream for all users.
27 Riparian right holders generally have the most senior priority to natural flows in a stream, and
28

1 older, more senior appropriative water rights have priority over more junior appropriative water
2 rights. Senior water right holders are more likely to receive water at times of shortage than more
3 junior water right holders. However, once water is stored or imported from another watershed,
4 the entity that stored or imported the water has the paramount right to that water. Other
5 appropriative water rights holders may divert any abandoned return flows. Riparian water right
6 holders are only entitled to divert natural flow, so are not entitled to divert releases, or the return
7 flows from upstream releases of stored water.
8

9 5. When the amount of water available in a surface water source is not sufficient to
10 support the needs of existing water right holders, the more junior right holders must cease
11 diversion in favor of more senior right holders. However, it is not always clear to a junior
12 diverter whether there is sufficient flow in the system to support their diversion and at the same
13 time support senior water uses downstream. It can also be difficult to determine whether releases
14 of stored water are abandoned flows that may be diverted or whether those flows are not available
15 for diversion because they are being released for downstream purposes. Similarly, it can be
16 difficult for a riparian to know if water is natural flow, or stored or imported water and whether
17 and when and to what extent correlative reductions in water use are needed due to the need to
18 share limited supplies amongst riparians. In accordance with the State's water right priority
19 system, the State Water Board notifies diverters of the need to curtail water diversions when
20 sufficient flows in a watershed are not available for a water user's needs, based on their priority
21 of right.
22
23

24 6. A curtailment notice is a notification to water right holders of a certain priority of
25 right that, due to water shortage conditions, the State Water Board has determined water is not
26 available under their priority of right. A notice of curtailment is not an enforceable decision or
27 order of the State Water Board. The notice provides the affected water right holder with the State
28

1 Water Board's findings of the unavailability of water under their priority of right for a certain
2 right and the need to cease diversion under that right, the exceptions to the notice for direct
3 diversion of water for power, and for continued use of previously stored water, and the potential
4 for future enforcement for unauthorized diversions. A curtailment notice does not consider any
5 particular diverter's other senior water rights or other facts such as water supply contracts,
6 agreements, transfers or groundwater supplies that may allow the diverter to continue to divert
7 lawfully. The notice is therefore not a State Water Board determination that any individual
8 diverter is taking water without authorization under the Water Code. A diverter who continues to
9 divert after receiving a notice of curtailment is not subject to penalties for violation of the
10 curtailment notice, but may be subject to enforcement for an unauthorized diversion if their
11 diversions do not fall within the exceptions enunciated in the notice and are not entirely
12 authorized by other, non-curtailed water rights.
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15 7. I have reviewed the Notice of Unavailability of Water and Need for Immediate
16 Curtailment dated June 12, 2016 and addressed to Patterson Irrigation District and attached as
17 Exhibit A to the petitioner's petition for writ of mandate. This notice is the type of curtailment
18 notice that I described in paragraph 6. This notice does not constitute a decision or order of the
19 State Water Board or a determination that Patterson Irrigation District, petitioner, or any other
20 individual diverter has engaged in an unauthorized diversion of water under the Water Code.
21

22 8. Diversion of water when it is unavailable under a diverter's priority of right
23 constitutes an unauthorized diversion and a trespass against the state. The State Water Board may
24 subject such unauthorized diversions to an Administrative Civil Liability (ACL) of up to \$1,000
25 per day and \$2,500 per acre-foot of water unlawfully diverted in a drought year, or refer a diverter
26 to the Attorney General's office for enforcement. The State Water Board may also issue
27 administrative cease and desist orders and request court injunctions to require that diversions
28

1 stop.

2 9. Before issuing such an order, the State Water Board must have particularized
3 information regarding an unlawful diversion or the potential of such a diversion: the Board may
4 not issue an enforceable order requiring diversion to cease simply based on lack of water
5 availability, absent information that there is a risk of or actual continued diversion. Additionally,
6 before issuing a final enforcement order, the State Water Board must first issue a draft Cease and
7 Desist Order or an ACL Complaint. If such enforcement action is proposed, a water right holder
8 is entitled to, upon written request within 20 day of receipt of the draft enforcement action, an
9 evidentiary hearing on all issues before the order takes effect.
10

11 10. The general analysis for determining the necessity for curtailment of water rights
12 in any watershed compares the current and projected available water supply with the total water
13 right diversion demand. For the water availability determination of the curtailment analysis, the
14 State Water Board relies upon the full natural flows of watersheds calculated by the Department
15 of Water Resources (DWR) for certain watersheds in its Bulletin 120, and in subsequent monthly
16 updates. "Unimpaired Runoff" or "Full Natural Flow" represents the natural water production of
17 a river basin, unaltered by upstream diversions, storage, or by export or import of water to or
18 from other watersheds. The full natural flow amount is different than the measured stream flows
19 at the given measurement points because the gauged flows are increased or decreased to account
20 for these upstream operations. Forecasted flow data is uncertain so DWR provides the data in the
21 form of "levels of exceedance" or simply "exceedance" to show the statistical probability that the
22 forecasted supply will occur. The exceedance is simply the percent of the time that the actual
23 flow is expected to exceed the projected flow. The 90 percent exceedance hydrology assumes
24 inflows from rainfall and snowmelt at levels that are likely to be met or exceeded by actual flows
25 with a 90 percent probability, or in other words, there is a ten percent or less chance of actual
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1 conditions turning out to be this dry or drier. The 50 percent exceedance is the 50/50 forecast.
2 The State Water Board uses both exceedances for its analyses.

3 11. Specifically, for the San Joaquin River watershed, the State Water Board totaled
4 DWR's full natural flows for the Stanislaus, Tuolumne, Merced, Upper San Joaquin, Cosumnes
5 and Mokelumne rivers on a monthly basis as the monthly available water supply for the San
6 Joaquin River watershed. State Water Board staff also increased these total full natural flow
7 amounts by adding monthly quantities for smaller watersheds and estimated return flows based on
8 the DWR's May, 2007 Report of Unimpaired Flow Data. Estimates in the report for 1977 were
9 used for these adjustments. The monthly adjusted water supply is provided in acre-feet per month
10 and the State Water Board converts these amount into average monthly cubic feet per second for
11 graphic purposes (at two exceedance levels). The State Water Board also shows DWR's daily
12 full natural flow calculations on the graph for consideration before any curtailment. DWR's daily
13 full natural flow calculations are less accurate because they are based on less data than is
14 available at the completion of each month. Due to the lag between the effect of upstream
15 operations and downstream flow measurements, calculated daily FNF will fluctuate from day to
16 day. State Water Board staff also checks available forecast information from the California-
17 Nevada River Forecast Center, real time flow conditions from the DWR and United States
18 Geological Survey. This real time information and forecasted precipitation events can delay the
19 curtailment notice.
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23 12. For water right demands, the State Water Board relies on information supplied by
24 water right holders on annual or triennial reports of water diversion and use required to be true
25 and accurate to the best of the knowledge of the diverters. The State Water Board also received
26 2014 diversions data from water right holders that represents 90 percent of the water diverted
27 from April through September in the Delta, and 90 percent of the water diverted from the upper
28

1 Sacramento and San Joaquin Rivers. This information was required pursuant to Order WR 2015-
2 0002 dated February 4, 2015. All reported monthly water diversion data is compiled by
3 watershed, type of right and priority dates. The State Water Board performs quality control
4 checks and removes obvious errors, excess reporting, removes demand for direct diversion for
5 power, and makes additional changes based on stakeholders comments. The corrected demand
6 data includes the 2014 reported data for 90% of the watershed demand plus for the remaining
7 diverters, an averaged diversion amount for 2010 through 2013. These monthly diversion
8 demands are grouped into water right types (riparian, pre-1914 and post-1914 rights) and by
9 priority dates for pre-1914 and post-1914 rights. For the Sacramento-San Joaquin River
10 Watersheds, special consideration of the Delta diversions is made. To be most conservative for
11 the San Joaquin River, the State Water Board performs a proportional analysis based on the
12 inflows from the watersheds. For example, for the month of June, the proportional full natural
13 flow of the San Joaquin River watershed based on 90% exceedance, was 17 percent. Therefore,
14 the San Joaquin watershed Delta demand was 17 percent of the total Delta demand.

15
16
17 13. The State Water Board provides graphical summations of these priorities with
18 monthly demands for the total riparian demand at bottom, the pre-1914 demands added to riparian
19 and depicted above the riparian demand. The monthly amounts are averaged into cubic feet per
20 second for graphical purposes.

21
22 14. The State Water Board is consistently making adjustments to its analyses based on
23 new information obtained from stakeholders, or adjustments to projected flows from the DWR.
24 State Water Board staff reviews this information and provides revisions to its data set and graphs
25 that are all shown on the Drought Website.

26
27 15. The goal of curtailments is principally to ensure that water to which senior water
28 right holders are entitled is actually available to them. To ensure that this occurs generally

1 requires that some water remain in most streams to satisfy senior demands at the furthest
2 downstream point of diversion of these senior water rights.

3 16. Attached as Exhibit ~~B~~^I is a water supply and demand chart prepared by the State
4 Water Board and issued on June 11, 2015 entitled "2015 San Joaquin River Basin Senior
5 Supply/Demand Analysis with Proportion Delta Demand." The bar graph data discloses in terms
6 of cubic feet per second the anticipated demand for water by riparian and pre-1914 water users
7 for the period of March through September, 2015. The variable solid blue line displays the daily
8 full natural flow from March 1, 2015 through June 7, 2015 of the San Joaquin River basin. The
9 declining dotted lines represent the forecasted full natural flow through September, 2015 for the
10 adjusted 50% and 90% exceedance levels. Based upon the data and information from which
11 Exhibit ~~B~~^I was derived and other relevant data, the State Water Board concluded that there is
12 insufficient water in the San Joaquin River basin to satisfy water right claimants with priorities of
13 1903 or later.
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16 17. On January 17 and April 2, 2014, the State Water Board issued a Notice of Surface
17 Water Shortage and Potential for Curtailment of Water Right Diversions. The notice advised that
18 if dry weather conditions persist, the State Water Board will notify water right holders of the
19 requirement to limit or stop diversions of water under their water rights, based on water right
20 priority.
21

22 18. In April, the State Water Board began issuing drought-related curtailment notices
23 to water right holders in a number of water-short watersheds.

24 The following notices of curtailment have been mailed to water right holders:

25 April 3, 2015- Antelope Creek Fishery Protection Regulation

26 April 17, 2015- Deer Creek Fishery Protection Regulation

27 April 23, 2015- Post-1914 and Surplus Class Rights in Scott River
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April 23, 2015- All post-1914 rights in the San Joaquin River Watershed.

April 30, 2015- all Permits and Licenses subject to Term 91 in Sacramento-San Joaquin watersheds and Delta.

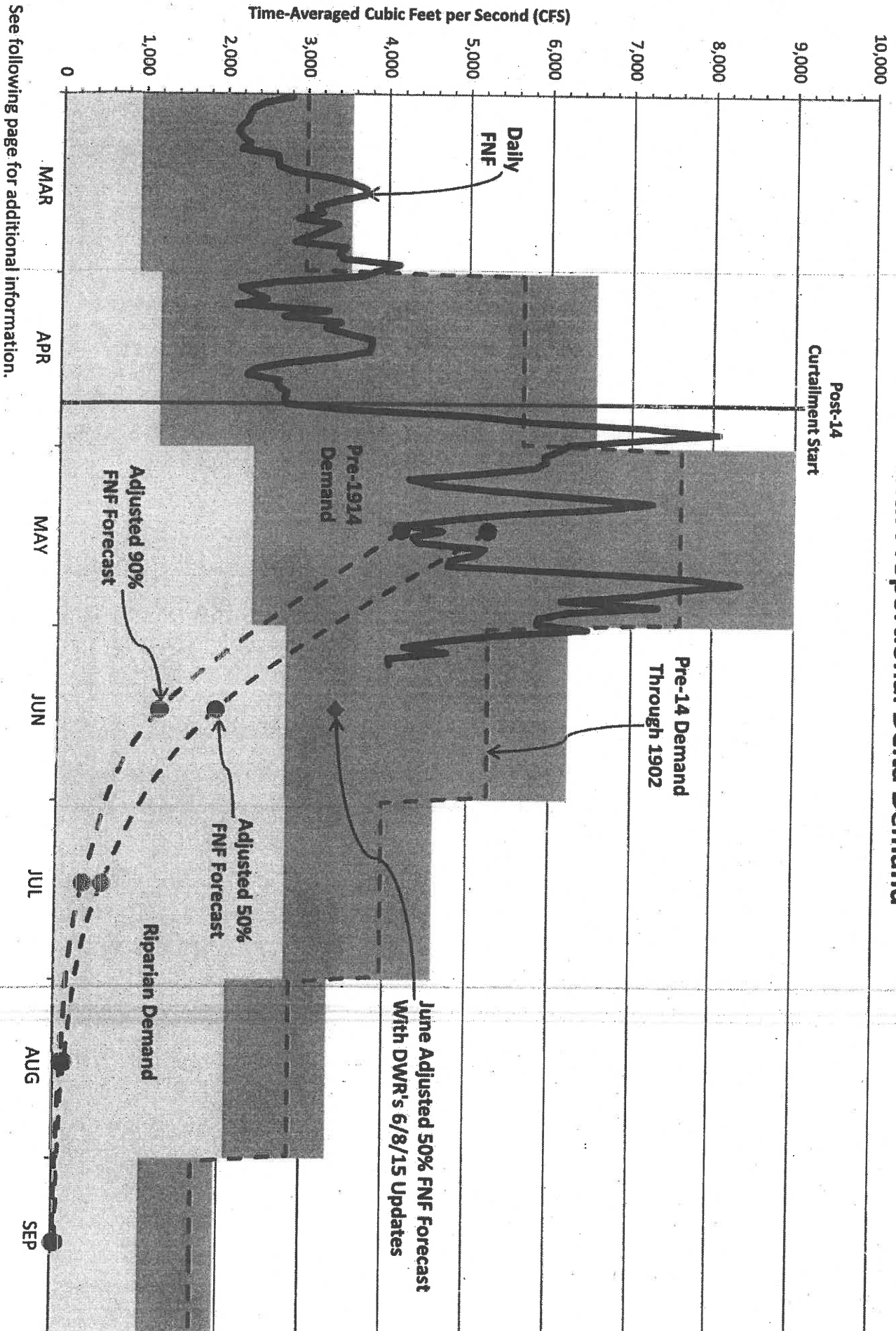
May 1, 2015- All post-1914 rights in Sacramento River Watershed and Delta

June 12, 2015- Pre-1914 rights with a priority dated of 2003 or later in the Sacramento-San Joaquin watershed and Delta.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge. Executed this 22 day of June, 2015 in Sacramento, California


JOHN O'HAGAN

2015 San Joaquin River Basin Senior Supply/Demand Analysis With Proportional Delta Demand



See following page for additional information.



Water Rights News

Senior Water Rights Curtailed in Delta, San Joaquin & Sacramento Watersheds

For Immediate Release
June 12, 2015

Contact: Tim Moran
Timothy.Moran@waterboards.ca.gov
George Kostyrko
George.Kostyrko@waterboards.ca.gov

SACRAMENTO -- With drought conditions continuing into the summer months, the State Water Resources Control Board (State Water Board) announced today that there is insufficient water available for senior water right holders with a priority date of 1903 or later in the San Joaquin and Sacramento watersheds and the Delta. The need for further curtailment of more senior rights and curtailments in other watersheds is being assessed weekly.

Notices are being sent to water right holders that direct recipients to stop diversions of water to protect more senior water rights and releases of previously stored water, as required by state law. Diversion of water when water is not available under the right holder's date of priority is unauthorized and unlawful. Violations are subject to fines up to \$1,000 per day and \$2,500 per acre-foot of water unlawfully diverted, cease and desist orders, or prosecution in court.

Senior water right holders with priority dates earlier than 1903 in the affected watersheds can continue to divert water in accordance with their water right. In addition, those who have previously stored water under a valid right may continue to hold that water or release it for beneficial use.

While this is the first time during the current drought that senior water right holders have been given notice that water is not available to serve their water right priority, it is not unprecedented. Some senior water right holders were curtailed during the drought of the late 1970s.

Water Rights Affected by This Notice

Today's curtailment notices affect 276 pre-1914 appropriative water rights held by 114 right holders. Today's notices do not affect any riparian right holders. The water rights affected include:

CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY



STATE WATER RESOURCES CONTROL BOARD

1001 J Street, Sacramento, CA 95814 • Mailing Address: P.O. Box 100, Sacramento, CA 95812-0100 • www.waterboards.ca.gov



- On the Sacramento River, 127 water rights with a priority date of 1903 or later are curtailed, affecting water rights held by 86 right holders.
- On the San Joaquin River, 24 water rights with a priority date of 1903 or later are curtailed, affecting water rights held by 14 right holders.
- In the Delta, 125 water rights with a priority date of 1903 or later are curtailed, affecting water rights held by 14 right holders.

Uses To be Curtailed

The following uses are listed for the pre-1914 water rights affected by today's notices:

- 135 water rights held by 53 right holders for irrigation, stockwatering, and/or livestock as the sole water use; and
- 208 water rights held by 80 right holders for irrigation, stockwatering, or livestock as at least one of the claimed water uses.

Today's action is based on reported diversion demands, estimates of natural flows and actual stream flows. Conditions in these and other watersheds continue to be monitored, and curtailment notices for other watersheds and for more senior water right holders in these watersheds may be imminent.

Some water right holders may have other, more senior rights to fall back on, or have water stored in reservoirs that they can still access. If that's not available they will have to find other sources of water, such as groundwater or purchased water, if available. Water right holders are cautioned that groundwater resources are significantly depleted in some areas.

Background

California water rights law is based on seniority. In dry years, when there isn't enough water in the system to serve all water right holders, those with more junior rights are required to stop diverting water from rivers and streams before restrictions are imposed on more senior right holders. The Water Commission Act of 1913, which took effect in 1914, created California's system of water rights and the distinction between junior and senior appropriative water rights.

Senior water right holders are those claiming appropriative water rights established prior to the Water Commission Act, and riparian water rights. Riparian water rights are rights granted to owners of land abutting a stream or river. In most instances, riparian rights share equal priority to the available natural flow and have seniority over appropriative water rights (both pre-1914 and post-1914). For appropriative rights, the priority system is based on the concept of "first in time, first in right."

The State Water Board administers California's system of water rights and is authorized to prevent illegal diversions of water. Illegal diversions include taking water at times when there is insufficient water available under the priority of right held by the diverter.



The State Water Board issued two letters earlier this year warning all water-right holders that their rights may be curtailed due to drought conditions. Last year, the State Water Board issued curtailment notices to more than 5,000 diverters on five watersheds statewide.

In April and early May of this year, the State Water Board issued curtailment notices for all post-1914 water rights in the Sacramento and San Joaquin River watersheds and the Delta. Curtailment notices were issued in the Scott River and Deer Creek watersheds as well.

In addition, the State Water Board approved a proposal from riparian water right holders in the Sacramento-San Joaquin River Delta on May 22 to voluntarily cut back water use in exchange for assurances that they would not face enforcement actions in the event that their riparian water rights are curtailed more severely later during the June-September growing season. Riparian water right holders had until June 1 to elect to participate in the voluntary program.

The senior water rights affected by today's notice add to the growing number of water rights restricted by the State's ongoing drought as demand far outstrips supply in key Northern California watersheds. As of this notice, a total of 8,721 junior water rights and 276 senior water rights in the Sacramento-San Joaquin River watersheds and Delta have been notified that there is insufficient water in the system to serve their rights.

To determine the need for curtailments, the State Water Board uses monthly diversion data and sorts that data by watershed, water right type and priority date. Water flow used for power generation that is diverted and returned back to the water course is removed from the analysis. The demands for water use by type of right are summed and plotted graphically to display junior and senior water right needs. To assess supply, monthly and daily natural flow data from the Department of Water Resources (DWR) are plotted with DWR estimates of return flows and additional minor tributary flows. The resulting Supply vs. Demand Curve indicates curtailment is needed when demand outstrips supply.

For this curtailment, several scenarios of delta and tributary demand were analyzed to produce conservative curtailment priority dates. As supplies continue to decline through the summer, it is expected that more senior rights will be subject to curtailment. As supply increases in the fall or winter, the State Water Board will lift the curtailment as soon as appropriate using the same procedure.

The State Water Board maintains a webpage to assist water right holders in several key watersheds to plan for possible limits on water supply availability. The webpage, titled "[Watershed Analysis](#)," details projected water supply, demand and availability for the watersheds most likely to face restrictions during the drought as demand outstrips available water supply.

A [Curtailment Fact Sheet](#) provides additional details on the curtailment process. Please visit our curtailment notification [website](#) to see what watersheds have received curtailment letters.



Information on the drought is available at the State Water Board's [drought website](#).

To learn about all actions the state has taken to manage our water resources and cope with the impacts of the drought, visit [Drought.CA.Gov](#). Every Californian should take steps to conserve water. Find out how at [SaveOurWater.com](#).

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