KAMALA D. HARRIS
Attorney General of California
TRACY L. WINSOR
GAVIN G. MCCABE
Supervising Deputy Attorneys General
MATTHEW G. BULLOCK, SBN 243377
TARA L. MUELLER, SBN 161536
CLIFFORD T. LEE, SBN 74687
Deputy Attorneys General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5546
Fax: (415) 703-5480
E-mail: Cliff.Lee@doj.ca.gov
Attorneys for Defendants and Respondents State Water Resources Control Board, et al.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

Coordination Proceeding Special title (Rule 3.550) CALIFORNIA WATER CURTAILMENT CASES, BYRON-BETHANY IRRIGATION DISTRICT, v. STATE WATER RESOURCES CONTROL BOARD, et al.	Case No. 1-15-CV-285182 JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4838 MEMORANDUM OF POINTS AND AUTHORITIES OF RESPONDENTS STATE WATER RESOURCES CONTROL BOARD, ET AL., IN SUPPORT OF DEMURRER TO PETITIONER BYRON-BETHANY IRRIGATION DISTRICT'S FIRST AMENDED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DAMAGES Date: February 19, 2016 Time: 9:00 a.m. Dept: 1 Judge: The Honorable Peter H. Kirwan Action Filed: June 26, 2015

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INTRODUCTION

In this unprecedented drought year, Respondent State Water Resources Control Board (Board) staff have issued water curtailment notices which inform the public about the availability of water for diversion in individual watersheds based upon the hydrologic information in Board staff's possession. These notices are informational only and have no binding effect on individual water right holders. In addition, the Board has commenced water right enforcement proceedings as to specific diverters to determine whether those diverters are taking water outside of the scope of their claimed water rights. Petitioner Byron-Bethany Irrigation District (BBID) objects to these drought mitigation efforts and asks this Court, *inter alia*, to: 1) set aside the Board's curtailment notices, and 2) interrupt and enjoin the pending Board administrative enforcement action against BBID.

BBID's challenges to the curtailment notices and the pending enforcement action should be dismissed under the doctrines of ripeness and exhaustion of administrative remedies. In addition, because the remedy for challenging these Board actions is by way of a petition for writ of mandate, BBID's declaratory and injunctive relief claims are an improper method for contesting a Board administrative action.[1]

The Board respectfully requests that this Court sustain the Board's demurrer to BBID's first amended petition for writ of mandate and complaint for declaratory and injunctive relief and damages without leave to amend.

BACKGROUND

California is in the midst of the most severe drought in the State's history. On January 17, 2014, Governor Brown issued a Proclamation of a State of Emergency resulting from the drought. (Board Second Request for Jud. Not. (Board Second RJN, Exh 1.)[2] The Governor called for

[1] It appears that all sixteen of BBID's causes of action, with the exception of the Eighth Cause of Action arising under the Public Records Act, directly challenge either the Board's water curtailment notices and/or the Board's enforcement action. The Eighth Cause of Action appears to be an indirect challenge to the water curtailment notices and/or the Board's enforcement action. To the extent that BBID intends the Eighth Cause of Action to challenge some other Board action, the respondents demur to the claim on the grounds that the claim is uncertain, ambiguous, and unintelligible. (Code Civ. Proc., § 430.10, subd. (f).)

[2] A demurrer may be based on judicially noticeable matters. (Code Civ. Proc., § 430.70.)

statewide reductions in water use and directed the State Water Board to "put water right holders throughout the state on notice that they may be directed to cease or reduce water diversions based on water shortages." (*Id.*, ¶ 7.) On April 25, 2014, the Governor issued a continued proclamation of drought emergency, which maintained the previous emergency orders (Board Second RJN, Exh. 2, ¶ 1), and further ordered the Board "to require curtailment of diversions when water is not available under the diverter's priority of right." (*Id.*, ¶ 17.)

On April 1, 2015, Governor Brown issued Executive Order B-29-15. (Board Second RJN, Exh. 3.) It again extends the state of emergency (*Id.*, ¶ 1) and orders that:

> The Water Board shall require frequent reporting of water diversion and use by water right holders, conduct inspections to determine whether illegal diversions or wasteful and unreasonable use of water are occurring, and bring enforcement actions against illegal diverters and those engaging in the wasteful and unreasonable use of water.

(*Id.*, ¶ 10.)

On June 12, 2015, Board staff issued a notice indicating that, based upon the hydrological data available to it, there was insufficient water supply in the Sacramento-San Joaquin river and Delta watersheds to satisfy appropriative water rights with a priority date of 1903 or later. (Board Second RJN, Exh. 4).[3] On June 26, BBID filed an action in Contra Costa County Superior Court, challenging the June notice. On June 29, West Side Irrigation District (WSID), Central Delta Water Agency, South Delta Water Agency, and Woods Irrigation Company (hereafter "the WSID Petitioners") filed a similar action in Sacramento County Superior Court.

[3] California maintains a "dual system" of water rights, which distinguishes between the rights of "riparian" users, those who possess water rights by virtue of owning the land by or through which flowing water passes, and "appropriators," those who hold the right to divert such water for use on both contiguous and noncontiguous lands. (See *El Dorado Irrigation Dist. v. State Water Resources Control Board* (2006) 142 Cal.App.4th 937, 961.) For historical reasons, California further subdivides appropriators into those whose water rights were established before and those after 1914. Post-1914 appropriators may possess water rights only through a permit or license issued by the Board, and their rights are circumscribed by the terms of the permit or license. Riparian users and pre-1914 appropriators do not need a permit or license to divert water. (*Millview County Water District v. SWRCB* (2014) 229 Cal.App.4th 879, 888-889.) In times of shortage, riparian water rights holders generally have priority over appropriators. Among appropriators, senior appropriators---those who acquired their rights first in time---are entitled to satisfy their reasonable needs before more junior appropriators are entitled to any water. (*Id.* at p. 890.)

On July 7, Sacramento County Superior Court Judge Shelleyanne W.L. Chang held an ex parte hearing in the WSID case. On July 10, Judge Chang partially granted the WSID Petitioners' application for a temporary restraining order, finding that the notices could be construed as coercive orders to cease diversions, and issued an order to show cause why a preliminary injunction should not issue. (Board Second RJN, Exh. 5.)

On July 15, the Board modified the curtailment notices, consistent with Judge Chang's order, and issued a revised notice to all diverters who previously received curtailment notices (hereafter "revised notice"). (Board Second RJN, Exh. 6.) This revised notice rescinded the curtailment notices to the extent the notices may have been construed as "an order requiring [anyone] to stop diversions under [their] affected water rights." (*Ibid.*)

The revised notice fully addressed the alleged procedural due process deficiencies of the initial curtailment notices. First, the revised notice states that "[t]he purpose of this notice is to rescind the 'curtailment' portions of the unavailability notices you received." (*Ibid.*) Second, the notice declares that "[t]o the extent that any of the notices described above contain language that may be construed as an order requiring you to stop diversions under your affected water right, that language is hereby rescinded." (*Ibid.*) Third, the notice announces that "any language that may be construed as requiring affected water right holders to submit curtailment certification forms is hereby rescinded." (*Ibid.*) Fourth, the notice informs the recipient that there is insufficient water available for certain categories of junior water rights holders, but provides that "[i]f you believe you received this notice in error, or have information that you want to provide in response to this notice, or have information you believe the State Water Board staff should otherwise consider, you may submit that information" to the Board. (*Ibid.*) Finally, the notice makes clear that it "does not establish or impose any compliance responsibilities." (*Ibid.*) Contrary to BBID's allegations, the plain language of the revised notice makes clear that it is not a binding document and does not "command" BBID or any other water user to cease diverting water, and therefore does not deprive BBID of its right to divert water. As described below, Judge Chang confirmed the purely informational nature of the revised notice in her order denying a preliminary injunction. (Board Second RJN, Exh. 7 [Chang order].)

On July 20, the Board's enforcement unit of the Division of Water Rights issued charging documents commencing an administrative civil liability (ACL) proceeding against BBID. (Board Second RJN, Exh. 8.) The predicate issue in that proceeding will be the determination of whether there wass sufficient water available to divert pursuant to BBID's own water rights at the time of the alleged unauthorized diversion, and if not, whether BBID was engaging in the unauthorized diversion of water in violation of Water Code section 1052. (Board Second RJN, Exh. 9, p. 2.) On August 6, BBID requested a hearing before the Board under section 1055 of the Water Code based on its disagreement with the facts and allegations set forth in the July 20 ACL complaint. (Board Second RJN, Exh. 10.)

On July 30, Judge Chang heard argument on the order to show cause why a preliminary injunction should not issue. In response to a coordination motion filed by the Board, the BBID action and four related matters were referred by the Judicial Council to the Alameda County Superior Court for a coordination motion hearing; on July 31 that court, through Judge Evelio Grillo, signed an order staying all five included actions pending a hearing on the coordination motion. On Monday, August 3, the Sacramento County Superior Court, through Judge Chang, issued a minute order denying the preliminary injunction in the WSID case, which order also had the effect of lifting the TRO. (Board Second RJN, Exh. 7.) Later that day, the parties and the Sacramento County Superior Court received notice of the stay issued by Judge Grillo. (Board Second RJN, Exh. 11.)

The five included actions were subsequently transferred to the Santa Clara County Superior Court for a coordinated trial. After filing amended petitions and complaints, BBID and WSID moved this Court to stay the pending Board enforcement proceedings against the districts. On September 24, 2015 this Court issued its Order after Hearing on September 22, 2015, denying BBID and WSID's respective stay motions. As this Court observed in its order, "[i]n the instant case, both BBID and WSID will have the opportunity to present evidence at the administrative enforcement hearing regarding their respective rights to the water before a tribunal that is required to be impartial, fair and neutral, and has the specific expertise to adjudicate these issues." (Sept. 24, 2015, Order After Hearing at pp. 5-6 (hereafter Sept. 24 Order).)

STANDARD OF REVIEW

A demurrer is used to test whether the complaint alleges facts sufficient to state a cause of action. (Code Civ. Proc., § 430.10, subds. (e), (f).) In deciding a general demurrer, the court should: (1) "treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law"; (2) "consider matters which may be judicially noticed"; and (3) "give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; see also *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.) When a demurrer is sustained, it is the plaintiff's burden to demonstrate that a reasonable possibility exists that amendment may cure the defects in the complaint. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43.) To satisfy this burden, the plaintiff must show in what manner the complaint can be amended and how that amendment will change the legal effect of the pleading. (*Ibid.*) The plaintiff must describe the elements of the cause of action and authority for it plus factual allegations that sufficiently state all required elements of that cause of action. (*Ibid.*) As explained below, there is no legal basis for BBID's claims against the Board; thus, BBID will not be able to successfully amend its petition and complaint. Accordingly, the Board asks that this Court sustain this demurrer without leave to amend.

ARGUMENT

I. THE EXHAUSTION OF ADMINISTRATIVE REMEDIES DOCTRINE BARS CAUSES OF ACTION ONE THROUGH TWELVE AND FOURTEEN THROUGH SIXTEEN BECAUSE THEY CHALLENGE THE BOARD'S PENDING ENFORCEMENT ACTION DIRECTED AGAINST BBID

BBID's Causes of Action One through Twelve and Fourteen through Sixteen challenge the Board's enforcement action directed at BBID.[4] However, as this Court has stated "[i]n the

[4] The challenges to the enforcement action are contained in the following paragraphs: First Cause of Action (¶ 98); Second Cause of Action (¶ 107); Second Cause of Action (¶¶ 121-126); Fourth Cause of Action (¶ 134); Fifth Cause of Action (¶¶ 136-141); Sixth Cause of Action (¶¶ 143-151, 154); Seventh Cause of Action (¶¶ 159-166); Eighth Cause of Action (¶¶ 174-179); Ninth Cause of Action (¶ 187); Tenth Cause of Action (¶ 200); Eleventh Cause of Action (¶ 207); Twelfth Cause of Action (¶ 210); Fourteenth Cause of Action (¶ 226); Fifteenth Cause of Action (¶¶ 229, 231); and Sixteenth Cause of Action (¶¶ 235-241).

instant case, both BBID and WSID will have the opportunity to present evidence at the administrative enforcement hearing regarding their respective rights to the water before a tribunal that is required to be impartial, fair and neutral, and has the specific expertise to adjudicate these issues." (Sept. 24, 2015, Order at pp. 5-6.) As explained below, this Court should apply the same reasoning here and grant the demurrer as to the above-listed causes of action for failure of BBID to exhaust its administrative remedies.

As the Sixth Appellate District has held, "[u]nder the doctrine of administrative exhaustion, the long-standing general rule is this: where an adequate administrative remedy is provided by statute, resort to that forum is a jurisdictional prerequisite to judicial consideration of the claim." (*McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 274.) Under this doctrine, "a controversy is not ripe for adjudication until the administrative process is completed and the agency makes a final decision that results in a direct and immediate impact on the parties." (*Ibid*; *Tejon Real Estate, LLC v. City of Los Angeles* (2014) 223 Cal.App.4th 149, 156.) The doctrine is a "fundamental rule of procedure." (*Abelleira v. District Court of Appeal.* (1941) 17 Cal.2d 280, 293.) It is "principally grounded on concerns favoring administrative autonomy (i.e. courts should not interfere with an agency determination until the agency has reached a final decision) and judicial efficiency (*i.e.* overworked courts should decline to intervene in an administrative dispute unless absolutely necessary)." (*Farmers Ins. Exch. v. Superior Court* (*People*) (1992) 2 Cal.4th 377, 391.) The doctrine applies even when a petitioner challenges the administrative proceedings on constitutional grounds. (*McAllister, supra,* 147 Cal.App.4th at p. 276.)

The separation of powers principle derived from the California Constitution provides the constitutional basis for the exhaustion doctrine. (*County of Contra Costa v. State of Cal.*. (1986) 177 Cal.App.3d 62, 76-77 (*County of Contra Costa*).) The *County of Contra Costa* court observed that because an "administrative procedure is part of the legislative process," separation of powers mandates that "a judicial action before the legislative process has been completed is premature and a court is without jurisdiction until administrative remedies have been exhausted." (*Id.* at p. 77.) Likewise here, if the courts are permitted to enjoin an ongoing quasi-judicial

agency procedure, this "would be to permit the courts to engage in an unwarranted interference" with the agency's process and also would contravene the separation of powers. (*Ibid.*, citing *Santa Clara County v. Super. Ct.* (1949) 33 Cal.2d 552, 556.)

In *Temescal Water Co. v. Dept. of Public Works* (1955) 44 Cal.2d 90, 94, the California Supreme Court specifically addressed the question of whether a water right determination of the "existence of unappropriated water" was a matter to be considered first by the Department of Public Works (the Board's predecessor) or whether a private party is "entitled to a trial de novo" before the superior court. According to the Supreme Court, "a holding that such danger is so imminent as to justify an independent judicial proceeding to determine the availability of unappropriated water *before* the department considers an application, would deprive the administrative proceeding of all of its proper functions."" (*Id.* at p. 106, emphasis added.) Judicial relief from a water right determination is only proper under section 1094.5 of the Code of Civil Procedure *after* the agency has issued the water right permit and *after* the aggrieved party has exhausted all administrative remedies. (*Ibid.*) In the present case, the exhaustion doctrine similarly bars petitioners from "depriv[ing] the [Board's] administrative proceeding of all of its proper functions" by having a trial de novo before this Court regarding the contested water rights issues prior to a final Board determination of those issues. (*Ibid.*)

BBID may assert that the "futility" exception to the exhaustion doctrine allows it to obtain a stay of proceedings. However, the California Supreme Court has held that this "exception applies only if the party invoking it can positively state that the administrative agency has declared what its ruling will be in a particular case." (*Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1313.) A statement by an agency representative "other than the body charged with hearing and deciding" is not sufficient to invoke the "futility" exception. (*Tejon, supra*, 223 Cal.App.4th at p. 158.) In the present case, BBID's petition at best only suggests that certain Board *staff* have rendered opinions on issues to be considered in the pending enforcement proceedings.[5] Since the Board, not its staff, is the "body charged with hearing and deciding," the

[5] As with any enforcement action by any agency, some staff in the enforcement unit must, of necessity, be of the opinion that an enforcement action is appropriate. Otherwise no (continued...)

"futility" exception does not apply here, and the exhaustion doctrine precludes the relief requested by BBID.

Based on the foregoing, this Court should confirm its exhaustion of administrative remedies ruling in its Sept. 24, 2015, Order and dismiss BBID's Causes of Action One through Twelve and Fourteen through Sixteen to the extent that the causes of action request this Court to enjoin or otherwise challenge the Board's pending administrative enforcement proceedings directed against BBID. To the extent that any remaining causes of action can be read as challenging the enforcement proceedings, the Board requests dismissal of those claims as well.

II. THE RIPENESS DOCTRINE BARS BBID'S CAUSES OF ACTION ONE THROUGH FOURTEEN BECAUSE BBID IS CHALLENGING THE BOARD'S JUNE 21, 2015, CURTAILMENT NOTICE AND JULY 15, 2015, REVISED NOTICE, WHICH HAVE NO BINDING EFFECT ON BBID

BBID's Causes of Action One through Fourteen challenge the Board's issuance of the June 21, 2015, water curtailment notice as revised by the July 15, 2015, notice.[6] To the extent that BBID is grounding its claims against the Board on these curtailment notices, and not the pending enforcement proceedings, BBID's claims should be dismissed for lack of ripeness. The June notice provided collective notification to all diverters whose diversions from the Sacramento-San Joaquin rivers and the Delta were based on pre-1914 appropriative rights with a priority date of 1903 or later, that "due to ongoing drought conditions, there is insufficient water in the system to service their claims of right." (Board Second RJN, Exh. 4.) While the June notice stated that "[t]hose who *are found* to be diverting water beyond what is legally available to them *may* be subject to administrative penalties," nothing in the generic notice "found" that any individual diverter had been actually diverting without authorization, nor did the notice initiate

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administrative actions would ever commence.

[6] The challenges to the Board notices are contained in the following paragraphs: First Cause of Action (¶¶ 89-98); Second Cause of Action (¶¶ 100-107); Third Cause of Action (¶¶112, 125); Fourth Cause of Action (¶¶ 128-131, 134); Fifth Cause of Action (137-139); Sixth Cause of Action (¶¶ 147-151); Seventh Cause of Action (¶¶156-157, 162); Eighth Cause of Action (¶ 179); Ninth Cause of Action (¶¶ 182, 187); Tenth Cause of Action (¶¶ 193-194, 198-200); Eleventh Cause of Action (¶ 207); Twelfth Cause of Action (¶¶ 209-211); Thirteenth Cause of Action (¶¶ 217-221); and Fourteenth Cause of Action (¶¶ 223, 226).

any enforcement action against any diverter. (*Ibid.*, italics added.)

As noted above, on July 15, 2015, the Board revised and clarified the June notice "to rescind the 'curtailment' portions of the unavailability notices." (Board Second RJN, Exh. 6.) Specifically, the revised notice states that "[t]o the extent that any of the notices described above contain language that may be construed as an order requiring you to stop diversions under your affected water right, that language is hereby rescinded." (*Ibid.*) While the revised notice, like the June notice, does state that "[t]hose who *are found* to be diverting water beyond what is legally available to them *may* be subject to administrative penalties," nothing in the revised notice finds that any diverter has been actually diverting without authorization, nor does the notice commence any enforcement action against any diverter. (*Ibid.*, italics added.) To underscore the non-binding nature of the curtailment notices, the revised notice further states that "[t]his notice does not establish or impose any new compliance responsibilities." (*Ibid.*)

In light of the above, BBID has not alleged, nor can it allege, a ripe controversy requiring resolution by this Court. A basic prerequisite to judicial review of administrative acts is the existence of a ripe controversy. (*Pacific Legal Foundation v. California Coastal Comm.* (1982) 33 Cal.3d 158,169 (*Pacific Legal*).) 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.)

As the California Supreme Court has observed, the purpose 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 way by the challenging parties." (*Pacific Legal*, *supra,* 33 Cal.3d at p. 171, quoting *Abbott Laboratories v. Gardner* (1967) 387 U.S. 136, 148-149); accord *PG&E Corp. v. P.U.C.* (2004) 118 Cal.App.4th 1174, 1216 (*PG&E Corp.*).) Generally, courts "will not decide the correctness

of an administrative agency's construction of a statute unless the party requesting relief has been cited or in some way concretely penalized by the agency based on that purportedly erroneous construction." (*Cal. Assn. of Health Facilities v. Dept. of Health Services* (1997) 16 Cal.4th 284, 290, fn. 3.)

In *Pacific Legal, supra*, 33 Cal.3d 158, the California Supreme Court set forth a two-pronged test for determining whether an action is ripe. (33 Cal.3d at p. 171.) Under that test, reviewing courts evaluate both: (1) the fitness of the issues for judicial decision; and (2) the hardship to the parties of withholding court consideration. (*Ibid.*) BBID's causes of action challenging the June notice and revised notice do not satisfy this test. First, BBID's challenges to the notices are not fit for judicial review because the notices do not find that BBID has been diverting water illegally, nor do they commence any action against BBID. As the First Appellate District has held, "the mere fact the parties have adverse positions" does not "render the issues appropriate for immediate judicial resolution." (*PG&E Corp., supra,* 118 Cal.App.4th at p. 1217.) "Where the posture of a case may require a court to speculate about unpredictable future events in order to evaluate the parties' claims," the claims are not ripe for judicial review. (*Ibid*; see also *Wilson & Wilson v. City Council* (2011) 191 Cal.App.4th 1559, 1582.) Second, BBID cannot claim it has suffered any hardship as a result of the notices because the notices are just that – notices – and do not require BBID to take any particular action in response to them.

In *PG&E Corp.*, the Public Utilities Commission had issued an interpretive "interim opinion" on a condition the Commission had imposed on its approval of the electric utilities' request to be reorganized as holding companies. This "holding company condition" set certain minimum capital requirements. (*PG&E Corp., supra,* 191 Cal.App.4th at pp. 1181-1182.) The utilities vigorously disputed the Commission's interpretation of the condition and sought judicial review. However, the First Appellate District rejected the utilities' claim that their challenge was "fit" for judicial review because "the PUC made no finding that any holding company or utility had violated the first priority condition." (*Id.* at p. 1191.) Because the Commission had "yet to apply its interpretation … to a concrete set of facts, the dispute petitioner would like this court to resolve is abstract," and thus the claim was not fit for judicial review. (*Id.* at p. 1217.) The court

further found that the utilities could not meet the second ripeness factor by claiming hardship, even though at least one utility alleged that the interim opinion adversely affected its stock prices and its ability to raise funds on the capital market. Because the Commission had not determined that any specific utility had violated the contested condition, the Court of Appeal held that the utilities' alleged hardships were not "concrete," but were "in fact speculative." (*Id.* at p. 1219.)

BBID's challenge to the curtailment notices is strikingly similar to the facts in *PG&E Corp.* Like the Commission's interim opinion in *PG&E Corp.*, the Board's notices do not find that any specific party has engaged in illegal conduct. Likewise, the Board notices do not initiate any enforcement proceeding against any specific party. Thus, BBID's challenge to the Board's curtailment notices similarly "are not ripe for review" because the issues posed are abstract and therefore not fit for review and the claimed hardships are speculative at best. (*PG&E Corp.*, *supra*, 191 Cal. App.4th at p. 1222.)[7]

The Board therefore asks that this Court dismiss BBID's Causes of Action One through Fourteen for lack of a ripe controversy. To the extent that any of BBID's other causes of action can be read as challenging the Board's curtailment notices, those causes of action similarly should be dismissed.[8]

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[7] In addition, BBID's twelfth cause of action for takings also is not ripe because the Board's pending enforcement action is not a final agency action, and the curtailment notices are merely general notices which have not yet been applied to BBID. "[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." (*People v. Murrison* (2002) 101 Cal.App.4th 349, 363, quoting *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 10 [holding that water rights takings claim was not ripe because the challenged regulation had not yet been applied to the water rights in question]; see also *County of Alameda v. Superior Court* (2005) 133 Cal.App.4th 558, 567 ["under both federal and California law, before a plaintiff may establish a regulatory taking, it must first demonstrate that it has received a final decision from the land use authority regarding application of the challenged land use regulation to its property"].)

[8] In the alternative, BBID's challenges to the curtailment notices are now moot. (*City of Los Angeles v. County of Los Angeles* (1983) 147 Cal.App.3d 952, 958.) In *National Assn. of Wine Bottlers v. Paul* (1969) 268 Cal.App.2d 741, 746-747, the First Appellate District remanded a challenge to a bulk grape marketing order to the trial court for dismissal as moot where the Department of Agriculture subsequently repealed the order. In facts similar to the present case, the Department's Director had adopted a bulk grape marketing order over the protest of the wine industry. The industry then obtained a trial court injunction against the Director's implementation of the order. Because of "the failure of a majority of the processors to assent to the continuation of the marketing order, the Director issued a directive terminating it." (*Id.* at p. 745.) On these facts, the Court of Appeal found the litigation to be moot and that the public

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III. BBID'S DECLARATORY RELIEF CLAIMS CONTAINED IN CAUSES OF ACTION ONE THROUGH ELEVEN AND THIRTEEN, FIFTEEN, AND SIXTEEN ARE IMPROPER CHALLENGES TO THE BOARD'S ADMINISTRATIVE ACTIONS

BBID's Causes of Action One through Eleven, Thirteen, Fifteen, and Sixteen ask this Court to enter declaratory judgment against the Board. BBID seeks declaratory relief as both as to the pending Board enforcement proceedings directed against BBID and the Board's curtailment notices.[9] Such relief is improper when challenging an agency's administrative activity.

"The law is well established that an action for declaratory relief is not appropriate to review an administrative decision." (*Walter Leimert Co. v. Calif. Coastal Comn.* (1993) 149 Cal.App.3d 222, 230, citing *State of California v. Superior Court* (*Veta*) (1974) 12 Cal.3d 237, 249; see also *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 127; *Scott v. City of Indian Wells* (1972) 6 Cal.3d 541, 546.) In the *Veta* case, the petitioners applied for a permit from the California Coastal Zone Conservation Commission (the predecessor to the California Coastal Commission) to develop property within the coastal zone, and the Commission denied the permit. The petitioners challenged the denial, filing a petition for writ of mandate and complaint for other relief, including a cause of action seeking a judicial declaration that petitioners were entitled to construct their development without a permit, or in the alternative that they were entitled to a permit, from the Commission. The Commission demurred to this and other causes of action in the petition and complaint, which the trial court overruled in its entirety. The Commission sought review of the trial court's rulings by prerogative writ in the California Supreme Court. The Supreme Court reversed, reasoning that "an action for declaratory relief is

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interest did not justify addressing the merits of the case because it was "highly speculative whether the issue will come up again." (*Id.* at p. 747.) As noted above, the Board has cured any alleged deficiencies in the June notice through the revised notice. BBID's claims regarding the curtailment notices are therefore moot.

[9] BBID's declaratory relief claims are set forth in the following paragraphs of the amended complaint: First Cause of Action (¶ 97); Second Cause of Action (¶ 106); Third Cause of Action (¶ 124); Fourth Cause of Action (¶ 134); Fifth Cause of Action (¶ 141); Sixth Cause of Action (¶ 154); Seventh Cause of Action (¶ 166); Eighth Cause of Action (¶ 179); Ninth Cause of Action (¶ 186); Tenth Cause of Action (¶ 199); Eleventh Cause of Action (¶ 206); Thirteenth Cause of Action (¶ 220); Fifteenth Cause of Action (¶ 231); and Sixteenth Cause of Action (¶ 241).

not appropriate to review an administrative decision." (*Veta*, 12 Cal.3d at p. 249.)

In addition, the *Veta* case held that, while declaratory relief is available to challenge the constitutionality of a statute, regulation or ordinance on its face (i.e. as applied in every situation), this procedure cannot be used to challenge the application of such statute, regulation or ordinance to a particular case and thereby "essentially seek[] to review the validity of an administrative action." (*Veta*, 12 Cal.3d at p. 251.) Instead, "such review is properly brought under the provisions of section 1094.5 of the Code of Civil Procedure rather than by means of declaratory relief." (*Ibid.*; accord *Walter Leimert Co.*, *supra*, 149 Cal.App.3d at pp. 230-231; *City of Santee v. Superior Court* (1991) 228 Cal.App.3d 713, 718; *Taylor v. Swanson* (1982) 137 Cal.App.3d 416, 418; *Mobil Oil Corp. v. Superior Court* (1976) 59 Cal.App.3d 293, 307.) Administrative mandamus is "the proper and sole remedy" for challenging the constitutionality of the application of a statute to a particular case. (*Agins v. City of Tiburon* (1979) 24 Cal.3d 266, 272-273.) Accordingly, the California Supreme Court in *Veta* reversed the trial court's decision overruling the Commission's demurrer to a cause of action seeking a declaration that the California Coastal Act was unconstitutional as applied to Veta. (*Veta*, 12 Cal.3d at p. 251.)

More recently, in *Tejon Real Estate, LLC. v. City of Los Angeles* (2014) 223 Cal.App.4th 149, 154-155, a property owner obtained informal opinions from city and fire department staff concerning the cost of a water extension and the need to install a fire hydrant. Believing that these opinions contravened city regulations, the property owner filed a declaratory relief action under section 1060 of the Code of Civil Procedure. Citing *Veta* and *Selby Realty*, the Second Appellate District sustained the city's demurrer on the grounds that declaratory relief was an improper means "to review a purported administrative decision." (*Tejon*, *supra*, 223 Cal.App.3d at p. 155.)

In the present case, BBID similarly seeks declaratory relief against the Board as to the pending enforcement action, the June notice and the revised notice. BBID does not bring any facial constitutional challenges to a Board statute or regulation. Thus, under the foregoing cases, this Court should sustain the Board's demurrer as to all of BBID's claims for declaratory relief.

IV. BBID'S FOURTEENTH CAUSE OF ACTION SHOULD BE DISMISSED BECAUSE INJUNCTIVE RELIEF IS A REMEDY, NOT AN INDEPENDENT CAUSE OF ACTION

BBID's Fourteenth Cause of Action seeks injunctive relief against the Board. The Court should dismiss this cause of action because injunctive relief is a remedy, not a stand-alone cause of action.

It is settled that a "permanent injunction is merely a remedy for a proven cause of action. It may not be issued if the underlying cause of action is not established." (*City of South Pasadena v. Department of Transportation* (1994) 29 Cal.App.4th 1280, 1293; *Camp v. Board of Supervisors* (1981) 123 Cal.App.3d 334, 356 ["Injunctive relief is a remedy and not, in itself, a cause of action, and a cause of action must exist before injunctive relief may be granted."].) In *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 65, the Third Appellate District recently sustained a demurrer to a cause of action seeking "an order enjoining the enforcement of a [city] ordinance" on the grounds that "[i]njunctive relief is a remedy, not a cause of action" and that "[a] cause of action must exist before a court may grant a request for injunctive relief." (*Ibid.*; see also *Livingston Rock & Gravel Co. v. County of Los Angeles* (1954) 43 Cal.2d 121, 128-129.) Based upon these authorities, the Court likewise should dismiss BBID's Fourteenth Cause of Action for injunctive relief.

CONCLUSION

BBID's lengthy petition, with its sixteen causes of action, seeks to challenge: 1) the Board's curtailment notices which, as revised, have no concrete impact on BBID; and 2) the Board's pending enforcement proceeding directed against BBID that has only just commenced, a proceeding where BBID can raise all of its objections regarding Board administrative policies before a neutral hearing officer and can seek judicial review if it is dissatisfied with the end result of the administrative process. Settled doctrines of exhaustion of administrative remedies and ripeness bar BBID from bypassing the Board's administrative process and requesting judicial intervention by this Court. Furthermore, BBID's reliance on declaratory and injunctive relief claims as separate causes of action contravenes long-standing rules of administrative law. For the above reasons, the Board respectfully requests that this Court grant the Board's demurrer without

leave to amend.

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Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
TRACY L. WINSOR
GAVIN G. MCCABE
Supervising Deputy Attorneys General
MATTHEW G. BULLOCK
TARA L. MUELLER
Deputy Attorneys General

CLIFFORD T. LEE
Deputy Attorney General
Attorneys for Defendants and Respondents State Water Resources Control Board, et al.

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