

LEGAL MEMO

BBID: The SWRCB's Curtailments, Contrary Legal Position, Threats of Enforcement, and Scare Tactics

On June 12, 2015, the State Water Resources Control Board's Executive Director sent a Notice to BBID and more than 100 other pre-1914 water right holders in the Delta and Sacramento-San Joaquin River watersheds purporting to curtail appropriative water rights with a priority date of 1903 and later. The June 12, 2015 Notice included, in bold type, the following:

NOTICE OF UNAVAILABILITY OF WATER AND NEED FOR IMMEDIATE CURTAILMENT FOR THOSE DIVERTING WATER IN THE SACRAMENTO-SAN JOAQUIN WATERSHEDS AND DELTA WITH A PRE-1914 APPROPRIATIVE CLAIM COMMENCING DURING OR AFTER 1903

The "Notice" was clear in its directive to cease diversions: "[w]ith this notice, the State Water Resources Control Board is notifying pre-1914 appropriative claims of right with a priority date of 1903 and later within the Sacramento-San Joaquin Watersheds and Delta of *the need to immediately stop diverting water . . .*" (emphasis added.) The Notice also directed BBID to complete a form certifying that BBID has ceased all diversions under its pre-1914 right.

Along with this "Notice," the SWRCB issued a Press Release, which provided, in bold type:

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

The press release explained that Notices were "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." (emphasis added.) The press release warned of the same threats of enforcement contained in the Notice, namely that anyone violating the curtailment would be subject to fines of "up to \$1,000 per day and \$2,500 per acre-foot of water unlawfully diverted, cease and desist orders, or prosecution in court."

BBID, like other pre-1914 water right holders, saw the Notice as an actual order issued by the SWRCB, threatening significant fines and penalties for the failure to comply. The certification form the SWRCB demands be completed by BBID requires BBID to confirm that it has ceased diversions altogether or is diverting based upon some other basis of right. It does *not* recognize or provide for continued diversions under BBID's pre-1914 appropriative water rights. Based upon the Notice and SWRCB's threats of enforcement, BBID and other water right holders prepared to challenge the SWRCB's curtailments. Banta-Carbona Irrigation District (BCID) was the first to file in Court, and sought a stay or temporary restraining order prohibiting enforcement of the Notice.

In a complete about-face, the SWRCB opposed BCID's request for stay or temporary restraining order by claiming the "Notice" was not an order or directive from the SWRCB, but was, instead, simply a general public notice. They did so in documents filed with the San Joaquin County Superior Court late in the afternoon on June 22, 2015.

BBID was surprised that the SWRCB was taking a position before the San Joaquin County Superior Court that was entirely inconsistent with the Notice itself, and inconsistent with the press release issued by the SWRCB just days before. Based upon the SWRCB's new position regarding the Notice, BBID sent the SWRCB a letter, dated June 23, 2015, pointing out the inconsistencies in the SWRCB's shifting position and attempting to confirm that the SWRCB actually did *not* curtail any water rights through issuing the Notice and that no certification was required. The SWRCB has not yet responded to BBID.

The SWRCB apparently, however, allowed its attorneys and employees to continue the enforcement threats to the press. For example, SWRCB staff attorney David Rose is quoted in the press as saying that the Notice carries the message that "you hold this right. Under our analysis, this right doesn't have water available to it. Be aware." In other words, the SWRCB has already determined there is no water available for you to divert – and, in order to avoid enforcement, any given water right holder will need to establish that water is available for that particular diverter on that particular day at the diverters point of diversion. The SWRCB's position is unprecedented and is wholly unworkable given the vastness of the state water system. It turns the entire water right system on its head in an attempt to coerce water right holders to cease diversions under the threat of significant enforcement.

BBID, like other water right holders, now faces the choice of continuing to divert water under its pre-1914 water rights when the SWRCB has already pre-determined that there is no water available for BBID to divert. BBID has been subjected to threats of fines of \$1,000/day and \$2,500 per acre-foot of water diverted, coercing the District to cease to divert under its pre-1914 appropriative water rights and turn to alternate water supplies in an attempt to mitigate damages to water users within BBID.

BBID is still assessing the issue of water availability and has not made a decision on whether to continue diversions under its pre-1914 appropriative water rights.

Whatever the ultimate decision with respect to diversions of water, BBID will vigorously defend its water rights for its customers and will seek damages from the SWRCB and State of California, not only for the coercive actions of the SWRCB, but also for the unlawful taking of BBID's water rights through the issuance of the Notice and threats of enforcement.