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SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SANTA CLARA

Coordination Proceeding  
Special Title (Rule 3.550)

**CALIFORNIA WATER CURTAILMENT  
CASES**

JUDICIAL COUNCIL  
COORDINATION PROCEEDING  
NO. 4838<sup>1</sup>

**STATEMENT OF DECISION,  
PHASE I TRIAL**

In Phase I of these coordinated actions, plaintiffs/petitioners seek a writ of mandate and declaratory relief in response to water curtailment efforts by defendant/respondent California

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<sup>1</sup> Included Actions: (1) Byron-Bethany Irrigation District v. California State Water Resources Control Board, Superior Court of California, County of Contra Costa, Case No. N150967; (2) The West Side Irrigation District v. California State Water Resources Control Board, Superior Court of California, County of Sacramento, Case No. 34201580002121; (3) Banta-Carbona Irrigation District v. California State Water Resources Control Board, Superior Court of California, County of San Joaquin, Case No. 39201500326421 CU WMSTK; (4) Patterson Irrigation District v. California State Water Resources Control Board, Superior Court of California, County of Stanislaus, Case No. 2015307; (5) San Joaquin Tributaries Authority v. California State Water Resources Control Board, Superior Court of California, County of Stanislaus, Case No. 2015366. The following cases were added-on by Order dated October 26, 2016: (6) The West Side Irrigation District v. SWRCB, Superior Court of California, County of Sacramento, Case No. 34-2016-80002387; (7) San Joaquin Tributaries Authorities v. SWRCB, Superior Court of California, County of Sacramento, Case No. 34-2016-80002389; and (8) Byron-Bethany Irrigation District v. SWRCB, Superior Court of California, County of Sacramento, Case No. 34-2016-80002388.

1 State Water Resources Control Board (the “Board” or “SWRCB”) in the Sacramento-San  
2 Joaquin River and Delta watersheds in response to California’s recent drought.

3 Having considered the record and the arguments of counsel, the Court issues the  
4 following Statement of Decision:

5  
6 I. Summary of the Proceedings

7 In April, May, and June of 2015, the Board issued curtailment notices (the “2015  
8 Curtailment Notices”) to water users in the above-described watersheds, including pre-1914,  
9 “senior” appropriators<sup>2</sup> who dispute the Board’s jurisdiction to curtail their water rights. As  
10 discussed below, the notices culminated the Board’s years-long effort to respond to an historic  
11 drought. Petitioners began to file the included actions in courts across the region, claiming,  
12 among other challenges, that the notices were issued without due process of law.

13 In response to petitioners’ challenges, a temporary restraining order (“TRO”) was issued  
14 in the included action of *West Side Irrigation District v. State Water Resources Control Board*  
15 (Case No. 34201580002121) by the Superior Court of California, County of Sacramento in July  
16 of 2015. The Sacramento court found that the notices likely violated due process and prohibited  
17 the Board from taking any action against certain water rights holders based on the notices. The  
18 Board then issued a “Partial Rescission Notice” revising the curtailment notices on July 15,  
19 2015, and the Sacramento court declined to enter a preliminary injunction.

20 In August of 2015, the Board’s petition for coordination was granted and the Judicial  
21 Council of California authorized the Presiding Judge of this Court to assign a trial judge in the  
22 coordinated actions, which were assigned to the Honorable Peter H. Kirwan. Meanwhile, the  
23 Board commenced administrative enforcement proceedings against two of the petitioners,  
24 Byron-Bethany Irrigation District (“BBID”) and West Side Irrigation District (“WSID”). The  
25  
26

27 <sup>2</sup> Appropriative water rights with a priority date before the effective date of the Water Commission Act are  
28 commonly referred to as “senior” or “pre-1914” water rights. (Dismissal AR 8386, *In the Matter of Administrative  
Civil Liability Complaint Against Byron-Bethany Irrigation Dist. and in the Matter of Draft Cease and Desist Order  
Against the West Side Irrigation Dist.*, Cal. St. Wat. Res. Bd. Order No. WR 2016-0015, 2016 WL 3388132, at \*12,  
fn. 2; Notice AR 4663.)

1 Court denied BBID and WSID's motions to stay the enforcement proceedings.<sup>3</sup> Following three  
2 days of administrative hearings, the enforcement proceedings were ultimately dismissed by the  
3 Board on June 15, 2016.

4 On October 3, 2016, this Court sustained in part and overruled in part SWRCB's  
5 demurrers to the five original petitions/complaints and granted motions to intervene by State  
6 Water Contractors ("SWC"). Three additional petitions/complaints by existing petitioners,  
7 which address the administrative enforcement proceedings, were coordinated as add-on cases by  
8 stipulation of the parties. In addition to SWC, the Central Delta Water Agency and South Delta  
9 Water Agency (which are also petitioners) and the Department of Water Resources have  
10 intervened in one or more of the coordinated actions.

11 The actions were reassigned to the Honorable Brian C. Walsh on January 3, 2017.  
12 SWRCB filed the administrative record associated with the enforcement proceedings on January  
13 17 (the "Dismissal AR") and filed a second administrative record associated with the curtailment  
14 notices on February 21 (the "Notice AR"). On May 4, the Court denied without prejudice  
15 petitioners' requests for fees and costs incurred in the administrative enforcement actions;  
16 overruled the Board's demurrers to three of the original petitions/complaints and sustained with  
17 leave to amend its demurrer to BBID's original petition/complaint; and denied without prejudice  
18 petitioners' motions to augment the administrative record. The Board answered each of the  
19 petitions/complaints, asserting several affirmative defenses.

20 In July of 2017, the Court ordered that trial would proceed in three phases, with Phase I  
21 to address the various petitions for writ of mandate, as well as BBID's eleventh cause of action  
22 for declaratory relief in Case No. 2015-1-CV-285182. Petitioners filed a consolidated opening  
23 brief on the merits on July 28, 2017. SWRCB and, separately, SWC filed opposition briefs in  
24 October of 2017. The Department of Water Resources joined in portions of both oppositions.  
25 Petitioners filed a consolidated reply brief in November of 2017, and trial was held on January  
26 26, 2018.

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<sup>3</sup> BBID appealed that order and challenged it by writ of mandate. The Court of Appeal denied the writ on February 2, 2016, and BBID subsequently withdrew its appeal.

1 II. Evidentiary Issues

2 The parties raise a number of evidentiary issues by formal objections and otherwise.

3 A. The Parties' Arguments Regarding the Administrative Record

4 As previously noted, two administrative records have been submitted by the Board:

5 (1) the "Notice AR," comprised of public and internal documents related to the Board's water  
6 availability analysis and other efforts regarding curtailments during the drought and (2) the  
7 "Dismissal AR," consisting of materials associated with the administrative enforcement  
8 proceedings against BBID and WSID. While they did not file any formal objection to this effect,  
9 petitioners argue that the "Notice AR" was improperly designated, because there were no formal  
10 "proceedings before the inferior tribunal" in connection with the curtailment notices as  
11 contemplated by Code of Civil Procedure section 1094.5, subdivision (a). However, *Phelps v.*  
12 *State Water Resources Control Bd.* (2007) 157 Cal.App.4th 89, 105 (hereinafter, "*Phelps*") held  
13 that Water Code section 1126 "indicates the Legislature's intent that section 1094.5 govern  
14 judicial review of all cases relating to state water law," whether or not a hearing is required by  
15 law as generally contemplated by that section. While *Phelps* does not address the scope of the  
16 administrative record in a case where no hearing occurred, it would be impossible for a court to  
17 fairly evaluate the action taken by an agency in the absence of any record of its activities. The  
18 Court will accordingly consider the Notice AR, which petitioners themselves discuss throughout  
19 their briefing. In any event, petitioners' main issue appears to be with consideration of the water  
20 availability analysis supporting the 2015 Curtailment Notices, which the Court will not evaluate  
21 in substance for the reasons discussed below. Petitioners' concerns with the Notice AR should  
22 thus be obviated.

23 SWRCB and SWC raise a separate but related issue with regard to the administrative  
24 record: they contend that petitioners should be barred from challenging the Board's water  
25 availability analysis using evidence from the Dismissal AR. Again, because the Court will not  
26 address petitioners' challenges to the water availability analysis in substance, it need not rule on  
27 this dispute.

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1           B. The SWRCB's Objections to Evidence

2           Beyond the two administrative records, petitioners submit an Appendix of Declarations in  
3 support of their trial brief. The declarations primarily address petitioners' legal status and  
4 authority, along with details regarding their asserted water rights. The Board objects to the  
5 declarations in their entirety on the ground that petitions for writ of administrative mandate are  
6 to be decided on the administrative record unless "there is relevant evidence that, in the exercise  
7 of reasonable diligence, could not have been produced or that was improperly excluded at the  
8 [administrative] hearing ...." (Code Civ. Proc., § 1094.5, subd. (e).) Here, however, there was  
9 no opportunity for any of the petitioners to present evidence at a hearing with regard to the  
10 curtailment notices, and several of the petitioners did not participate in the enforcement  
11 proceedings. Again, as discussed in *Phelps*, the Water Code provides that section 1094.5  
12 governs judicial review of "all cases relating to state water law," regardless of whether a hearing  
13 is conducted. (*Phelps, supra*, 157 Cal.App.4th at p. 105.) It would be inequitable to allow the  
14 Board to unilaterally determine the record under these circumstances, without accounting for the  
15 unique context resulting from the interplay between the Water Code and section 1094.5. Further,  
16 as urged by petitioners, this evidence relates to petitioners' standing to bring these actions in  
17 court, an issue that would not have been developed at the administrative level in any event. (See  
18 *Nasha L.L.C. v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 485 [admitting evidence of  
19 administrative bias; "it was only in the course of the superior court action that [petitioner] had  
20 the opportunity to ... fully develop" this issue].) Consequently, the Court OVERRULES the  
21 Board's objection to the declarations as a whole (Objection No. 1).

22           SWRCB also objects to portions of several declarations that recite the water rights held  
23 by each petitioner on the grounds that these statements lack foundation, are speculative, are  
24 outside the personal knowledge of the declarant, lack relevance, assert a legal argument or  
25 conclusion, constitute opinion testimony without a proper foundation and oral testimony of the  
26 content of writings, and are hearsay. While some of these objections might have merit if the  
27 Court were called to determine the validity of specific water rights, for purposes of Phase I, the  
28 Board does not dispute that petitioners possess the water rights they claim, and it never purported

1 to curtail or take enforcement action against petitioners on the ground that their asserted water  
2 rights were invalid. Further, the Board does not dispute petitioners' standing to bring these  
3 actions on the ground that they and/or their constituent water users do not actually hold the water  
4 rights they claim. Consequently, though the Court need not make any findings regarding the  
5 validity of specific water rights at this time in order to resolve the claims before it, the Court  
6 **OVERRULES** these objections (Objection Nos. 2-7).

7 C. The Parties' Requests for Judicial Notice

8 The Board's request for judicial notice of prior orders in this action (Request Nos. 1, 3,  
9 and 6) is **GRANTED**. (Evid. Code, § 452, subd. (d).) Its request for judicial notice of a water  
10 law treatise published by the State of California (Request No. 2) is also **GRANTED**. (Evid.  
11 Code, § 452, subd. (c).) The Board's request is unopposed in these respects.

12 The Board also seeks judicial notice of notices of water availability that it issued to water  
13 users during September through November of 2015 (Request No. 4). According to the Board,  
14 these notices "demonstrate that the Curtailment Notices have been rescinded." Along the same  
15 lines, the Board requests judicial notice of its resolution (Request No. 5) delegating authority to  
16 its Executive Director to take certain actions. Petitioners oppose the Board's request as to these  
17 documents, particularly as to the truth of factual statements they contain, but they do not  
18 specifically dispute the documents' authenticity and concede that the curtailment notices were  
19 rescinded. The Board's requests are **GRANTED** as to the existence, contents, and legal effect of  
20 these documents, but not as to the truth of any factual statements they contain. (Evid. Code,  
21 § 452, subd. (c); *Linda Vista Village San Diego Homeowners Assn., Inc. v. Tecolote Investors,*  
22 *LLC* (2015) 234 Cal.App.4th 166, 185 [when courts take judicial notice of documents, their legal  
23 effect may be established where there is no genuine dispute regarding the documents'  
24 authenticity and the legal effect is clear from the face of the documents]; *Sosinsky v. Grant*  
25 (1992) 6 Cal.App.4th 1548, 1564-1568 [courts cannot take judicial notice of the truth of hearsay  
26 statements or facts set forth in judicially noticeable documents].)

27 SWC's request for judicial notice of Water Board Order WR 2016-0015 and Water Board  
28 Decision 1641, which is unopposed, is **GRANTED**. (Evid. Code, § 452, subd. (c).)

1 Finally, petitioners' request for judicial notice of the Board's opening brief in the relevant  
2 case of *Young v. State Water Resources Control Bd.* (2013) 219 Cal.App.4th 397 and of orders  
3 issued by the Board in two 2011 enforcement proceedings, submitted with their reply papers, are  
4 GRANTED. (Evid. Code, § 452, subds. (c) and (d).)

### 5 6 III. Overview of California Water Law and the Board's Role

7 To put the Board's curtailment efforts and the parties' arguments in context, a basic  
8 understanding of the legal landscape in which this dispute arises is needed. While this Court will  
9 not attempt an exhaustive summary of the complex body of law governing water rights in  
10 California, an overview of its most relevant principles is in order.

#### 11 A. Relevant General Principles of California Water Law

12 "California maintains a 'dual system' of water rights, which distinguishes between the  
13 rights of 'riparian' users, those who possess water rights by virtue of owning the land by or  
14 through which flowing water passes, and 'appropriators,' those who hold the right to divert such  
15 water for use on noncontiguous lands." (*Light v. State Water Resources Control Bd.* (2014) 226  
16 Cal.App.4th 1463, 1478.) Prior to 1914, appropriative water rights were available, generally  
17 speaking, "by simply diverting water and putting it to use." (*People v. Murrison* (2002) 101  
18 Cal.App.4th 349, 361.) In 1913, the Legislature adopted the Water Commission Act, codifying  
19 the process for appropriation of water and creating a regulatory scheme to establish those rights.  
20 (*Ibid.*) Since 1914, new appropriative rights must issue through a permit or license from the  
21 Board, and these rights are circumscribed by the terms of the permit or license. (*Millview*  
22 *County Water District v. State Water Resources Control Bd.* (2014) 229 Cal.App.4th 879, 889  
23 (hereinafter, "*Millview*"). "Pre-1914" appropriators need neither a permit nor other  
24 governmental authorization to exercise their water rights. (*Ibid.*)

25 Other than those flowing from the permitting requirement, there are no "substantive  
26 difference[s]" between pre-1914 and later appropriative rights. (*People v. Murrison, supra*, 101  
27 Cal.App.4th at p. 361.) Both rights are limited to a particular volume of diversion; for pre-1914  
28 rights, that volume is determined by historical use, while for post-1914 rights it is fixed by

1 permit. (*Millview, supra*, 229 Cal.App.4th at p. 889.) All appropriative rights may be forfeited  
2 by the appropriator's failure to make beneficial use of a particular volume of water, up to the  
3 entire volume of a claim, for a period of five years. (*Ibid.*)

4 In times of shortage, the "rule of priority" generally renders the rights of riparian users  
5 paramount to those of appropriators, although riparians must curtail their use proportionately  
6 among themselves. (*Millview, supra*, 229 Cal.App.4th at p. 890.) Appropriators may only divert  
7 water when the reasonable needs of riparian users are fully satisfied; as a result, appropriators  
8 may be deprived of all use of water when supply is short. (*Ibid.*) Among appropriators, senior  
9 users who acquired their rights first in time are entitled to satisfy their reasonable needs, up to  
10 their full appropriation, before more junior appropriators are entitled to any water. (*Ibid.*)

11 All water rights, even riparian and pre-1914 rights, are subject to the police powers of the  
12 state. (*People v. Murrison, supra*, 101 Cal.App.4th at p. 361.) Specifically, all water rights are  
13 limited by the "reasonable use" doctrine, which is enshrined in the California Constitution and  
14 has been held to be a valid exercise of the police power. (*Millview, supra*, 229 Cal.App.4th at  
15 p. 890; *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 106.) In  
16 addition, the state's navigable waters are subject to the public trust doctrine, providing that "the  
17 state, as trustee, has a duty to preserve this trust property from harmful diversions by water rights  
18 holders." (*United States v. State Water Resources Control Bd., supra*, 182 Cal.App.3d at p. 106.)  
19 Thus, "no one has a vested right to use water in a manner harmful to the state's waters." (*Ibid.*)

#### 20 B. Overview of SWRCB's History and Authority Over Water Rights

21 "The Board was created as the State Water Commission in 1913 to administer the  
22 appropriation of water for beneficial purposes." (*Light v. State Water Resources Control Bd.*,  
23 *supra*, 226 Cal.App.4th at p. 1481.) Originally, "the Board had the 'limited role' of granting use  
24 rights to water that was not being applied to beneficial purposes and was not otherwise  
25 appropriated." (*Ibid.*, quoting *National Audubon Society v. Superior Court (Dept. of Water and*  
26 *Power of the City of Los Angeles)* (1983) 33 Cal.3d 419, 442.)

27 In 1928, Article X, section 2 of the California Constitution was enacted, which abolished  
28 the right of riparian users to make unreasonable use of water and "established the doctrine of



1 reasonable use as an overriding feature of California water law” applicable to “[a]ll uses of  
2 water.” (*National Audubon Society v. Superior Court*, *supra*, 33 Cal.3d at pp. 442-443.) “The  
3 1928 amendment itself did not expand the authority of the Water Board,” but “[m]ore recent  
4 statutory and judicial developments ... have greatly enhanced [its] power ... to oversee the  
5 reasonable use of water ....” (*Id.* at pp. 443-444.) However, “notwithstanding its power to  
6 protect the public interest, the Board plays a limited role in resolving disputes and *enforcing*  
7 rights of water rights holders, a task mainly left to the courts.” (*United States v. State Water*  
8 *Resources Control Bd.*, *supra*, 182 Cal.App.3d at p. 104, italics original.) “[T]he Board’s role in  
9 examining existing water rights to estimate the amount of surplus water available for  
10 appropriation does *not* involve adjudication of such rights.” (*Ibid.*, italics original.)

11 A recent opinion by the Court of Appeal for the First Appellate District summarizes the  
12 Board’s authority with a focus on riparian and pre-1914 users. It explains that, as currently  
13 constituted, the Board’s enabling statute describes its function as “to provide for the orderly and  
14 efficient administration of the water resources of the state” and grants it the power to “exercise  
15 the adjudicatory and regulatory functions of the state in the field of water resources.” (*Light v.*  
16 *State Water Resources Control Bd.*, *supra*, 226 Cal.App.4th at pp. 1481-1482, quoting Wat.  
17 Code, § 174.) “In that role, the Board is granted ‘any powers ... that may be necessary or  
18 convenient for the exercise of its duties authorized by law’ (§ 186, subd. (a)), including the  
19 power to ‘make such reasonable rules and regulations as it may from time to time deem  
20 advisable....’ (§ 1058.)” (*Id.* at p. 1482.)

21 Again, “[t]he Board’s authority to prevent unreasonable or wasteful use of water extends  
22 to all users, regardless of the basis under which the users’ water rights are held.” (*Light v. State*  
23 *Water Resources Control Bd.*, *supra*, 226 Cal.App.4th at pp. 1482.) While riparian and pre-1914  
24 appropriative users “cannot be required to obtain permits as a condition of exercising their right  
25 to divert, that does not mean their use of California’s waters is free from Board regulation.” (*Id.*  
26 at p. 1487 [upholding a regulation establishing a process for addressing diversions for frost  
27 protection in light of impacts on young salmon populations in the Russian River stream system].)  
28 “Limited and particularized prohibitions designed to prevent unreasonable use are different from,

1 and by no means legally equivalent to, the comprehensive regulation embodied in a water use  
2 permit, which, as an allocation of ‘excess water,’ typically limits the user’s rights without regard  
3 to the reasonableness of use.” (*Ibid.*)

4 With regard to the adjudication of water rights, the Water Code provides that the Board,  
5 in addition to the courts, may make a comprehensive determination of “all rights to water of a  
6 stream system whether based upon appropriation, riparian right, or other basis of right.”  
7 (*National Audubon Society v. Superior Court, supra*, 33 Cal.3d at p. 448, citing Wat. Code,  
8 § 2501.) “Upon petition signed by one or more claimants to water of any stream system, ... the  
9 board shall, if ... the facts and conditions are such that the public interest and necessity will be  
10 served by a determination of the water rights involved, enter an order granting the petition and  
11 make proper arrangements to proceed with the determination.” (Wat. Code, § 2525.) This part  
12 of the Water Code expressly authorizes the Board to determine the relative priorities of all water  
13 rights in a stream system. (See Wat. Code, § 2769 [“The decree shall in every case declare as to  
14 the water right adjudged to each party, the priority, amount, season of use, purpose of use, point  
15 of diversion, and place of use of the water...”].) However, “the Board’s determination is  
16 tentative in nature and must be filed in the superior court for hearing and final adjudication.  
17 (§§ 2750, 2768, 2769 ...)” (*United States v. State Water Resources Control Bd., supra*, 182  
18 Cal.App.3d at p. 104, fn. 3.)

19 As this discussion shows, the Board was created to administer new appropriations and  
20 has broad regulatory authority over these post-1914 water rights, but its powers have expanded  
21 to include limited regulatory and adjudicatory authority over senior users. With this background  
22 in mind, the Board’s efforts at issue in these actions may be better understood and evaluated.

#### 24 IV. Factual Findings

25 In 2014 and 2015, California was experiencing a drought unprecedented in scope and  
26 severity during its statehood. As described in an emergency proclamation issued by the  
27 Governor of California, the state suffered record dry conditions, water supplies dipped to  
28 alarming levels, and the risk of harm to drinking water supplies, agricultural employment,

1 farmers' long-term investments in their crops, and wildlife, as well as the risk of wildfires,  
2 greatly increased. (Notice AR 1581.) In this extremely challenging environment, the Board was  
3 called to exercise its powers to uphold California's water rights system and regulate water use  
4 for the benefit of the public.

5 A. Curtailment Efforts in 2014

6 In January of 2014, the Governor issued his emergency proclamation declaring a state of  
7 emergency due to drought conditions. (Notice AR 1581.) Among other commands, the  
8 proclamation directed the Board to "put water right holders throughout the state on notice that  
9 they may be directed to cease or reduce water diversions based on water shortages." The 2014  
10 proclamation did not discuss or refer to actual curtailments<sup>4</sup> of water rights, nor did it purport to  
11 define or expand the Board's authority with respect to curtailments.

12 "On the same day as the Governor's Proclamation, January 17, 2014, the State Water  
13 Board issued a Notice of Surface Water Shortage and Potential for Curtailment of Water Right  
14 Diversions." (Notice AR 1926, Cal. St. Wat. Res. Bd. Resolution No. 2014-0031, 2014 WL  
15 3398115.) "The notice advised that if dry weather conditions persist, the State Water Board will  
16 notify water right holders of the requirement to limit or stop diversions of water under their water  
17 rights, based on water right priority." (*Ibid.*) This informational notice (Notice AR 1580) was  
18 followed by the Board's publication of a "Fact Sheet" (Notice AR 1585) describing it as such  
19 and indicating that "notices to curtail water diversion" might follow in the "Next Steps," which  
20 would also include efforts by the Board to "assure compliance."

21 On March 1, 2014, the Governor signed drought relief legislation into law. (Notice AR  
22 1926, Resolution No. 2014-0031.) The legislation amended Water Code section 1058.5, which  
23 had previously authorized the Board to adopt emergency regulations "to prevent the waste,  
24 unreasonable use, unreasonable method of use, or unreasonable method of diversion, of water, to  
25 promote wastewater reclamation, or to promote water conservation," to additionally authorize  
26 emergency regulations "to require curtailment of diversions when water is not available under  
27

28 <sup>4</sup> SWRCB indicates that "curtailment" is not a term of art in water law, and the Court is not aware of its use  
anywhere in the Water Code other than in the recent amendment to section 1058.5 discussed herein. Like the Board,  
the Court uses the term "curtailment" to refer to a voluntary or required reduction or cessation of water diversion.

1 the diverter's priority of right" and "to require reporting of diversion or use or the preparation of  
2 monitoring reports." The Governor proclaimed a continuing state of emergency on April 25,  
3 2014, ordering that "[t]he Water Board will adopt and implement emergency regulations  
4 pursuant to Water Code section 1058.5, as it deems necessary to prevent the waste, unreasonable  
5 use, unreasonable method of use, or unreasonable method of diversion of water, to promote  
6 water recycling or water conservation, and to require curtailment of diversions when water is not  
7 available under the diverter's priority of right." (Notice AR 1788.)

8 On May 27, 2014, the Board issued curtailment notices similar to those at issue in these  
9 actions to all post-1914 water rights holders in the Sacramento and San Joaquin River  
10 Watersheds. (Notice AR 1845.) These notices informed recipients "of the need to immediately  
11 stop diverting," with exceptions for human health and safety and hydroelectric power generation,  
12 and required them to submit a certification of compliance. They included a "Warning" to senior  
13 rights holders:

14 You may have received this notice because the State Water Board's records show  
15 you divert water under a riparian or pre-1914 water right. As such, it is important  
16 that you conserve water due to declining supplies. If current conditions persist,  
17 the State Water Board may curtail some pre-1914 and riparian water rights in the  
18 near future.

19 (Notice AR 1846.)

20 On July 2, 2014, SWRCB adopted Resolution No. 2014-0031, entitled "To Adopt an  
21 Emergency Regulation for Statewide Drought-Related Curtailment of Water Diversions to  
22 Protect Senior Water Rights." The resolution discussed the earlier responses to the drought as  
23 summarized above. The Board found that an emergency regulation was needed because "[t]he  
24 State's current system for curtailing diversions and enforcing those curtailments will not provide  
25 for timely and effective implementation of the State's water right system during the current  
26 drought when numerous water diversions require curtailment and enforcement in a short period  
27 of time." (Notice AR 1926, Resolution No. 2014-0031.) "The emergency regulation is needed  
28 to greatly increase timely compliance with and effective enforcement of the reporting  
requirements and water diversion curtailments issued by the State Water Board during the  
drought to ensure that senior water rights are protected." The Board found that, while it "has

1 existing authority to issue curtailment notices for junior water users, and to initiate enforcement  
2 action, it is likely that there will be a high degree of noncompliance during the drought that will  
3 impact senior water right holders because water will not be available for their diversions due to  
4 unauthorized diversions and failure to report.”

5 The resolution discussed the Board’s then-existing curtailment procedures:

6 The State Water Board currently requests that recipients of a curtailment notice  
7 submit information regarding, among other things, their curtailment or reason for  
8 continued diversion. However, if many water right holders fail to respond to the  
9 request for reporting information under the curtailment notices issued under the  
10 current authorities, it will be exceedingly difficult for the State Water Board to  
11 focus curtailment investigations and refine future curtailment analyses to reflect  
12 actual hydrologic conditions and actual legal water use[.] ... As opposed to the  
13 process required by the State Water Board’s existing authorities, which requires  
14 case-by-case investigations, issuance of a draft cease and desist order (CDO) or  
proposed administrative civil liability (ACL), or both, and the opportunity for an  
evidentiary hearing, a violation of the emergency regulation is itself immediately  
enforceable by administrative liability. This would be in addition to any ACL for  
violation of a CDO pursuant to Water Code section 1845 or for unlawful  
diversion in violation of Water Code section 1052.

15 First and foremost among the emergency regulations adopted by the Board, “California  
16 Code of Regulations, title 23, section 875 provide[d] that the Deputy Director for the Division of  
17 Water Rights may issue curtailment orders, and identifie[d] sources of sufficiently reliable  
18 information upon which to base a decision to issue those orders.” Section 875 further “clarifie[d]  
19 that, unlike curtailment notices, curtailment orders issued pursuant to that section are subject to  
20 the State Water Board’s petition for reconsideration process.”

21 The Board decided that the emergency regulations would not “apply curtailment orders  
22 to” holders of riparian and pre-1914 rights. It indicated that

23 in light of the complexities regarding the relative priority of riparian and pre-1914  
24 appropriative rights, upon receipt of a complaint alleging interference with a  
25 water right by a riparian or pre-1914 water right holder, or information indicating  
26 unlawful diversion of stored water by riparians or pre-1914 water right holders,  
27 the Deputy Director may issue an order to these diverters requiring the diverter to  
28 provide certain information necessary for determining issues of relative priority.  
Staff are encouraged to investigate whether curtailment notices and potential  
enforcement under the Board’s existing processes should be pursued for these  
diverters based on the information received[.]

1 The resolution indicates that public notice of the Board's consideration of the emergency  
2 regulations was issued, and the Board also distributed for public review and comment a Finding  
3 of Emergency pursuant to State laws and regulations.

4 The emergency regulations were adopted by the Board on July 2, 2014. However, the  
5 Board did not issue any curtailment orders under these regulations. According to a presentation  
6 found in the administrative record, this was because "over 9,000 Curtailment Notices [had]  
7 already issued" in 2014 and "[i]ssuing Curtailment orders for [the] same diversions would have  
8 taken resources away from field investigation activities already in progress." (Notice AR 3184.)  
9 The 2014 curtailment notices were ultimately lifted in October and November of that year. (See  
10 Notice AR 2274-2275, 2339-2342.)

11 By the end of 2014, SWRCB had "conducted nearly 950 field inspections to determine  
12 compliance with curtailment notices." (Notice AR 3193, Cal. St. Wat. Res. Bd. Resolution No.  
13 2015-0015, 2015 WL 1406115.) "The field inspection program, and the submittal of responses  
14 to curtailment notices, found that many persons who received curtailment notices for a post-1914  
15 right claimed a riparian or pre-1914 right for continued diversions." (*Ibid.*) Although reporting  
16 of such rights is typically required, "[i]n many instances, the claimed right had never been  
17 reported to the Division." (*Ibid.*) The Board also issued two "informational orders" to a total of  
18 over 473 pre-1914 and riparian users under another section of the emergency regulations,  
19 California Code of Regulations section 879, subdivision (c). (Notice AR 3185.) A limited  
20 number of enforcement proceedings were initiated for failure to respond to these orders. (*Ibid.*)  
21 As provided by the enabling statute, the 2014 emergency regulations automatically expired in  
22 early 2015. (See Wat. Code, § 1058.5, subd. (c) ["An emergency regulation adopted by the  
23 board under this section may remain in effect for up to 270 days, as determined by the board  
24 ...."].)

#### 25 B. The Drought Continues in 2015

26 As the drought continued, the Board issued another informational "Notice of Surface  
27 Water Shortage and Potential for Curtailment of Water Right Diversions" on January 23, 2015.  
28 (Notice AR 2902.) On March 17, it adopted Resolution No. 2015-0015, "Amending and

1 Readopting a Drought Emergency Regulation Regarding Informational Orders.” The resolution  
2 amended Code of Regulations section 879 governing informational orders in order to “extend the  
3 Deputy Director’s authority to enforce the existing orders and authorize the Deputy Director to  
4 issue additional orders.” However, it did not extend the other aspects of the 2014 emergency  
5 regulations, including section 875 regarding curtailment orders, for reasons that are unclear.<sup>5</sup>

6 On April 1, 2015, the Governor issued Executive Order B-29-15, finding a continued  
7 drought emergency and extending the Governor’s proclamations discussed above, along with  
8 two prior executive orders. (Notice AR 3266.) In a section entitled “INCREASE  
9 ENFORCEMENT AGAINST WATER WASTE,” the Governor ordered that “[t]he Water Board  
10 shall require frequent reporting of water diversion and use by water right holders, conduct  
11 inspections to determine whether illegal diversions or wasteful and unreasonable use of water are  
12 occurring, and bring enforcement actions against illegal diverters and those engaging in the  
13 wasteful and unreasonable use of water.” Although SWRCB’s 2014 emergency regulations had  
14 expired, the Governor’s Executive order did not specifically address curtailments of water rights  
15 or the adoption of additional emergency regulations.

#### 16 C. The Curtailment Notices and Enforcement Actions at Issue Herein

17 It was the Board’s renewed curtailment efforts in 2015, in the absence of emergency  
18 regulations authorizing curtailment orders, that ultimately gave rise to these actions. On April  
19 23, 2015, SWRCB issued a curtailment notice to post-1914 right holders in the San Joaquin  
20 River Watershed, declaring a need for these users to “immediately stop diverting” and requiring  
21 them to complete a form certifying cessation of diversion under their post-1914 rights. (Notice  
22 AR 3470.) The notice stated that completion of the form was “mandatory to avoid unnecessary  
23 potential enforcement proceedings.” The notice cited Water Code sections 1052, 1055, 1831,  
24 and 1845. Together, these provisions purport to authorize penalties of \$1,000 per day and

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25  
26 <sup>5</sup> The Board did adopt an emergency regulation for “Curtailment of Diversions due to Insufficient Flow for Specific  
27 Fisheries for Mill, Deer, and Antelope Creeks,” declaring diversions that would reduce flows below minimums  
28 at least one “curtailment order” pursuant to this regulation. (*Ibid.*) Like the 2015 Curtailment Notices at issue in  
these actions, the “curtailment order” commanded that specific users cease diversions and required recipients to  
certify their compliance. (*Ibid.*) It indicated that “[v]iolations of this Order shall be subject to further enforcement  
and any applicable penalties pursuant to Water Code sections 1052, 1831, 1845, and 1846.” (Notice AR 3303.)

1 \$2,500 per acre-foot of water for past violations established through the Administrative Civil  
2 Liability ("ACL") process, and penalties of up to \$10,000 per day if the Board issues a Cease  
3 and Desist Order ("CDO") that a user subsequently violates. On May 1, 2015, a curtailment  
4 notice with identical language was issued to post-1914 right holders in the Sacramento River  
5 Watershed. (Notice AR 3516.) On June 12, 2015, a very similar notice informed pre-1914  
6 appropriative rights holders with a priority date of 1903 or later in both the Sacramento and San  
7 Joaquin River watersheds of the need to "immediately stop diverting" water. (Notice AR 4212.)  
8 This notice also required the completion of a form certifying that diversions had ceased and  
9 indicated that enforcement proceedings might be pursued against those who diverted water  
10 beyond that legally available to them under the authorities described above.

11 Petitioners BBID, WSID, Patterson Irrigation District, and Banta-Carbona Irrigation  
12 District submitted separate petitions for reconsideration of the curtailment notices under Water  
13 Code section 1122, but the Board rejected them on the ground that the notices were not a  
14 "decision" or "order" subject to reconsideration. (Notice AR 5201, 5203, 5270, 5272.) Still, the  
15 Board continued to indicate that enforcement actions might result if the petitioners continued to  
16 divert.

17 As already described, after lawsuits challenging the 2015 Curtailment Notices were filed  
18 and a TRO issued (Notice AR 4917), the Board issued a "Partial Rescission Notice" on July 15,  
19 2015 (Notice AR 4918). The Partial Rescission Notice stated that it was intended "to rescind the  
20 'curtailment' portions of the unavailability notices you received," including "language that may  
21 be construed as an order requiring you to stop diversions under your affected water right" and  
22 "language that may be construed as requiring affected water right holders to submit curtailment  
23 certification forms." However, it emphasized that "information available to the State Water  
24 Board continues to indicate that there is insufficient water available" for recipients to continue  
25 diverting and stated in bold: **"Diversion when there is no available water under the priority  
26 of your right is an unauthorized diversion and use and is subject to enforcement by the  
27 State Water Board."** The Partial Rescission Notice indicated that the Board was continuing  
28



1 inspections and re-emphasized that it could pursue enforcement under Water Code sections  
2 1052, 1055, 1831, and/or 1845.

3 And consistent with that threat, the Board promptly issued a draft CDO against WSID  
4 and an ACL Complaint to BBID. The draft CDO threatened fines of \$10,000 per day for non-  
5 compliance were a CDO to issue (Dismissal AR 0001), while the ACL Complaint sought over  
6 \$1.5 million in penalties for the period from June 13 to June 25, 2015, when BBID allegedly  
7 diverted after receiving the curtailment notice issued on June 12 (Dismissal AR 0010).<sup>6</sup>

8 As the actions before this Court proceeded, the hearings on the enforcement actions were  
9 consolidated and heard beginning on March 21, 2016, and both enforcement cases were  
10 dismissed on June 15, 2016. The Board's Dismissal Order affirmed the agency's "authority to  
11 take enforcement action pursuant to Water Code section 1052 against the unauthorized diversion  
12 of water under claim of a pre-1914 water right," but found that the Board's Prosecution Team  
13 had failed to meet its burden to show water was unavailable at the time petitioners diverted.  
14 (Dismissal AR 8386, *In the Matter of Administrative Civil Liability Complaint Against Byron-*  
15 *Bethany Irrigation Dist. and in the Matter of Draft Cease and Desist Order Against the West*  
16 *Side Irrigation Dist.*, Cal. St. Wat. Res. Bd. Order No. WR 2016-0015, 2016 WL 3388132, at  
17 \*8.)

18 With the state's reservoirs at improved volumes and the enforcement actions now  
19 concluded, this Court is asked to review the legal propriety of the Board's efforts before drought  
20 again reduces California's water supplies to emergency levels. Petitions for writ of mandate, and  
21 one cause of action for declaratory relief, challenging both the 2015 Curtailment Notices and the  
22 enforcement proceedings were heard in the Phase I trial on January 26, 2018.

#### 23 24 V. Standard of Review Governing Petitions for Writ of Mandate

25 The parties have a minor dispute regarding the standard of review to be applied to the  
26 administrative mandamus claims. As the Court previously ruled in this case, Water Code section  
27

28  
<sup>6</sup> It is unclear why the Board used different enforcement procedures against these entities.

1 1126 provides that Code of Civil Procedure section 1094.5 governs judicial review of all issues  
2 of state water law decided by the Board when performing an adjudicatory function like  
3 determining and enforcing water rights. (See *Phelps, supra*, 157 Cal.App.4th at p. 105; see also  
4 *United States v. State Water Resources Control Bd., supra*, 182 Cal.App.3d at p. 113 [“in  
5 undertaking to allocate water rights, the Board performs an adjudicatory function” and its actions  
6 are reviewed under section 1094.5].) Under that section, a trial court may issue a writ of  
7 administrative mandate if an agency has (1) acted in excess of its jurisdiction, (2) deprived the  
8 petitioner of a fair hearing, or (3) committed a prejudicial abuse of discretion. (Code Civ. Proc.,  
9 § 1094.5, subd. (b).) Abuse of discretion is established if the respondent has not proceeded in  
10 the manner required by law, the order or decision is not supported by the findings, or the findings  
11 are not supported by the evidence. (*Ibid.*)

12 “Where it is claimed that the findings are not supported by the evidence, in cases in  
13 which the court is authorized by law to exercise its independent judgment on the evidence, abuse  
14 of discretion is established if the court determines that the findings are not supported by the  
15 weight of the evidence. In all other cases, abuse of discretion is established if the court  
16 determines that the findings are not supported by substantial evidence in the light of the whole  
17 record.” (Code Civ. Proc., § 1094.5, subd. (c).) Petitioners contend that the Court should apply  
18 its independent judgment to each of the issues before it, while the Board asserts that the  
19 “substantial evidence” standard applies to petitioners’ challenges to the water availability  
20 analysis supporting the 2015 Curtailment Notices.

21 As the parties appear to agree, the majority of the issues raised by petitioners are not  
22 claims that the Board’s findings are unsupported by the evidence, but are legal questions to be  
23 reviewed de novo. (See *Duncan v. Department of Personnel Admin.* (2000) 77 Cal.App.4th  
24 1166, 1174.) Legal questions include “the ultimate questions, whether the agency’s decision was  
25 ... unlawful or procedurally unfair.” (*Ibid.*, quoting *Rosenblit v. Superior Court (Fountain Valley*  
26 *Regional Hospital and Medical Center)* (1991) 231 Cal.App.3d 1434, 1443.) While an agency’s  
27 interpretation of a statute or ordinance is given a level of deference considering the agency’s  
28 subject matter expertise, statutory interpretation is ultimately an issue of law for the Court’s

1 independent determination. (*MHC Operating Limited Partnership v. City of San Jose* (2003)  
2 106 Cal.App.4th 204, 219.) Notably, “the general rule of deference to [agency] interpretations  
3 ... does not apply when the issue is the scope of the agency’s jurisdiction,” a key issue here.  
4 (*Pacific Bell Wireless, LLC v. Public Utilities Com’n of State of Cal.* (2006) 140 Cal.App.4th  
5 718, 729, internal citations and quotations omitted.)

6 As discussed below, the Court will evaluate the writ requested by petitioners on the  
7 grounds that the Board exceeded its statutory jurisdiction, deprived the petitioners of a fair  
8 hearing, and did not proceed in the manner required by law, but will not reach the issue of  
9 whether the Board’s water availability analysis was supported by the evidence. Consequently,  
10 the de novo standard of review applies to all of the issues the Court must address, and it need not  
11 resolve the parties’ dispute regarding the standard governing review of the water availability  
12 analysis.

#### 13 14 VI. Statement of the Court’s Rulings

15 The Court will address the determinative issues with regard to the Phase I claims roughly  
16 as organized in the parties’ consolidated briefing, and generally without reference to the  
17 individual claims in the various petitions/complaints.

##### 18 A. Petitioners Lack Standing to Challenge the Dismissal Order

19 The Board contends that petitioners lack standing to challenge the Dismissal Order  
20 because they were not “aggrieved” by that order under Water Code section 1126, since it  
21 dismissed the administrative proceedings against them and imposed no consequences on them.  
22 (See Wat. Code, § 1126, subd. (b) [“Any party aggrieved by any decision or order may, not later  
23 than 30 days from the date of final action by the board, file a petition for a writ of mandate for  
24 review of the decision or order.”].) Petitioners respond that the Dismissal Order contains  
25 incorrect statements of law “assert[ing] an expanded scope of jurisdiction and regulatory  
26 authority over Petitioners’ water rights,” which will harm their water rights in the future if not  
27 challenged here.

28 ///

1 To have standing under section 1126, an aggrieved party's interest "must be immediate,  
2 pecuniary, and substantial and not nominal or a remote consequence of the judgment." (*State*  
3 *Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 829 [holding petitioner had no  
4 standing to challenge a permit condition imposed on another user], citing *County of Alameda v.*  
5 *Carleson* (1971) 5 Cal.3d 730, 737.) This standard is adopted from the standing requirement for  
6 appeals from a civil judgment. (*Id.* at pp. 829-830.) In that context, courts have held that a party  
7 dismissed from an action is without standing to appeal. (See *Bates v. John Deere Co.* (1983) 148  
8 Cal.App.3d 40, 53; see also *Hensley v. Hensley* (1987) 190 Cal.App.3d 895, 898 [citing *Maxwell*  
9 *Hardware Co. v. Foster* (1929) 207 Cal. 167, 170 for the proposition that "[a] party cannot  
10 appeal from a judgment in his favor"].) This standing jurisprudence

11 is grounded in the most basic notion of why courts entertain civil appeals. We are  
12 here to provide relief for appellants who have been wronged by trial court error.  
13 Our resources are limited and thus are not brought to bear when appellants have  
14 suffered no wrong .... The guiding principle is one often encountered in daily life:  
no harm, no foul.

15 (*State Water Resources Control Bd. Cases, supra*, 136 Cal.App.4th at p. 829, quoting *Rebney v.*  
16 *Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1132.) "The same reasoning applies with equal  
17 force to a party claiming to be aggrieved by a water rights decision by the Board." (*Id.* at  
18 p. 829.)

19 Here, petitioners have not suffered "immediate, pecuniary, and substantial" harm as a  
20 result of the Dismissal Order. Any future harm they fear is entirely speculative. While they  
21 seem to believe that statements in the Dismissal Order unnecessary to its resolution of the  
22 administrative proceedings in their favor will bind the Board or SWRCB staff, they provide no  
23 authority supporting this proposition. Nor do they provide any support for their request that the  
24 Court "strike" undesirable statements in an order resolving administrative proceedings in their  
25 favor. The Court accordingly finds that petitioners lack standing to challenge the Dismissal  
26 Order.

27 ///

28 ///

1        B. Petitioners Have Not Shown that the Board Failed to Conduct the Enforcement  
2        Proceedings in the Manner Required By Law

3        In addition to attacking the Dismissal Order itself, petitioners challenge other aspects of  
4        the administrative enforcement proceedings: they contend that the Board abused its discretion  
5        by refusing to entertain BBID's motion to dismiss the ACL Complaint and by rejecting BBID's  
6        cost memorandum filed in the administrative proceedings. Since these arguments do not address  
7        evidentiary findings by the Board, they raise the issue of whether the Board proceeded in the  
8        manner required by law. (See Code Civ. Proc., § 1094.5, subd. (b).)

9        Petitioners cite no regulatory or other authority that requires the Board to entertain a  
10       motion to dismiss enforcement proceedings. They do not argue that the failure to rule on  
11       BBID's motion before the hearing amounted to a due process violation, only that the process  
12       offered in the enforcement actions failed to cure the due process violations resulting from the  
13       2015 Curtailment Notices. Essentially, petitioners complain that they spent unnecessary time  
14       and money on the hearing because the Board would not rule on BBID's motion. But to establish  
15       an abuse of discretion, petitioners must show not merely that the Board's approach was  
16       imperfect or inefficient, but that the Board has not proceeded in the manner required by law.  
17       Petitioners do not even attempt to make this showing here.

18       Similarly, petitioners cite no authority that would authorize or require the Board to award  
19       costs in enforcement proceedings, other than Code of Civil Procedure section 1032, governing  
20       cost awards in civil actions. The Court previously struck memoranda of costs incurred during  
21       the administrative proceedings, which were filed directly in this action after the Board declined  
22       to award costs, noting that petitioners lacked authority supporting the application of section 1032  
23       to administrative proceedings. While they continue to argue that SWRCB erred in declining to  
24       award costs under section 1032, petitioners still cite no authority applying this section to  
25       administrative proceedings. As before, petitioners rely on argument that administrative  
26       proceedings have been deemed "actions" and "proceedings" in other contexts. This argument  
27       remains unpersuasive, and there is no basis to find that the Board improperly rejected BBID's  
28       cost memorandum.

1 Petitioners have thus failed to show that the Board failed to conduct the enforcement  
2 proceedings in the manner required by law.

3 C. The Curtailment Notices Were Final Agency Actions Under Water Code  
4 Section 1126, But the Court Will Not Issue a Declaration to That Effect

5 Turning to petitioners' challenges to the 2015 Curtailment Notices, BBID's eleventh  
6 cause of action in Case No. 2015-1-CV-285182 seeks declaratory relief "regarding whether  
7 curtailment notices issued by the SWRCB to water right holders are orders, decisions or final  
8 actions as contemplated by California Water Code sections 1122 and/or 1126, including the legal  
9 rights and duties arising therefrom by and between the SWRCB and water right holders."  
10 Petitioners contend that it was unclear whether they could challenge the 2015 Curtailment  
11 Notices through petitions for reconsideration or petitions for writ of mandate under these  
12 statutes, and the issue is likely to recur in the future. The Board did not directly address BBID's  
13 eleventh cause of action in its briefing or at trial, but has urged in connection with petitioners'  
14 due process claims that the curtailment notices were merely advisory in nature.

15 To review the statutes at issue, Water Code section 1122 provides that "[t]he board may  
16 order a reconsideration of all or part of a decision or order on the board's own motion or on the  
17 filing of a petition of any interested person or entity ... filed not later than 30 days from the date  
18 the board adopts a decision or order." Water Code section 1126 declares "the intent of the  
19 Legislature that all issues relating to state water law decided by the board be reviewed in state  
20 courts, if a party seeks judicial review." (Wat. Code, § 1126, subd. (a).) It provides that  
21 aggrieved parties "may, not later than 30 days from the date of final action by the board, file a  
22 petition for a writ of mandate for review of the decision or order." (Wat. Code, § 1126, subd.  
23 (b).) "If no aggrieved party petitions for a writ of mandate within the time provided by this  
24 section, the decision or order of the board is not subject to review by any court." (Wat. Code,  
25 § 1126, subd. (d).)<sup>7</sup>

26  
27  
28 <sup>7</sup> Sections 1122 and 1126 are found in a chapter of the Water Code entitled "Reconsideration, Amendment, and  
Judicial Review of Water Right Decisions and Orders." They apply to SWRCB decisions and orders issued under  
specified provisions of the Water Code, including those governing both the ACL and CDO processes (sections 1052,  
1055, 1831, and 1845), as well as section 1058.5 governing the issuance of emergency regulations authorizing

1       Returning to BBID's request for relief, *Phelps, supra*, 157 Cal.App.4th 89, a case which  
2 the Court has applied to this action before, is binding precedent on both the finality issue and the  
3 propriety of declaratory relief. In *Phelps*, individual farmers sought to challenge the Board's  
4 imposition of civil penalties under Water Code section 1052 for unauthorized diversion of water  
5 following the Board's issuance of curtailment notices. The curtailment notices, which were  
6 substantively identical to those at issue here, directed the farmers to "immediately" discontinue  
7 diversion under their permits and licenses, which "prohibit[ed] diversion of water when  
8 satisfaction of inbasin entitlements require[d] release of stored water ... by the Central Valley  
9 Project of the State Water Project." (At p. 97.) The curtailment notices announced the Board's  
10 determination that such water was being released, and indicated that failure to curtail "could  
11 result in imposition of administrative civil liability" under section 1052. (*Ibid.*)

12       The farmers did not challenge the curtailment notices directly, and SWRCB issued ACL  
13 complaints under section 1055 and imposed penalties after a hearing. (*Phelps, supra*, 157  
14 Cal.App.4th at pp. 97-98.) The farmers then sought to challenge the penalties imposed—the  
15 very approach that the Board contends petitioners should have taken here. But both the trial  
16 court and the appellate court held that the *Phelps* petitioners' challenge was time-barred under  
17 section 1126. The Court of Appeal first held that the petitioners could have challenged the  
18 imposition of the condition regarding the release of stored water at the time their permits and  
19 licenses were issued. (*Id.* at pp. 101-103.) It went on to hold that they were required to  
20 challenge the implementation of the condition through the curtailment notices because the  
21 curtailment notices were a final action by the Board. (*Id.* at pp. 103-105.) The Court of Appeal  
22 specifically rejected the argument, again raised by the Board here, that the curtailment notices  
23 were "merely notices of potential future violations," citing their "unequivocal language"

24  
25  
26  
27  
28       curtailment orders. (See Wat. Code, § 1120.) There is no provision in the Water Code that addresses a "curtailment  
notice" as such.

1 requiring plaintiffs “to *immediately* discontinue diversion of water.” (*Id.* at p. 104, italics  
2 original.)<sup>8</sup>

3 Under *Phelps*, the 2015 Curtailment Notices were final agency actions subject to  
4 challenge via petition for writ of mandate. That no public hearing preceded their issuance and no  
5 formal order was entered is not determinative. (*Phelps, supra*, 157 Cal.App.4th at p. 105  
6 “[n]othing in subdivision (b) of section 1126 limits the type of proceeding subject to judicial  
7 review,” and judicial review of board decisions “is not limited to ‘proceedings in which by law a  
8 hearing is required’ ” like other writ proceedings]; see also *Temescal Water Co. v. Dept. of*  
9 *Public Works, supra*, 44 Cal.2d at p. 102 [“The sufficiency of the administrative findings does  
10 not determine the availability of” judicial review, “but is a question to be determined upon ...  
11 review ....”].)

12 However, the Board has also issued truly informational curtailment notices. For this  
13 reason, the Court will not issue declaratory relief stating that all curtailment notices are final  
14 actions. Further, as the Court previously ruled, *Phelps* specifically held that “declaratory relief is  
15 unavailable” to challenge decisions or orders of the Board. (*Phelps, supra*, 157 Cal.App.4th at  
16 p. 105; see also *State of California v. Superior Court (Veta Co.)* (1974) 12 Cal.3d 237, 249 [“It is  
17 settled that an action for declaratory relief is not appropriate to review an administrative  
18 decision.”].) Petitioners’ arguments will be addressed in the context of their mandamus claims,  
19 which is the proper approach under *Phelps*.<sup>9</sup>

20 D. The Board Does Not Have Jurisdiction to Curtail Pre-1914 Appropriators Under  
21 Water Code Section 1052

22 As an initial matter, the Board contends that the issue of its jurisdiction to curtail pre-  
23 1914 appropriators was mooted by the rescission of the 2015 Curtailment Notices and the  
24

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25 <sup>8</sup> Although *Phelps* held that the writ at issue in that action was untimely on two independent grounds, both grounds  
26 are holdings that bind the Court. (See *Varshock v. California Dept. of Forestry and Fire Protection* (2011) 194  
27 Cal.App.4th 635, 646, fn. 7 [“when a decision is based on two separate grounds, neither is dictum”].)

28 <sup>9</sup> Petitioners also appear to seek a declaration that the Board must entertain petitions for reconsideration of  
curtailment notices, but did not brief this issue in any detail or clearly explain their request that the Court declare  
“the legal rights and duties arising [from the issuance of curtailment notices] by and between the SWRCB and water  
right holders.” Considering the permissive language of section 1122 governing petitions for reconsideration (“[t]he  
board *may* order a reconsideration of all or part of a decision or order ...,” italics added), plaintiffs have not shown  
they are entitled to relief on this point, even if declaratory relief was proper.



1 dismissal of the enforcement actions. However, as the Court previously held, even if the issue is  
2 technically moot, the Court will reach it under the public interest exception to mootness, since  
3 “the jurisdictional question posed is of continuing public interest and importance.” (*Young v.*  
4 *State Water Resources Control Bd.* (2013) 219 Cal.App.4th 397, 403 (hereinafter, “*Young*”)  
5 [rejecting mootness argument where Board had granted petition for reconsideration partially  
6 rescinding curtailment order].) Contrary to the Board’s argument, drought conditions are likely  
7 to recur in the future in California, and the parties will benefit from receiving guidance from the  
8 courts on this issue before they again find themselves addressing it in the midst of an emergency.  
9 (See *Southern Cal. Edison Co. v. Public Utilities Com.* (1978) 20 Cal.3d 813, 826 [“in California  
10 drought can occur at any time”]; *RiverWatch v. County of San Diego Dept. of Environmental*  
11 *Health* (2009) 175 Cal.App.4th 768, 782 [“drought [is] a persistent threat in California”].) The  
12 temporary and seasonal nature of drought emergencies and of the Board’s resulting curtailment  
13 efforts support this outcome: as summarized above, during the last drought, multiple rounds of  
14 curtailment notices were issued and then rescinded within months, and the drought had ended by  
15 the time these cases came to trial. This is a pattern that can be expected to repeat itself in the  
16 future. (See *In re William M.* (1970) 3 Cal.3d 16, 23, fn. 14 [“we should not avoid the resolution  
17 of important and well litigated controversies arising from situations which are ‘capable of  
18 repetition, yet evading review’ ”].)

19 Turning to the substance of the parties’ dispute, petitioners contend that issuing  
20 curtailment notices to pre-1914 rights holders was beyond the Board’s jurisdiction. The Board  
21 cites *Millview, supra*, 229 Cal.App.4th 879 and *Young, supra*, 219 Cal.App.4th 397 to support its  
22 position that it has the authority to take enforcement action against “illegal” diverters, even those  
23 who claim a riparian or pre-1914 right, under Water Code section 1052.<sup>10</sup>

#### 24 1. The Water Code Enforcement Provisions at Issue

25 Subdivision (a) of section 1052, which is found in Division 2 of the Water Code,  
26 provides that “[t]he diversion or use of water subject to this division other than as authorized in  
27

28 <sup>10</sup> Notably, the Board does not contend that the reasonable use doctrine, the public trust doctrine, or any more  
general authority to adjudicate or police senior water rights authorized its actions.

1 this division is a trespass.” Subdivision (c) sets forth the maximum liability of any water user  
2 who commits such a trespass, which is increased during times of drought, and subdivision (d)(2)  
3 provides that “[t]he board may impose civil liability in accordance with Section 1055,” following  
4 the service of an ACL complaint as well as a hearing upon request (Wat. Code, § 1055,  
5 subds. (a) and (b)).

6 Alternatively, section 1831 of the Water Code permits the Board to issue a CDO, after  
7 notice and the opportunity for a hearing, “in response to a violation or threatened violation” of,  
8 among other mandates, “[t]he prohibition set forth in Section 1052 against the unauthorized  
9 diversion or use of water subject to this division.” (Wat. Code, § 1831, subd. (d).)

10 The Board’s Dismissal Order summarizes the history of these enforcement provisions as  
11 follows. “Section 1052 codifies section 38 of the Water Commission Act, which stated, ‘[t]he  
12 diversion or use of water subject to the provisions of this act other than as it is in this act  
13 authorized is hereby declared to be a trespass.’ (Stats. 1913, ch. 586, § 38.)” (Dismissal AR  
14 8386, *In the Matter of Administrative Civil Liability Complaint Against Byron-Bethany*  
15 *Irrigation Dist. and in the Matter of Draft Cease and Desist Order Against the West Side*  
16 *Irrigation Dist.*, Cal. St. Wat. Res. Bd. Order No. WR 2016-0015, 2016 WL 3388132, at \*5.)  
17 Originally, section 38 authorized the Water Commission to seek a court-issued injunction against  
18 such a trespass, but did not grant it independent authority to impose an administrative remedy.  
19 (*Ibid.*)

20 “In the aftermath of the severe drought in California in the 1977 water year, and the  
21 report of the Governor’s Commission to Review California Water Rights Law, the Legislature  
22 expanded the Board’s enforcement authority to allow the Board to take its own administrative  
23 enforcement actions against unauthorized diversions.” (*Ibid.*) “Section 1831, enacted in 1980,  
24 authorized the Board to issue a preliminary cease and desist order to enforce the terms of permits  
25 and licenses through its own administrative action. (Former Wat. Code, § 1831, added by Stats.  
26 1980, ch. 933, § 13.)” (*Ibid.*) Then, “[i]n 1987, the Legislature amended Water Code section  
27 1052 to authorize the Board to petition the court to impose civil liability for the unauthorized  
28 diversion or use of water, in addition to seeking an injunction. (Former Wat. Code, § 1052,

1 amended by Stats. 1987, ch. 756, § 1.)” (*Ibid.*) “The amendment also granted the Board  
2 authority to administratively impose civil liability in critically dry years. (*Id.*, § 1, subds. (a) &  
3 (b).)” (*Ibid.*) “In 1991, the Legislature removed the limitation that administrative civil liability  
4 only be imposed during years declared to be critical. (Former Wat. Code, § 1052, amended by  
5 Stats. 1991, ch. 1098, § 1, subds. (a) & (b).)” (*Ibid.*)

## 6 2. Analysis

7 The issue of whether section 1052 authorizes the Board to curtail senior users turns on  
8 that section’s definition of a trespass as the “use of water subject to this division other than as  
9 authorized in this division.” (See *People v. Shirokow* (1980) 26 Cal.3d 301, 304, 306 [holding,  
10 in rejecting a claimed prescriptive right, that “[w]hether defendant’s diversion of water may be  
11 enjoined under section 1052 turns on our interpretation of the phrase ‘water subject to the  
12 provisions of this division (division 2)’ ”].) Petitioners contend that Water Code sections 1201  
13 and 1202, which exclude waters subject to riparian and pre-1914 appropriative rights from the  
14 unappropriated waters to be allocated by permit under the Code, render these rights beyond the  
15 scope of what is “subject to” and “authorized in” Division 2 of the Water Code. (See *id.* at  
16 pp. 306, 309 [emphasizing that the “key inquiry” under section 1052 “is whether defendant’s use  
17 of water is subject to the appropriation procedures of the code”; holding that uses other than  
18 those pursuant to “riparian rights and those which have been otherwise appropriated prior to”  
19 1914 are “conditioned upon compliance with the appropriation procedures of division 2”].)

20 In its briefing, the Board addressed this issue only obliquely, by reference to *Millview* and  
21 *Young*. At trial, it argued that Water Code section 1052 incorporates the Board’s investigatory  
22 powers under section 1051. The Court will address these arguments in turn.

23 Both *Millview* and *Young* addressed the Board’s authority under section 1831 of the  
24 Water Code. (See *Young, supra*, 219 Cal.App.4th at pp. 400-401; *Millview, supra*, 229  
25 Cal.App.4th at p. 892.) In *Millview*, the SWRCB had issued a CDO restricting a pre-1914  
26 appropriative right based on a finding that the right had been largely forfeited by a period of  
27 diminished use. (*Millview, supra*, 229 Cal.App.4th at p. 884.) Similarly, in *Young*, the Board  
28 issued a CDO establishing the amount of water to which a user was entitled pursuant to riparian

1 or pre-1914 rights. (*Young, supra*, 219 Cal.App.4th at pp. 401-402.) Since there was no  
2 argument that these users were violating a water permit or prior Board order, both *Millview* and  
3 *Young* addressed the Board's authority to enforce "[t]he prohibition set forth in Section 1052  
4 against the unauthorized diversion or use of water subject to this division." (Wat. Code, § 1831,  
5 subd. (d)(1).) Both cases affirmed the Board's authority to "make a preliminary determination  
6 for purposes of enforcement whether the diverter has either the riparian or pre-1914  
7 appropriative rights it claims without filing a lawsuit." (*Young, supra*, 219 Cal.App.4th at  
8 p. 400; see also *Millview, supra*, 229 Cal.App.4th at p. 895 [citing *Young*].)

9 As the petitioners correctly note, *Millview* and *Young* did not address the Board's  
10 authority to curtail or determine the relative priorities of riparian or pre-1914 rights. Petitioners  
11 argue that these cases are properly construed to authorize the Board's preliminary determination  
12 of senior users' water rights only where the result of that determination is that additional water  
13 claimed by such users is deemed unappropriated water subject to regulation by the Board and  
14 appropriation by other users.

15 The reasoning of *Millview* and *Young* supports this position. Both cases observed that the  
16 Board's permitting authority does not encompass senior right holders, with *Young* citing sections  
17 1201 and 1202. (See *Young, supra*, 219 Cal.App.4th at p. 404; *Millview, supra*, 229 Cal.App.4th  
18 at p. 894.) The opinions cited *Temescal Water Co. v. Department of Public Works* (1955) 44  
19 Cal.2d 90, where it was held (consistent with discussion in *Meridian, Ltd., v. San Francisco*  
20 (1939) 13 Cal.2d 424 cited by the Board) that SWRCB has the authority to make a preliminary  
21 determination of whether unappropriated water is available for purposes of issuing a permit.  
22 (See *Young, supra*, 219 Cal.App.4th at pp. 404-405; *Millview, supra*, 229 Cal.App.4th at p. 894.)  
23 *Millview* and *Young* held that the Board may similarly make a preliminary determination as to  
24 whether senior right holders are making an "unauthorized" diversion of water beyond the scope  
25 of their senior rights—water that was therefore not previously appropriated under sections 1201  
26 and 1202—for enforcement purposes. (See *Young, supra*, 219 Cal.App.4th at pp. 406-407;  
27 *Millview, supra*, 229 Cal.App.4th at p. 895.)

28 *Millview's* discussion is the more helpful. *Millview* explained that *Young's* rationale

1 grants the Board the authority to determine the scope of a claimed right as well as  
2 its existence. Section 1831 allows the Board to issue an order preventing the  
3 unauthorized diversion of water. Unauthorized diversion includes not merely the  
4 diversion of water under a claimed but invalid pre-1914 right, but also diversion  
5 beyond the proper scope of a valid pre-1914 right, whether because the diversion  
6 exceeds the maximum perfected amount of water under the right or because an  
7 intervening forfeiture has reduced the proper scope. The Board therefore  
8 possesses the jurisdiction to determine all of these issues.

9 (*Millview, supra*, 229 Cal.App.4th at p. 895.) *Millview* also discussed the Legislature's  
10 expansion of the Board's enforcement authority beyond permit violations to encompass  
11 "unauthorized" diversions:

12 The Legislature's intent to expand the Board's authority into territory formerly  
13 occupied by the courts is made clear from the progression of legislation in this  
14 area. As originally enacted in 1980, section 1831 allowed the Board to issue a  
15 CDO only against violations of the terms of a permit, leaving other types of  
16 misuse of water outside the Board's presumed CDO authority. When the  
17 Legislature expanded section 1831 by amendment in 2002, it added subdivision  
18 (d)(1), which expressly authorizes the Board to issue a CDO against violations of  
19 "[t]he prohibition set forth in Section 1052 against the unauthorized diversion or  
20 use of water...." At the time, although section 1052 directed the Board to prevent  
21 the unauthorized diversion of water, the Board could do so only by requesting the  
22 Attorney General to commence an action to enjoin such diversion. Subdivision  
23 (d)(1) of section 1831 therefore expanded the Board's authority into the  
24 adjudication of unauthorized diversion, which was previously vested in the courts.

25 (*Millview, supra*, 229 Cal.App.4th at pp. 895-896.) Here—other than the emergency regulation  
26 process the Board chose not to pursue—there was no similar legislative expansion of the Board's  
27 enforcement authority to encompass curtailments of valid senior rights due to drought.

28 As shown by the analyses in these cases, as well as in *People v. Shirokow, supra*, 26  
29 Cal.3d 301, section 1052 authorizes the Board to determine for enforcement purposes whether  
any user is diverting water "subject to" Division 2 other than as "authorized in" Division 2.  
Contrary to the Board's position, neither the relevant cases nor the statute itself establish a  
broader enforcement jurisdiction over all "illegal" diversions.<sup>11</sup>

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<sup>11</sup> While dicta in *Millview* and *Young* use the term "illegal" as a synonym for "unauthorized" in discussing the Board's statutory authority under these provisions, that dicta must be disregarded for the reasons discussed above. At least some of the statements in *Millview* and *Young* are traceable to dictum in a California Supreme Court opinion

1 The Board points out that Water Code section 1051, addressing SWRCB's investigatory  
2 powers for purposes of Division 2, more broadly authorizes it to "[a]scertain whether or not  
3 water heretofore filed upon or attempted to be appropriated is *appropriated under the laws of*  
4 *this State.*" (Wat. Code, § 1051, subd. (c), italics added.) However, section 1051 does not grant  
5 the Board any enforcement powers, and section 1052 does not incorporate section 1051 but  
6 provides its own, narrower definition of a "trespass" subject to enforcement. Section 1051's  
7 reference to appropriation "under the laws of this State" stands in contrast to section 1052's  
8 "diversion or use of water subject to this division other than as authorized in this division,"  
9 confirming the Legislature's choice to define the Board's enforcement powers more narrowly  
10 than its investigatory powers. The Board's reading of "water subject to" Division 2 to include  
11 water subject to its section 1051 investigatory powers does not address the fact that senior users'  
12 diversions are not "authorized in" Division 2, but pre-date it. Again, the Legislature could have  
13 easily defined a trespass to encompass "illegal" diversions more broadly if it wished. Finally,  
14 contrary to the Board's argument at trial, *Millview* and *Young* did not hold that section 1051  
15 authorized enforcement proceedings—in fact, they did not cite section 1051 at all.

### 16 3. Conclusion

17 For the reasons discussed above, the Court finds that section 1052 does not authorize the  
18 Board to "curtail" or take enforcement action against pre-1914 appropriators based on their use  
19 of water in excess of that available under their priority of right.

20 However, this does not mean that the Board is wholly without jurisdiction over these  
21 users, nor that the Legislature could not authorize it to take enforcement action against them in  
22 times of drought. The Board has already been delegated some adjudicatory and enforcement  
23 powers over senior users. For example, Water Code sections 2501 et seq. authorize it to make a

24  
25 addressing fees assessed against permit holders, *California Farm Bureau Federation v. State Water Resources*  
26 *Control Bd.* (2011) 51 Cal.4th 421. That opinion stated that "[t]he SWRCB does have authority to prevent illegal  
27 diversions and to prevent waste or unreasonable use of water, regardless of the basis under which the right is held."  
28 (At p. 429.) However, it cited only to Water Code section 275, governing reasonable use, in support of this  
statement, leaving the reader to guess at the meaning of the reference to "illegal diversions." Most likely, this was a  
recognition of the Board's authority to prevent *unauthorized* diversions, as in *Millview* and *Young*. (See also *People*  
*v. Shirokow*, *supra*, 26 Cal.3d at p. 304 ["unauthorized diversion" based on asserted prescriptive rights arising from  
adverse use initiated after the enactment of the code was "diversion of water without first obtaining a permit from  
the board constitut[ing] a trespass within the meaning of section 1052"].)

1 comprehensive determination of all rights to water in a stream system, to be reviewed and  
2 finalized in the courts. And Water Code section 1058.5 was amended during the drought to  
3 authorize emergency regulations “to require curtailment of diversions when water is not  
4 available under the diverter’s priority of right.” The Court expresses no opinion on the Board’s  
5 authority under these alternative Water Code provisions, under other statutory provisions not  
6 addressed by the parties, or pursuant to a future delegation of power by the Legislature.<sup>12</sup>

7 Ultimately, it may be preferable for the Board rather than the courts to order curtailments  
8 during a drought. As the Supreme Court has stated, “there is a limitation inherent in the ability  
9 of private lawsuits to provide clarity, certainty, and security to water rights and water users. ...  
10 This method of resolving controversies ... is necessarily piecemeal, unduly expensive and  
11 obviously unsatisfactory.” (*In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d  
12 339, 347-348, internal citation and quotations omitted.) But statutory authorization must provide  
13 the foundation to such action.

14 Finally, petitioners do not challenge the Board’s jurisdiction or statutory authorization to  
15 curtail post-1914 users, and the Court expresses no opinion on this matter.

16 E. The Curtailment Notices Violated Petitioners’ Due Process Rights

17 Petitioners contend that the 2015 Curtailment Notices violated their due process rights by  
18 curtailing their water rights without providing them with a hearing or other opportunity to  
19 challenge the Board’s underlying water availability analysis and other findings. The Board  
20 argues that petitioners lack standing to bring due process claims as public entities. In addition, it  
21 argues that the curtailment notices were advisory notices that did not deprive petitioners of  
22 property rights.

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24  
25 <sup>12</sup> Discussion in *United States v. State Water Resources Control Bd.*, *supra*, 182 Cal.App.3d 82, which addressed the  
26 Board’s authority to regulate and enforce water quality in the Delta, is similar to the Court’s finding here.  
27 Analyzing the statute before it, the court noted that, although regulation of property rights for environmental  
28 purposes—including limiting water rights—was clearly within the state’s police power, the Legislature had “not  
adequately authorized the Board to exercise the state police power to compel compliance with water quality  
standards” in that case. (*Id.* at pp. 123-124.) Here, while a strong argument could be made that the police power  
encompasses curtailments of pre-1914 users in times of drought—and even that the Legislature specifically  
authorized the Board to take enforcement action against such users through emergency regulations—the Board  
instead proceeded under pre-existing enforcement authority that does not apply to this circumstance.

1 As with petitioners' jurisdictional argument, this challenge raises a fundamental issue of  
2 broad public interest that is likely to recur, and the Court exercises its discretion to resolve it  
3 even if it is technically moot.

4 *1. Standing*

5 In support of its argument that petitioners lack standing to bring due process claims, the  
6 Board refers generally to the "long line of cases which hold that a public entity, being a creature  
7 of the state, is not a 'person' within the meaning of the due process clause, and is not entitled to  
8 due process from the state." (*San Diego County Water Authority v. Metropolitan Water Dist. of*  
9 *Southern Cal.* (2017) 12 Cal.App.5th 1124, 1163, quoting *Santa Monica Community College*  
10 *Dist. v. Public Employment Relations Bd.* (1980) 112 Cal.App.3d 684, 690.) It cites no cases  
11 applying this principle against a water district's challenge to actions impacting its users' water  
12 rights.

13 The Board acknowledges but attempts to distinguish *Central Delta Water Agency v. State*  
14 *Water Resources Control Bd.* (1993) 17 Cal.App.4th 621 (hereinafter, "*Central Delta*"), which  
15 held that two of the petitioners in the instant actions had standing to bring equal protection  
16 claims against the Board. As urged by petitioners, equal protection claims are generally not  
17 available to public entities under the same reasoning that due process claims are not. (See *San*  
18 *Diego County Water Authority v. Metropolitan Water Dist. of Southern Cal.*, *supra*, 12  
19 Cal.App.5th at p. 1163 ["the Water Authority is not asserting a right to due process of law, or  
20 equal protection of the law, rights that understandably are principally for the benefit of natural  
21 persons"].) *Central Delta* nevertheless held that petitioners had standing to bring such claims  
22 against the Board on behalf of their constituent water users, citing the principle that "a political  
23 subdivision of the state may challenge the constitutionality of a statute or regulation on behalf of  
24 its constituents where the constituents' rights under the challenged provision are 'inextricably  
25 bound up with' the subdivision's duties under its enabling statutes." (*Central Delta*, *supra*, 17  
26 Cal.App.4th at p. 629.)

27 The Board contends that "[e]ven assuming *arguendo* that the *Central Delta* case does  
28 provide a foundation for standing for two of the Petitioners," the enabling statutes of those



1 petitioners are distinct from those of the other petitioners. However, the Board does not actually  
2 represent that these other enabling statutes are different from those in *Central Delta* in any  
3 material way. Petitioners cite to Water Code section 22075, which provides that “[a] district  
4 may do any act necessary to furnish sufficient water in the district for any beneficial use.” There  
5 is no practical distinction between this language and the language relied on by *Central Delta*.  
6 (See *Central Delta, supra*, 17 Cal.App.4th 621, 629 [“Because a discharge fee is a ‘reclamation  
7 matter,’ and legal action to determine the validity of such a fee is ‘an activity to assist  
8 landowners in local districts,’ appellants assert that the agencies have standing to bring this  
9 challenge pursuant to their statutory mandates. We agree.”].) Water districts’ duties to furnish  
10 sufficient water for their constituents’ beneficial use are clearly “bound up with a determination”  
11 of whether the curtailment notices violated their constituents’ water rights, and the districts  
12 accordingly have standing to bring due process claims on behalf of their users. (*Ibid.*; see also  
13 *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 833 [holding  
14 county water district had standing to challenge environmental impact report affecting the  
15 delivery of water to the district, citing the district’s authority under Water Code section 31020 to  
16 “do any act necessary to furnish sufficient water in the district for any present or future beneficial  
17 use”].)

## 18 2. Merits of Due Process Claims

19 “Both the federal and state Constitutions compel the government to afford persons due  
20 process before depriving them of any property interest.” (*Today’s Fresh Start, Inc. v. Los*  
21 *Angeles County Office of Educ.* (2013) 57 Cal.4th 197, 212.) The Board does not dispute the  
22 basic premise that water rights are property rights subject to this requirement. (See *United States*  
23 *v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 101 [“It is ... axiomatic that  
24 once rights to use water are acquired, they become vested property rights. As such, they cannot  
25 be infringed by others or taken by governmental action without due process and just  
26 compensation.”].)

27 “[T]he precise dictates of due process are flexible and vary according to context.”  
28 (*Today’s Fresh Start, Inc. v. Los Angeles County Office of Educ., supra*, 57 Cal.4th at p. 212.)

1 The essence is that a person in jeopardy of serious loss be given notice of the case against him or  
2 her and opportunity to meet it at a meaningful time and in a meaningful manner. (*Ibid.*) To  
3 guide this assessment, California has adopted the standard announced in *Mathews v. Eldridge*  
4 (1976) 424 U.S. 319, which balances three considerations:

5 First, the private interest that will be affected by the official action; second, the  
6 risk of an erroneous deprivation of such interest through the procedures used, and  
7 the probable value, if any, of additional or substitute procedural safeguards; and  
8 finally, the Government's interest, including the function involved and the fiscal  
and administrative burdens that the additional or substitute procedural  
requirement would entail.

9 (*Today's Fresh Start, Inc. v. Los Angeles County Office of Educ.*, *supra*, 57 Cal.4th at p. 213,  
10 quoting *Mathews v. Eldridge*, *supra*, 424 U.S. at p. 335.)

11 The first inquiry in every due process challenge is whether the plaintiff has been deprived  
12 of a protected interest in property or liberty. (*Today's Fresh Start, Inc. v. Los Angeles County*  
13 *Office of Educ.*, *supra*, 57 Cal.4th at p. 214.) Petitioners have vested rights to the reasonable use  
14 of water encompassed by their water rights, so the Court must determine whether the Board's  
15 issuance of the curtailment notices "substantially impacted the practical use and administration  
16 ... of [their] water." (*Imperial Irrigation Dist. v. State Water Resources Control Bd.* (1990) 225  
17 Cal.App.3d 548, 562-563 [requirement that irrigation district submit a water conservation plan  
18 providing for reservoir construction did substantially impact its water rights, but district did not  
19 have vested rights to *unreasonable* water use].) While the Board characterizes the 2015  
20 Curtailment Notices as merely informational, they clearly had a substantial practical impact on  
21 petitioners' use of their water. The curtailment notices unequivocally ordered petitioners to stop  
22 using water at the time of their issuance or risk large fines, and the Partial Rescission Notice  
23 perpetuated the practical impairment of petitioners' water rights by again announcing that, while  
24 the Board was no longer "ordering" petitioners to stop using water, it might at any time  
25 commence enforcement proceedings against them to recover penalties that were already  
26 accruing.<sup>13</sup> (See *Phelps*, *supra*, 157 Cal.App.4th at p. 105 [curtailment notices that  
27  
28

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<sup>13</sup> Again, the notices threatened enforcement under the ACL and/or CDO processes established by Water Code sections 1052, 1055, 1831, and 1845. While penalties under section 1845 do not accrue until a CDO issues after a

1 unequivocally directed plaintiffs to immediately stop diverting were a decision or order that  
2 aggrieved the recipients].) In BBID's case, the Board made good on this threat by pursuing an  
3 ACL Complaint seeking penalties for a period beginning the day after the June curtailment  
4 notice issued.

5 While the notices have now been rescinded, even a temporary deprivation of property is  
6 subject to the requirements of due process. (See *Koshak v. Malek* (2011) 200 Cal.App.4th 1540,  
7 1547 ["Normally notice and an opportunity for a hearing must precede even a temporary  
8 deprivation of a property interest."], internal citation and quotations omitted; *Beck Development*  
9 *Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1191, fn. 17, 1192  
10 [even in an emergency situation warranting summary action by the state, a temporary  
11 interference with property interests triggers due process requirements].) Although temporary,  
12 the deprivation here—the practical rescission of petitioners' water rights—is of a more severe  
13 nature than in *Machado v. State Water Resources Control Bd.* (2001) 90 Cal.App.4th 720, where  
14 it was held that a cleanup and abatement order addressing a dairy's discharge of animal waste  
15 had only a limited impact on a dairy's property rights because it did not impose penalties or  
16 "affect the fundamental nature of [the dairy's] business." (At p. 726.) Here, the curtailment  
17 notices impaired the petitioners' fundamental functions as water districts. The April and May  
18 notices expressly recognized that recipients would be required to obtain water from other sources  
19 during an unprecedented drought. (Notice AR 3470-3471, 3516-3517 [directing recipients to  
20 identify "the alternate water supply you will use in lieu of the curtailed water right" by  
21 completing a mandatory Curtailment Certification Form].)<sup>14</sup> They stated that "[t]here is no  
22 exception to the curtailment notice[s] for health and safety needs" and required those who  
23 continued to divert for this purpose to report such diversions to the Board, which would  
24 "carefully analyze [them] on a case-by-case basis" to unspecified ends. (*Ibid.*) These notices

25  
26  
27 noticed hearing, already-accruing penalties were threatened under the section 1055 ACL process. The notices did  
28 not specify (and the Board still does not explain) the circumstances dictating whether one enforcement procedure or  
the other would be used. Consequently, all of the petitioners were under the threat of retroactive section 1055  
proceedings as long as the notices remained in effect.

<sup>14</sup> The June notice could be expected to have the same effects, although it did not say so in such explicit terms.

1 concluded with a statement that the Board “recognize[s] the burden and loss this notice creates  
2 for you during the drought ....” (*Ibid.*) In sum, the magnitude of the curtailments announced by  
3 the Board was acknowledged by all at the time.

4       The second *Matthews* factor is the risk of an erroneous deprivation of petitioners’ water  
5 rights through the procedures used, and the probable value, if any, of additional or substitute  
6 procedural safeguards. (See *Today’s Fresh Start, Inc. v. Los Angeles County Office of Educ.*,  
7 *supra*, 57 Cal.4th at p. 213.) Again, the Board contends that there was no risk of erroneous  
8 deprivation of rights because the notices did not deprive petitioners of their rights. The Board  
9 does not address the procedures it employed in issuing the notices or the relative merits of any  
10 alternatives. Meanwhile, petitioners persuasively argue that the Board’s use of a methodology  
11 that was never subject to public challenge to determine whether water was available created a  
12 high risk of error. Indeed, in dismissing the enforcement actions, the Board itself ultimately  
13 determined that the Prosecution Team had not met its burden of proof on this point. Publishing  
14 its methodology and holding a public hearing where water users and outside experts could  
15 challenge it would both reduce the risk of erroneously depriving water users of their rights and  
16 assist the Board in pursuing effective enforcement measures. Again, notice and a hearing are  
17 typically required before even a temporary deprivation of a property interest. (*Koshak v. Malek*,  
18 *supra*, 200 Cal.App.4th at p. 1547.) While postdeprivation review was deemed adequate in  
19 *Machado v. State Water Resources Control Bd.*, *supra*, 90 Cal.App.4th 720, the issue in that  
20 case—whether illegal discharges of animal waste had occurred—was straightforward and the  
21 petitioner was provided with an informal opportunity to dispute the Board’s determination before  
22 the Board took action, along with a clear procedure for prompt postdeprivation review. (At  
23 pp.726-727.) The large-scale, complex, and burdensome curtailments here required a public,  
24 predeprivation process to satisfy due process.

25       The final *Matthews* factor is the government’s interest, including the function involved  
26 and the fiscal and administrative burdens that the additional or substitute procedural requirement  
27 would entail. (*Today’s Fresh Start, Inc. v. Los Angeles County Office of Educ.*, *supra*, 57 Cal.4th  
28 at p. 213.) The Board contends that, during the drought, it had an urgent need to “advise the

1 regulated community of the severity of the water shortage” and emphasizes that the Governor  
2 directed it to “put water right holders throughout the state on notice that they may be directed to  
3 cease or reduce water diversions based on water shortages.” However, following the Governor’s  
4 directive, the Board issued purely advisory notices that have not been challenged by the  
5 petitioners. As discussed, the notices challenged here did not merely advise that curtailments  
6 may occur in the future, but commanded specific water users to immediately cease diverting.

7 In addition, the Legislature has authorized the Board to issue curtailment *orders* pursuant  
8 to emergency regulations. The Board adopted emergency regulations following a public hearing,  
9 but allowed them to expire before ordering users to stop diverting based on the regulations.  
10 While the Court will not address whether curtailment orders issued under emergency regulations  
11 would satisfy due process, the Board’s argument that it would be impossible to provide any  
12 process before ordering curtailments during a drought emergency rings hollow under the  
13 circumstances at issue here. Further, as noted by petitioners, the Board adopted a curtailment  
14 methodology to protect water quality following a public hearing through “Term 91,” discussed in  
15 *Phelps*. While providing a hearing prior to issuing curtailments would require the Board to  
16 undertake some fiscal and administrative burdens, the additional burdens would not be unduly  
17 onerous considering the need for the Board to adopt a defensible methodology before curtailing  
18 and to justify that methodology during enforcement proceedings to achieve compliance with its  
19 orders.

20 The Court is mindful of the difficult challenges faced by SWRCB in fulfilling its mission  
21 during an unusually severe drought. Due process jurisprudence recognizes and accommodates  
22 these types of challenges. (See *Today’s Fresh Start, Inc. v. Los Angeles County Office of Educ.*,  
23 *supra*, 57 Cal.4th at p. 212 [the requirements of due process “are flexible and vary according to  
24 context”].) Nevertheless, due process requires certain minimal protections that were not  
25 provided here. In a future drought, the Board is called to fashion a curtailment process that gives  
26 users some meaningful opportunity to challenge the underlying findings *before* they are ordered  
27 to curtail their water use and *before* fines for noncompliance begin to accrue against them.  
28

1 Finally, the Board submitted *Santa Clara Waste Water Co. v. County of Ventura*  
2 *Environmental Health Div.* (2017) 17 Cal.App.5th 1082 (hereinafter, “*Santa Clara*”) for the  
3 Court’s consideration as new authority. That opinion reversed the trial court’s denial of an anti-  
4 SLAPP motion in a lawsuit challenging a county agency’s “notice to comply” following an  
5 inspection of the plaintiff’s facility that revealed materials deemed hazardous waste. The “notice  
6 to comply” was not described in detail in the opinion; however, the county was clear in a series  
7 of communications with the plaintiff that it did not intend to take any enforcement action itself,  
8 but would merely pass its findings along to the District Attorney’s office, which already had an  
9 active criminal case against the plaintiff. (*Id.* at p. 1086.) Those circumstances stand in contrast  
10 to the events here, where the Board repeatedly threatened and then actually prosecuted  
11 enforcement actions related to the curtailment notices. Further, the *Santa Clara* plaintiff focused  
12 its merits opposition to the county’s anti-SLAPP motion on statutory arguments under the Health  
13 and Safety Code. In the few sentences it devoted to plaintiff’s due process claim, the appellate  
14 court noted that the plaintiff “cite[d] no authority that even remotely supports [this] argument.”  
15 (*Id.* at p. 1091.) For these reasons, the *Santa Clara* opinion is distinguishable and does not aid  
16 the Court’s due process analysis in this case.

### 17 3. Conclusion

18 In conclusion, petitioners have standing to bring due process claims challenging the 2015  
19 Curtailment Notices and the Board’s subsequent actions. The Board violated petitioners’ due  
20 process rights by issuing the curtailment notices, which ordered immediate curtailments and  
21 threatened large fines accruing from the time the notices issued, without first providing water  
22 users with an opportunity to challenge the findings upon which they were based. This due  
23 process violation was not cured by the Partial Rescission Notice or the dismissal of the  
24 enforcement proceedings. Because the requirements of due process are flexible and dependent  
25 on circumstances, the Court will not attempt to define the specific process that must be used in a  
26 future drought. However, water users must be provided with some meaningful opportunity,  
27 including some form of public hearing, to challenge the Board’s underlying findings *before* they  
28


1 are ordered to curtail their water use and *before* fines for noncompliance begin to accrue against  
2 them.

3  
4 VII. Petitioners' Remaining Arguments

5 At the conclusion of all phases of trial, the Court will issue the writ requested by  
6 petitioners based on the findings above. Consequently, it need not reach petitioners' other  
7 arguments, including that the curtailment notices violated the Governor's emergency order and  
8 violated the rule of priority, that the Board's water unavailability determination was not  
9 supported by substantial evidence, that the Executive Director did not have the authority to issue  
10 curtailments, and that the curtailment notices improperly amended the Water Quality Control  
11 Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary. Particularly in light of  
12 the rulings on the fundamental jurisdictional and due process issues above, the Court credits the  
13 Board's position that it will likely take a different approach to curtailments in the future, and  
14 agrees that it would be improper to litigate the details of the former process at this juncture.

15 Accordingly, the Court will not issue a writ on any of the alternative grounds raised by  
16 petitioners.

17  
18 Dated: 2-20-18

  
Honorable Brian C. Walsh  
Judge of the Superior Court

## INCLUDED ACTIONS

| <u>COURT</u>   | <u>NUMBER</u>             | <u>SHORT TITLE</u>   |
|--|---------------------------|--|
| Superior Court of California<br>County of Contra Costa | N150967                   | Byron-Bethany Irrigation<br>District v. California State<br>Water Resources Control<br>Board, et al.         |
| Superior Court of California<br>County of Sacramento   | 34201580002121            | The West Side Irrigation<br>District, et al. v. California<br>State Water Resources<br>Control Board, et al. |
| Superior Court of California<br>County of San Joaquin  | 39201500326421CU<br>WMSTK | Banta-Carbona Irrigation<br>District v. California State<br>Water Resources Control<br>Board, et al.         |
| Superior Court of California<br>County of Stanislaus   | 2015307                   | Patterson Irrigation District<br>v. California State Water<br>Resources Control Board, et<br>al.             |
| Superior Court of California<br>County of Stanislaus   | 2015366                   | San Joaquin Tributaries<br>Authority, et al. v. California<br>State Water Resources<br>Control Board         |
| Superior Court of California<br>County of Sacramento   | 34-2016-80002387          | The West Side Irrigation<br>District v. SWRCB  |
| Superior Court of California<br>County of Sacramento   | 34-2016-80002389          | San Joaquin Tributaries<br>Authorities v. SWRCB  |
| Superior Court of California<br>County of Sacramento   | 34-2016-80002388          | Byron-Bethany Irrigation<br>District v. SWRCB  |