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10 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 IN AND FOR THE COUNTY OF SANTA CLARA

12 Coordination Proceeding
Special Title (Rule 3.550)

Case No. 1-15-CV-285182

13 CALIFORNIA WATER
14 CURTAILMENT CASES

JUDICIAL COUNCIL COORDINATION
PROCEEDING NO. 4838

15 BYRON-BETHANY IRRIGATION DISTRICT,

BYRON-BETHANY IRRIGATION
DISTRICT'S NOTICE OF MOTION
AND MOTION FOR ATTORNEYS'
FEES PURSUANT TO CODE OF CIVIL
PROCEDURE § 1021.5;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF

16 Petitioner/Plaintiff,

17 vs.

18 CALIFORNIA STATE WATER RESOURCES
CONTROL BOARD; THOMAS HOWARD as
19 EXECUTIVE DIRECTOR OF THE STATE
WATER RESOURCES CONTROL BOARD;
20 MICHAEL GEORGE, as DELTA
WATERMASTER; and DOES 1 THROUGH
21 100, INCLUSIVE,

Date: October 18, 2019
Time: 9:00 a.m.
Dept: 1
Judge: Hon. Brian C. Walsh

22 Respondents/Defendants.

SOMACH SIMMONS & DUNN
A Professional Corporation

1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that on October 18, 2019, at 9:00 a.m., in Department 1 of the
3 Superior Court of California, County of Santa Clara, located at 191 North First Street, San Jose,
4 California, Petitioner/Plaintiff Byron-Bethany Irrigation District (BBID) will and hereby does
5 move for attorneys' fees pursuant to Code of Civil Procedure section 1021.5. BBID seeks
6 attorneys' fees incurred in the amount of \$1,957,950.73 under Code of Civil Procedure
7 section 1021.5.

8 The motion will be made on the grounds that this action has resulted in the enforcement of
9 an important right affecting the public interest, a significant benefit has been conferred on the
10 general public, and the necessity and financial burden of private enforcement are such as to make
11 the requested award appropriate.

12 The motion is based on this notice of motion and motion; the declarations of Rick
13 Gilmore, Michael E. Vergara, Theresa C. Barfield, and Robert P. Soran; Request for Judicial
14 Notice, the Proposed Order, the pleadings, exhibits, administrative records, and documents on file
15 in this action, and such additional evidence and arguments as may be properly presented at or
16 before the time of the hearing.

17 In accordance with California Rules of Court, rule 3.1308(a)(1) and Santa Clara County
18 Superior Court Local Rules, rule 8(e), this Court will issue a tentative ruling on this matter no
19 later than 3:00 p.m. on the court day preceding the scheduled hearing. If the Court has not
20 directed oral argument, and you wish to contest the tentative ruling, you must give notice of your
21 intention to appear to the other parties and the Court no later than 4:00 p.m. the court day
22 preceding the scheduled hearing. The tentative ruling will automatically become the order of the
23 Court on the scheduled hearing date if the Court has not directed oral argument and if the
24 contesting party fails to timely notice an objection to the other side and the Court. Tentative
25 rulings will be posted on the Court's website, www.sccourt.org, where further information may

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1 be found. If a party does not have access to the internet, the tentative ruling may be accessed by
2 calling Court Services at (408) 882-2515. Questions about these procedures may be addressed to
3 the specific department where the matter is to be heard.

4 Dated: August 5, 2019

Respectfully submitted,

5 SOMACH SIMMONS & DUNN
6 A Professional Corporation

7
8 By: _____
9 Theresa C. Barfield
10 Attorneys for Petitioner/Plaintiff BYRON-
11 BETHANY IRRIGATION DISTRICT

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Byron-Bethany Irrigation District (BBID) holds a pre-1914 appropriative water right to
4 divert and beneficially use water from watercourses in the California Delta. On June 12, 2015,
5 the State Water Resources Control Board (Water Board or Board) issued a notice directing all
6 pre-1914 appropriative water right holders in the Sacramento-San Joaquin watersheds and the
7 Delta “to immediately stop diverting water” or risk severe penalties (Curtailment Notice). In
8 advance of issuing the Curtailment Notice, the Board did not provide water right holders with any
9 opportunity to challenge the water availability analysis that purportedly supported the notice.

10 BBID, along with other California water rights holders, challenged the Curtailment Notice
11 in state court and succeeded in their respective claims that the Board does not have authority
12 under Water Code section 1052 to curtail or take enforcement action against *any* pre-1914
13 appropriators, and that the Curtailment Notice violated the constitutionally protected due process
14 rights of the thousands of water rights holders. After litigation was commenced, the Board also
15 initiated enforcement proceedings against BBID and West Side Irrigation District (WSID) at the
16 administrative level, and ultimately found that the water availability analysis relied upon by its
17 own staff to support the Curtailment Notice was unreliable.

18 BBID prevailed in both forums, and vindicated important rights affecting the public
19 interest. BBID now moves for attorneys’ fees under Code of Civil Procedure section 1021.5
20 (section 1021.5), the private attorney general doctrine, in the amount of \$1,957,950.73. The
21 requested award reflects the skill required litigate a complex, multi-party case, the qualifications
22 and experience of counsel, and the ultimate successful result obtained by the BBID and the other
23 Petitioners on the most impactful causes of action. For reasons explained below, BBID’s fee
24 request is reasonable in this novel and precedent-setting case that vindicates important public
25 interests.

26 **II. PERTINENT PROCEDURAL AND FACTUAL HISTORY**

27 **A. BBID’s Role and the Public Interests it Serves and Benefits**

28 BBID is a public agency, a California Irrigation District, formed and operating pursuant to

1 Division 11 of the Water Code, sections 20500 et seq. (Declaration of Rick Gilmore (Gilmore
2 Decl.), ¶ 6.) It holds a vested pre-1914 appropriative water right to divert water from watercourses
3 within the California Delta. (Gilmore Decl. at ¶ 9.) BBID’s purposes include the provision of
4 water to lands within the District for any beneficial use, including municipal and agricultural uses,
5 to construct the necessary works for the diversion and use of water for those beneficial uses, and to
6 commence and maintain any action and proceeding to carry out its purposes or protect its interests.
7 (*Id.* at ¶¶ 6 – 21.)

8 **B. The May/June 2015 Curtailment Notices and Effects Therefrom**

9 On May 1, 2015, the Water Board curtailed post-1914 appropriative water rights in the
10 Delta. (State Water Board Amended Administrative Record, Curtailment (SB-AR) 003516-
11 003517.) On June 12, 2015, the Water Board issued a similar curtailment notice to all pre-1914
12 appropriative water right holders in the Sacramento-San Joaquin River watersheds and the Delta
13 with priority dates between 1903 and 1914, including BBID. (SB-AR 004212-004213; Gilmore
14 Decl. at ¶ 22.) The May and June 2015 curtailments (Curtailment Notices) directed the water
15 right holders to “immediately stop diverting” under their water rights, and provided that any
16 further diversions would subject each of the water rights holders to significant administrative
17 fines, cease and desist orders, or prosecution in court. (SB-AR 004212-004213, 003516-003517.)
18 The Water Board issued the Curtailment Notices without the benefit, or constitutional protection,
19 of a hearing or proceeding prior to impairing the property rights of thousands of California water
20 rights holders. (Gilmore Decl. at ¶¶ 23, 24, 25.)

21 The immediate cessation of diversions would have resulted in the loss of water deliveries to
22 thousands of California citizens, depriving them of water needed for human health and sanitation
23 needs, fire protection, and other uses. (Gilmore Decl. at ¶¶ 26, 27.) It likewise would have
24 resulted in thousands of acres of California farmland lying fallow, loss of hundreds of jobs for
25 agricultural workers, and the destruction of thousands of acres of annual and permanent crops
26 resulting in a loss estimated to exceed \$65 million dollars. (*Id.* at ¶¶ 26, 28, 29.)

27 **C. California Water Rights Holders Filed Lawsuits to Challenge the Curtailment
28 Notices in June 2015**

BBID filed suit against the Water Board on June 26, 2015, challenging the Curtailment

1 Notice. (Declaration of Michael Vergara (Vergara Decl.), ¶ 2.) BBID’s lawsuit asserted, among
2 other things, that the Water Board exceeded its jurisdiction, violated due process, and conducted a
3 flawed water availability analysis. (Vergara Decl. at ¶ 2.) The lawsuit sought a writ of mandate
4 directing the Board to set aside the Curtailment Notice, requested the Court to issue a
5 determination on the matters raised, and sought the costs of suit, and attorney’s fees in accordance
6 with section 1021.5. (*Ibid.*) Between June 18, 2015 and June 29, 2015, multiple other water right
7 holders also sued the Water Board to stop enforcement of the Curtailment Notices.¹ (*Ibid.*)

8 **D. In July of 2016, the Water Board Initiated Enforcement Actions**

9 In mid-July, 2015, after BBID and others filed formal actions in Superior Court to
10 challenge the curtailments, the Water Board nonetheless issued administrative enforcement
11 proceedings against BBID and WSID (Enforcement Actions), seeking millions of dollars in
12 penalties for alleged violations of the Curtailment Notices. (Enforcement Administrative Record
13 (AR) 000001-000020; Vergara Decl. at ¶ 3.) Following the Board’s initiation of the Enforcement
14 Actions, BBID amended its Superior Court petition/complaint to also challenge the administrative
15 proceedings. (Vergara Decl. at ¶ 3.) As generally alleged by BBID, the Enforcement Actions
16 were extensions of the ongoing illegal curtailment actions, and were likewise initiated in excess of
17 the Board’s jurisdiction, violated due process and were based upon the same flawed water
18 availability analysis underlying the Curtailment Notices. (*Ibid.*) BBID also expressly alleged that
19 the Enforcement Actions raised the same factual and legal issues previously placed in issue when
20 BBID filed its original petition/complaint. (*Ibid.*)

21 **E. The September 2015 Motions to Stay the Enforcement Actions**

22 The issues raised by the Water Board in the Enforcement Actions were raised first by
23 BBID and WSID in their Superior Court actions. (Vergara Decl. at ¶ 4.) Thus, BBID and WSID
24 filed motions to stay the Enforcement Actions in September 2015. (*Ibid.*) The motions invoked
25 the doctrine of exclusive concurrent jurisdiction and requested that the Court stay the
26 Enforcement Actions to prevent, among other concerns, conflicting judgments and inefficiencies

27 _____
28 ¹ The various lawsuits filed in June 2015 were coordinated in Judicial Coordination Proceeding 4838 in Santa Clara Superior Court, entitled the California Water Curtailment Cases.

1 caused by separate suits on the same controversy. (Vergara Decl. at ¶ 4.)

2 During oral argument, the Water Board urged the Court to deny the motions, arguing that
3 BBID and WSID would have the opportunity to present evidence to an impartial tribunal at the
4 administrative level, alleviating any concerns regarding ensuring the parties' access to a fair
5 adjudicative process. (Request for Judicial Notice in Support of BBID's Motion for Attorneys'
6 Fees Pursuant to Code of Civil Procedure section 1021.5 (RJN), Exh. A, at 6:9-16; 8:4-12.) The
7 Court permitted the Enforcement Actions to proceed, emphasizing the "sound policy reasons" for
8 doing so, including principles of judicial efficiency by "allowing courts to take advantage of
9 administrative expertise" while promoting a "uniform application of regulatory laws." (*Id.*
10 at 5:21-28; RJN, Exh. B, at 5:20-27.) The Court concluded that "both BBID and WSID will have
11 the opportunity to present evidence at the administrative enforcement hearing regarding their
12 respective rights to the water before a tribunal that is required to be impartial, fair and neutral, and
13 has the specific expertise to adjudicate these issues." (*Id.* at 5:28-6:4.) The court expressly
14 recognized "the fact that special considerations need to be made and careful coordination and
15 management is necessary to avoid duplicity, preserve resources and avoid inconsistent rulings.
16 The Court is confident that this can be accomplished while still allowing the issues before the
17 [Water Board] to be adjudicated." (*Id.* at 6:17-21.)

18 Accordingly, the Court permitted the enforcement actions to proceed in the interest of
19 judicial efficiency, and with the understanding that the parties would present evidence in an
20 adjudicatory proceeding with specialized expertise, with active management by the Court.

21 **F. The Litigation Effort**

22 The effort involved in the Enforcement Actions was significant and included extensive
23 discovery, trial preparation and trial, while the parties were also engaged in protracted law and
24 motion work in the Superior Court. (Vergara Decl. at ¶ 5.) The Water Board staff never prepared
25 a written report describing the method, rationale or information that they used to determine that
26 there was not water available for WSID and BBID. (*Ibid.*) Therefore, the parties had to conduct
27 extensive discovery to try to understand the factual, legal and analytical basis for the water
28

1 availability determination.² (Vergara Decl. at ¶ 5.) The Water Board also required that all parties
2 submit all exhibits, case-in-chief testimony and rebuttal testimony, in writing, several weeks prior
3 to the start of the hearings. (*Ibid.*) Much of the expert testimony involved creation and evaluation
4 of very large and complex excel databases used to process all of the water supply and diversion
5 information for the entire Sacramento-San Joaquin watershed, as well as complex hydrologic
6 modeling runs to reflect operation of the Delta under different factual scenarios. (*Ibid.*)

7 After a number of pre-hearing communications, motions, and conferences, the hearing
8 was held from March 21-23, 2016. (Vergara Decl. at ¶ 6.) After the prosecution rested its case,
9 the Petitioners moved for nonsuit or dismissal of the action. (*Ibid.*) On June 7, 2016, the Board
10 adopted a final order dismissing the enforcement actions (Dismissal Order). (*Ibid.*) In the
11 Dismissal Order, the Board held that its staff’s water availability analysis was not sufficiently
12 accurate to find that the prosecution had carried its burden of proof. (AR 008399, 008401.)

13 Thereafter, in 2016, BBID and other petitioners filed motions for attorneys’ fees
14 addressing fees incurred in the Enforcement Action to ensure compliance with, and protect
15 against, any future argument that the doctrine of exhaustion of administrative remedies required
16 the same. (Vergara Decl. at ¶ 7.) The Court heard oral argument and issued an order denying
17 recovery of fees because the issue was “not ripe”, without prejudice to raising the issue again
18 upon completion of the Superior Court action. (RJN, Exh. C, at 5:6 - 6:1; RJN, Exh. D, at 4:22 –
19 5:2, 5:24-26, 6:19-21, 7:8-9; Vergara Decl. at ¶ 7.)

20 At the April 28, 2017 Case Management Conference, the Court determined that the
21 coordinated cases would proceed in three phases. (Vergara Decl. at ¶ 8.) The trial for “Phase I”
22 was held in this case on January 26, 2018, and the Court issued its Final Statement of Decision
23 (FSOD) on April 3, 2018. (RJN, Exh. E; Vergara Decl. at ¶ 8.) In the FSOD, the Court held that
24 the 2015 Curtailment Notices violated Water Code section 1052, by curtailing and taking
25 enforcement action against pre-1914 appropriators based on a general lack of available water
26

27 ² The docket is available online at:
28 http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/byron_bethany/index.shtml, and
http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/westside_irrigation_district/cease_and_desist_hearing.shtml (Last visited August 2, 2019).

1 under priority of right, as opposed to a specific trespass against Division 2 water. (Vergara Decl.
2 at ¶ 8.) The Court also held the Curtailment Notices violated the constitutional right to due
3 process by failing to provide water right holders a hearing or other opportunity to challenge the
4 Board’s analysis and findings. (*Ibid.*)

5 III. ARGUMENT

6 A. Petitioners are Entitled to Recover Their Attorneys’ Fees Under Code of Civil 7 Procedure Section 1021.5

8 California’s private attorney general doctrine is codified in section 1021.5, and provides a
9 statutory basis for seeking attorneys’ fees. (*Press v. Lucky Stores, Inc.*, (1983) 34 Cal.3d 311, 317
10 (*Press*.) Its objective is to encourage suits effectuating a strong public policy by awarding fees
11 to those who successfully litigate actions which benefit a broad class of citizens. (*Woodland Hills
12 Residents Assn., Inc. v. City Council of Los Angeles*, (1979) 23 Cal.3d 917, 933 (*Woodland
13 Hills*.) Section 1021.5 authorizes a court to award attorneys’ fees to (1) a prevailing party; (2)
14 when the action has resulted in the enforcement of an important right affecting the public interest;
15 (3) a significant benefit has been conferred on general public or a large class of persons; (4) the
16 necessity and financial burden of private enforcement are such as to make the award appropriate,
17 and (5) such fees should not in the interest of justice be paid out of the recovery, if any.

18 In its original form, section 1021.5 did not allow for an attorney fee award to a public
19 entity. (See Stats. 1977, ch. 1197, § 1, p. 3979; *City of Carmel-by-the-Sea v. Board of
20 Supervisors*, (1986) 183 Cal. App. 3d 229, 254–256). In 1993, the Legislature amended section
21 1021.5 “to its present form, which allows a public entity to recover attorney fees from another
22 public entity.” (*People ex rel. Brown v. Tehama County Bd. of Supervisors*, (2007) 149
23 Cal.App.4th 422, 450 (*Tehama County*.) By this amendment, the Legislature recognized that
24 sometimes there may be a need for one public entity to engage in public interest litigation against
25 another public entity under circumstances that make a fee award appropriate. The legislative
26 history of the 1993 amendment reveals that the amendment was aimed at “enabl[ing] small public
27 entities to resist large, well-financed public entities, who, in the absence of [the amendment],
28 [would] simply bludgeon the former into legal submission.” (Assem. Com. on Judiciary,

1 Analysis of Sen. Bill No. 764 (1993–1994 Reg. Sess.) as amended July 16, 1993, p. 4; quoted in
2 *State Water Res. Control Bd. Cases*, (2008) 161 Cal.App. 4th 304, 314 (*SWRCB Cases*).

3 As noted by the Third Appellate District, “in the wake of the 1993 amendment, there may
4 be circumstances in which it is proper to pay a “bounty” under *section 1021.5* to encourage public
5 entities to pursue public interest litigation against other public entities.” (*SWRCB Cases* at 314,
6 emphasis added.)

7 **1. Petitioners are the Prevailing Parties**

8 **a. Petitioners prevailed in the primary court action**

9 Courts must take a “broad, pragmatic view of what constitutes a ‘successful party.’”
10 (*Graham v. Daimler Chrysler Corp.*, (2004) 34 Cal.4th at 553, 565 (*Graham*)). BBID was the
11 prevailing party in this court action and was the prevailing party in the BBID/WSID Enforcement
12 Action. BBID promptly and properly brought legal challenges to the Water Board’s curtailment
13 efforts *before* the Board commenced enforcement proceedings. The “Curtailment Notice Cases”
14 lawsuits specifically raised due process and jurisdiction challenges. BBID prevailed on these
15 primary legal challenges in this Court and Judgment was entered in its favor. Having succeeded
16 on these claims, BBID is a successful party for purposes of recovering attorneys’ fees.³

17 The Water Board will nonetheless argue: (1) Petitioners should not be able to obtain a fee
18 award related to the enforcement proceedings because they are not part of this “action,” and (2)
19 because Petitioners’ coordinated “Dismissal Order Cases” were dismissed, they are not prevailing
20 parties for all purposes. Each of these points are addressed below.

21 **b. BBID also prevailed in the intervening, intertwined and necessary**
22 **administrative enforcement proceeding**

23 BBID also prevailed in the intervening Water Board administrative Enforcement Action.
24 The Enforcement Action was a necessary and interrelated part of this Court action making it
25 appropriate for the Court to award attorneys’ fees as part of the section 1021.5 award. “[A] party
26

27 ³ Although the Court did not reach every Board violation alleged by BBID, it only declined to do so because
28 resolution of the due process claim and the section 1052 claim was sufficient to grant the requested writ. (RJN,
Exh. E, at 39; *Hull v. Rossi*, (1993) 13 Cal.App.4th 1763, 1768.) Accordingly, the Court’s decision not to address
some of BBID’s claims does not detract from its status as a successful party.

1 may receive attorneys' fees incurred in an administrative hearing" under section 1021.5. (*Edna*
2 *Valley Water v. County of San Luis Obispo*, (2011) 197 Cal.App.4th 1312, 1315 (*Edna Valley*);
3 *Wallace v. Consumers Cooperative of Berkeley, Inc.*, (1985) 170 Cal.App.3d 836 [holding that
4 attorneys' fees were properly awarded for services rendered during the administrative hearing
5 vindicated the public interest because it was intertwined with the action].) The relevant inquiry
6 "is whether they [the services provided] were useful and of a type ordinarily necessary to the
7 vindication of the public interest litigated." (*Best v. California Apprenticeship Council*, (1987)
8 193 Cal.App.3d 1448, 1459 (*Best*)). Whether the administrative proceedings "precede or follow a
9 court action" is irrelevant to this inquiry since the order of proceedings does not necessarily
10 render them any more or less "intertwined, useful and of a type ordinarily necessary to the court
11 action." (*Id.* at 1462.) "[T]he nature of the relief sought, not the label or procedural device by
12 which the action is brought, is determinative of the right to seek fees under section 1021.5." (*In*
13 *re Head*, (1986) 42 Cal.3d 223, 226.)

14 The "useful" and "necessary" test is satisfied here because Petitioners, including BBID,
15 were effectively compelled to litigate the Water Board's administrative proceeding before they
16 could have their day in court on the fundamental legal disputes. Courts have held that where a
17 party commencing a court action is required to exhaust its administrative remedies in an
18 administrative proceeding, the useful and necessary test is satisfied. (*Edna Valley, supra*, 197
19 Cal.App.4th at 1320.) Notably, even if the Court determines that the Enforcement Action was
20 not, *per se*, "necessary" to the vindication of the public interest litigated in the Court action,
21 "California case law clearly provides a trial court discretion to award a fee that compensates work
22 performed in a collateral action that may not have been absolutely necessary to the action in
23 which fees are awarded but was nonetheless closely related to the action in which fees are sought
24 and useful to its resolution." (*Children's Hospital & Medical Center v. Bonta*, (2002) 97
25 Cal.App.4th 740, 779-780 (*Children's Hospital*)).

26 Here, the Water Board's administrative proceedings did not even start until after BBID
27 filed this Court action, and arguably were a direct response by the Water Board to that action.
28 After the administrative proceedings began, BBID asked that they be stayed so that the legal

1 challenges to the Water Board’s effort could be decided in court before they were forced to incur
2 the expense of an improper administrative proceeding. This Court denied the requested stay. As
3 a result, BBID was forced to fully litigate the administrative proceedings before this Court ruled
4 that the Board process exceeded its jurisdiction and violated Petitioners’ due process rights.
5 Notably, if the requested stay had been granted, Petitioners could have litigated the due process
6 and jurisdictional challenges first, which would have required that the Water Board terminate the
7 administrative proceedings as legally improper.

8 Even after this Court denied the requested stay, BBID and others persisted to try and
9 prevent the expense of the intervening Water Board proceedings by filing pre-hearing motions at
10 the Water Board to dismiss the proceedings for lack of jurisdiction and due process violations,
11 which the Water Board refused to rule upon. Thus, the administrative Enforcement Action went
12 forward. Cross-examination by Petitioners’ counsel illuminated fatal flaws in the Water Board’s
13 prosecution team’s proof, which led to dismissal of the Enforcement Actions as to both BBID and
14 WSID by the Water Board at the conclusion of the prosecution team’s case in chief. This
15 effective cross-examination would not have been possible without the extensive discovery and
16 expert work conducted by Petitioners to prepare for the administrative hearing.

17 Under these circumstances, it would defeat the purpose of section 1021.5 to find that
18 attorneys’ fees cannot be awarded for the administrative Enforcement Action. Further, it would
19 unfairly reward the Water Board for initiating a retaliatory administrative enforcement proceeding
20 against BBID and WSID after the Petitioners went to Court to challenge the legal foundation for
21 the Board’s curtailment actions.

22 **c. Petitioners prevailed on the substance of the dismissal order cases**

23 When the Water Board dismissed the administrative proceedings in Petitioners’ favor, it
24 inserted a section in the Dismissal Order purporting to declare the scope of the Water Board’s
25 jurisdiction over riparian and pre-1914 appropriative rights, and the scope of its enforcement
26 authority through Water Code section 1052. Due to the concern that the statements might be
27 cited as precedent in future Water Board proceedings, Petitioners challenged these legal
28 conclusions by filing new petitions for writs of mandate (the Dismissal Order Cases). This Court

1 did not issue a substantive ruling on this issue in the Dismissal Order Cases. Rather, in the
2 FSOD, this Court determined that BBID and other parties procedurally lacked standing to
3 challenge the Dismissal Order.

4 Despite this Court’s procedural determination that the Petitioners lacked standing, this
5 Court ultimately agreed with Petitioners on the substance of the claims challenging the Water
6 Board’s legal conclusions regarding jurisdiction. It did so by ruling in the Curtailment Notice
7 Cases that the Water Board lacked jurisdiction to curtail pre-1914 rights and had violated
8 Petitioners’ due process rights through its curtailment procedures in 2015. Thus, the fact that the
9 Petitioners lacked standing on this issue in the Dismissal Order Cases should not change
10 Petitioners’ status as prevailing parties in this litigation.

11 **2. Petitioners Enforced Important Constitutional and Statutory Rights Affecting**
12 **the Public Interest**

13 The Petitioners enforced an important set of rights affecting a class of people larger than
14 themselves by confirming that the Board does not have authority under Water Code section 1052
15 to curtail pre-1914 appropriators, and by forcing the Board to set aside the Curtailment Notices
16 and change its curtailment policy in the future to protect water users’ constitutional rights to due
17 process. “A central function [of the private attorney general doctrine] is ‘to call public officials to
18 account and to insist that they enforce the law.’” (*Serrano v. Unruh*, (1982) 32 Cal.3d 621, 632
19 (*Serrano IV*), quoting *Alyeska Pipeline Service Co. v. Wilderness Society*, (1975) 421 U.S. 240,
20 267.) “If, as a result of the efforts of plaintiffs’ attorneys, rights created or protected by the State
21 Constitution are protected to the benefit of a large number of people, plaintiffs’ attorneys are
22 entitled to reasonable attorney’s fees . . . under the private attorney general equitable doctrine.”
23 (*Serrano v. Priest*, (1977) 20 Cal.3d 25, 46-47 (*Serrano*)). For purposes of seeking attorneys’
24 fees under section 1021.5, “[a] determination that the public policy vindicated is one of
25 constitutional stature . . . establishes the first of the . . . elements requisite to the award (i.e., the
26 relative societal importance of the public policy vindicated).” (*Press, supra*, 34 Cal.3d 311, 318
27 (citing *Serrano, supra*, 20 Cal.3d 25, 46 fn. 18).) Attorneys’ fees are also proper under section
28 1021.5 when the underlying action succeeds in vindicating a *statutory* duty owed to the public.

1 (See *County of Orange v. Barratt American, Inc.*, (2007) 150 Cal.App.4th 420.)

2 Here, it is unquestionable that the Court resolved issues of both a constitutional and
3 statutory nature in favor of BBID. By holding that the Board violated water rights holders' due
4 process protections, and requiring the Board to provide those protections going forward, the Court
5 ensured that fundamental rights guaranteed by the state and federal constitutions will be upheld in
6 the future for *all* water rights holders. Petitioners' success in confirming the jurisdictional limits
7 of the Water Board enforced an important right affecting the public interest. Jurisdictional limits
8 preserve separation of powers, ensure our government functions properly, and provide individuals
9 with regulatory certainty. Over 9,000 water rights holders were impacted by the Board's
10 improper curtailment practices, and Petitioners' successful efforts to protect statutory and
11 constitutional rights due to those water rights holders therefore resulted in a benefit to a
12 substantial public interest. For enforcing these vital public constitutional and statutory issues,
13 BBID is entitled to reasonable attorneys' fees.

14 **3. Petitioners' Legal Victory Conferred a Significant Benefit on a Large Class**
15 **of Persons**

16 Courts recognize that a "significant benefit" within the meaning of section 1021.5 is often
17 reflected in nonmonetary, policy-focused advances in the challenged area of law. (*Woodland*
18 *Hills, supra*, 23 Cal.3d at 939.) In addition, a "significant benefit" justifying an attorneys' fees
19 award need not represent a tangible gain, but "may be recognized simply from the effectuation of
20 a fundamental constitutional or statutory policy." (*Ibid.*, citing *Serrano, supra*, 20 Cal.3d at
21 p. 42.) "Although fundamental constitutional rights are by nature individual rights, their
22 enforcement benefits the entire public." (*Planned Parenthood v. Aakhus*, (1993) 14 Cal.App.4th
23 162, 171-172.)

24 BBID conferred a substantial benefit on a large class of people within the state – namely,
25 all pre- and post-1914 water rights holders in California. This understanding is supported by the
26 Court's phrasing of its decision: "[W]ater users must be provided with some meaningful
27 opportunity, including some form of public hearing, to challenge the Board's underlying
28 findings" and "section 1052 does not authorize the Board to 'curtail' or take enforcement action

1 against *pre-1914 appropriators* based on their use of water in excess of that available under their
2 priority of right.” (RJN, Exh. E, pp. 31, 39 (emphasis added).) The decision is not written to
3 apply only to those petitioners who brought the action related to the Curtailment Notices, but
4 rather to apply broadly and in a forward-reaching manner. All water rights holders impacted by
5 the Curtailment Notices received a benefit from BBID’s case, and so will all similarly situated
6 water rights holders in the future. Significantly, this Court has already declared that the
7 jurisdictional and due process challenges in this case raised fundamental issues of broad public
8 interest, likely to recur. (*Id.* at p. 32.)

9 **4. The Necessity and Financial Burden of Enforcement by a Small Public Entity**
10 **Against a Large State Makes an Award of Attorneys’ Fees Appropriate**

11 An award of attorneys’ fees is appropriate when the costs of the claimant’s legal victory
12 transcends personal interest, that is, when the necessity for pursuing the lawsuit placed a burden
13 on the plaintiff out of proportion to his individual stake in the matter. (*Woodland Hills, supra*, at
14 94.) In enacting section 1021.5, “the Legislature was focused on public interest litigation in the
15 conventional sense: litigation designed to promote the public interest by enforcing laws that a
16 governmental or private entity was violating, rather than private litigation that happened to
17 establish an important precedent.” (*Adoption of Joshua S.*, (2008) 42 Cal.4th 945, 956.) *Norberg*
18 *v. Cal. Coastal Com.*, (2013) 221 Cal. App. 4th 535, 541.) Further, when the legislature amended
19 the statute to allow public entities to obtain fee awards in cases against other public entities, it
20 specifically intended to enable “small public entities to resist large, well-financed public entities,
21 who, in the absence of [the amendment], [would] simply bludgeon the former into legal
22 submission.” (*SWRCB Cases, supra*, (2008) 161 Cal.App. 4th 304, 314.)

23 Section 1021.5 requires this Court to use its discretion to determine if the financial burden
24 of enforcement by one set of public entities against another makes a fee award “appropriate.”
25 (Code Civ. Proc. § 1021.5(b).) The award is appropriate here because Petitioners were forced to
26 (1) challenge the jurisdictional basis for the Water Board’s curtailment of pre-1914 rights; (2)
27 contest the level of due process given to water right holders in the curtailment process; and (3)
28 invalidate the factual basis for the Water Board’s Sacramento-San Joaquin watershed-wide

1 curtailment methodology, affecting over 9,000 water right holders, in the Board’s administrative
2 proceeding, before having their day in court.

3 Unlike, *City of Hawaiian Gardens v. City of Long Beach*, (1998) 61 Cal.App.4th 1100
4 (where the City successfully prevented a road closure impacting only its citizens) and *County of*
5 *Inyo v. City of Los Angeles*, (1978) 78 Cal.App.3d 82 (where the County protected water for its
6 residents) and *Millview County Water Dist. v. SWRCB*, (2016) 4 Cal.App.5th 759 (where
7 Millview defended only its own water right from forfeiture), this case invalidated the Board’s
8 methodology with statewide implication, confirmed the Board’s jurisdictional limits and
9 confirmed the due process rights of all water rights holders. These benefits clearly transcended
10 BBID’s interest in the matter. (*Tehama County, supra*, 149 Cal.App.4th at pp. 455–456.) When
11 applying the financial burden criterion of section 1021.5 to public entities, “the pertinent question
12 is whether the public entity deserves a reward for pursuing litigation that was in the interest of a
13 greater spectrum of the public than its own constituents.” (*Id.* at p. 456; *City of Maywood v. Los*
14 *Angeles Unified Sch. Dist.*, (2012) 208 Cal.App.4th 362, 434–35, as modified (Aug. 14, 2012).)
15 That question is easily answered in the affirmative here.

16 This case was not merely private litigation that happened to establish important precedent.
17 Here, BBID filed suit *before* the Water Board initiated the Enforcement Action, and BBID
18 litigated the substantive legal issues in this Court *after* the Enforcement Action and curtailments
19 were over. Thus, the decision to pursue the action was not driven by a financial incentive to
20 BBID. In fact, many of the involved Petitioners were never under threat of financial penalty, and
21 any risk of penalties for BBID was over by the time Phase I was litigated in this Court.
22 Petitioners litigated this case to set precedent that will help protect all water right holders in the
23 future. The cost of the action was disproportionate to the benefits to BBID alone, making a fee
24 award appropriate.

25 **5. BBID Did Not Receive Any Monetary Recovery from Which the Attorneys’**
26 **Fees Could be Paid**

27 The final factor for the Court to consider is whether the attorneys’ fees should, in the
28 interest of justice, be paid out of the recovery. Where the petitioner received no monetary

1 recovery, as here, this factor is satisfied. (*Best, supra*, 193 Cal.App.3d 1448, 1469.)

2 **B. BBID’s Request for Attorneys’ Fees is Reasonable**

3 The well-established method of calculating an attorneys’ fees award is to determine the
4 lodestar by multiplying the number of hours reasonably expended by the reasonable hourly
5 market rate. (*Ketchum v. Moses*, (2001) 24 Cal.4th 1122, 1133 (*Ketchum*)). Where the statutory
6 criteria of section 1021.5 are met, fully compensatory fees must be awarded. (*Ibid.* [“fee awards
7 should be fully compensatory”]; *Horsford v. Board of Trustees of California University*, (2005)
8 132 Cal.App.4th 359, 394 (*Horsford*) [finding unsupported fee reduction to be abuse of
9 discretion].) Lodestar equates to the basic fee for comparable legal services in the community.
10 (*Pellegrino v. Robert Half International, Inc.*, (2010) 182 Cal.App.4th 278, 290-291; *Graham*,
11 *supra*, 34 Cal.4th at 579.) Evidence of the hourly rates charged by attorneys with similar
12 experience and expertise in the geographic area is relevant to establish reasonable fees. (*Serrano*
13 *IV, supra*, 32 Cal.3d at p. 640 n.31; *Margolin v. Regional Planning Comm’n*, (1982) 134
14 Cal.App.3d 999, 1006-1007.)

15 The total amount of attorneys’ fees that BBID seeks to recover in this motion as of the
16 date the motion is filed is \$1,957,950.73.⁴ (Gilmore Decl. at ¶ 35; Vergara Decl. at ¶ 9;
17 Declaration of Theresa C. Barfield (Barfield Decl.), ¶ 2-4). A detailed summary of attorneys’
18 fees sought, identifying the nature of attorney tasks with the associated hours/fees is set forth in
19 Exhibit A to the Barfield Declaration filed concurrently herewith. (Barfield Decl., Exh. A, ¶ 5).
20 The detailed explanations of work performed, as described in the supporting declaration of Mr.
21 Vergara and Exhibit A to Ms. Barfield’s Declaration, evidence the reasonableness of the hours
22 spent on the matter. (Vergara Decl. at ¶¶ 2-16; Barfield Decl., Exh. A, ¶ 5).

23 Moreover, an independent review of Somach Simmons & Dunn’s work on this matter was
24 performed by Robert P. Soran, a Sacramento attorney with over 25 years of extensive experience
25 in complex environmental litigation and administrative law issues, including enforcement defense

26 _____
27 ⁴ BBID does not seek recovery of attorneys’ fees in relation to the Dismissal Order Cases, or Phases II and III of the Curtailment
28 Notice Cases. (Barfield Decl. at ¶ 3.) BBID further requests an award of attorneys’ fees for the time required to prepare this
Motion and the reply brief, if necessary, and to prepare for and attend the hearing in this matter. (Barfield Decl. at ¶ 4.) Such fees
are proper, as a successful party is entitled to an award of reasonable attorneys’ fees for the time spent in recovering fees under
section 1021.5. (*Serrano IV, supra*, 32 Cal.3d at 639.) These fees will be updated by declaration at the time of the hearing.

1 matters against various California state agencies. (Declaration of Robert P. Soran (Soran Decl.)
2 at ¶¶ 1-9.) (See *e.g.*, *Children’s Hospital*, 97 Cal.App.4th 740, 782. [Courts consider declaration
3 testimony provided under oath to assess and support fee requests.]) The rates of BBID’s
4 attorneys are well within the range of rates charged in the Sacramento area for environmental or
5 similar practitioners of comparable experience and skill. (Vergara Decl. at ¶ 16; Soran Decl. at
6 ¶ 5.) The rates are also well below the range of rates charged in the Bay Area, including San Jose
7 where this matter is venued. (Soran Decl. at ¶ 5.) (See *Altavion, Inc. v. Konica Minolta Systems*.
8 *Laboratory Inc.*, (2014) 226 Cal.App.4th 26, 71) (Generally, an attorney’s “market rate” is based
9 on the rates in the community where the court is located.)

10 Based upon Mr. Soran’s background and experience, as well as his review of the
11 procedural history, documents filed both at the trial Court and in the administrative proceedings,
12 the detailed summary of fees sought, and Somach Simmons & Dunn’s *unredacted* invoices, the
13 amount of time spent on this case was reasonable given the substantive and procedural
14 complexity as well as the importance of the subject matter. (Soran Decl. at ¶¶ 1-9.) Indeed, it is
15 Mr. Soran’s opinion that “[w]ithout such a successful action, the public would be deprived of
16 valuable protections afforded by the law as a result of this litigation.” (*Id.* at ¶ 9.)

17 **IV. CONCLUSION**

18 For the foregoing reasons, BBID respectfully requests this Court to award attorneys’ fees
19 to BBID in the amount of \$1,957,950.73 pursuant to Code of Civil Procedure section 1021.5.

20 Respectfully submitted,

21 SOMACH SIMMONS & DUNN
22 A Professional Corporation

23 
24 By: _____
25 Theresa C. Barfield, Esq.
26 Attorneys for BYRON-BETHANY IRRIGATION
27 DISTRICT
28

Dated: August 5, 2019