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EXEMPT FROM FILING FEES PURSUANT TO GOVERNMENT CODE SECTION 6103

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

Coordination Proceeding Special Title (Rule 3.550) CALIFORNIA WATER CURTAILMENT CASES	Case No. 1-15-CV-285182 JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4838
BYRON-BETHANY IRRIGATION DISTRICT, Petitioner/Plaintiff, vs. CALIFORNIA STATE WATER RESOURCES CONTROL BOARD; THOMAS HOWARD as EXECUTIVE DIRECTOR OF THE STATE WATER RESOURCES CONTROL BOARD; MICHAEL GEORGE, as DELTA WATERMASTER; and DOES 1 THROUGH 100, INCLUSIVE, Respondents/Defendants.	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 Date: October 18, 2019 Time: 9:00 a.m. Dept: 1 Judge: Hon. Brian C. Walsh

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

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

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

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

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

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

Dated: August 5, 2019

Respectfully submitted,

SOMACH SIMMONS & DUNN
A Professional Corporation

By: _____
Theresa C. Barfield
Attorneys for Petitioner/Plaintiff BYRON-BETHANY IRRIGATION DISTRICT

SOMACH SIMMONS & DUNN
A Professional Corporation

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

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

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

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

II. PERTINENT PROCEDURAL AND FACTUAL HISTORY

A. BBID's Role and the Public Interests it Serves and Benefits

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

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

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

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

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

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

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

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

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

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

E. The September 2015 Motions to Stay the Enforcement Actions

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

[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.

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

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

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

F. <u>The Litigation Effort</u>

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

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

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

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

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

[2] The docket is available online at: 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).

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

III. ARGUMENT

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

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

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

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

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

1. Petitioners are the Prevailing Parties

a. Petitioners prevailed in the primary court action

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

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

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

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

[3] Although the Court did not reach every Board violation alleged by BBID, it only declined to do so because 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. BBID Did Not Receive Any Monetary Recovery from Which the Attorneys' Fees Could be Paid

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

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

B. BBID's Request for Attorneys' Fees is Reasonable

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

The total amount of attorneys' fees that BBID seeks to recover in this motion as of the date the motion is filed is $1,957,950.73.[4] (Gilmore Decl. at ¶ 35; Vergara Decl. at ¶ 9; Declaration of Theresa C. Barfield (Barfield Decl.), ¶ 2-4). A detailed summary of attorneys' fees sought, identifying the nature of attorney tasks with the associated hours/fees is set forth in Exhibit A to the Barfield Declaration filed concurrently herewith. (Barfield Decl., Exh. A, ¶ 5). The detailed explanations of work performed, as described in the supporting declaration of Mr. Vergara and Exhibit A to Ms. Barfield's Declaration, evidence the reasonableness of the hours spent on the matter. (Vergara Decl. at ¶¶ 2-16; Barfield Decl., Exh. A, ¶ 5).

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

[4] BBID does not seek recovery of attorneys' fees in relation to the Dismissal Order Cases, or Phases II and III of the Curtailment 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.

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

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

IV. CONCLUSION

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

Respectfully submitted,

SOMACH SIMMONS & DUNN
A Professional Corporation

Dated: August 5, 2019

By: _____
Theresa C. Barfield, Esq.
Attorneys for BYRON-BETHANY IRRIGATION DISTRICT

SOMACH SIMMONS & DUNN
A Professional Corporation