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EXEMPT FROM FILING FEES
PURSUANT TO GOVERNMENT
CODE SECTION 6103

9
10 BEFORE THE
11 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

12
13 In the Matter of the Petition of:

SWRCB/OCC File

14 Byron-Bethany Irrigation District for
Reconsideration of Notice of Unavailability for
15 Post-1914 Water Right Holders and Warning of
Impending Water Unavailability for Pre-1914 and
16 Riparian Claimants in the Sacramento-San
Joaquin Delta Watershed

PETITION FOR RECONSIDERATION
OF NOTICE OF UNAVAILABILITY
FOR POST-1914 APPROPRIATIVE
WATER RIGHTS

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18 I. PETITION FOR RECONSIDERATION

19 (1) Petitioner:

20 Byron-Bethany Irrigation District
7995 Bruns Road
21 Byron, CA 94514

22 (2) The specific Board action of which Petitioner requests reconsideration:

23 The State Water Resources Control Board's (SWRCB) Notice of Unavailability for
24 Post-1914 Water Right Holders and Warning of Impending Water Unavailability for
Pre-1914 and Riparian Claimants in the Sacramento-San Joaquin Delta Watershed
25 (Notice).

26 (3) The date on which the order or decision was made by the Board:

27 June 15, 2021.

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1 (4) The reason the action was inappropriate or improper:

2 The Water Unavailability Methodology for the Delta Watershed (Methodology), the basis
3 for the Notice, is insufficient to support a finding of water unavailability; the Deputy
4 Director lacks authority to issue the Notice to diverters in the Delta; the SWRCB violated
due process; and the SWRCB failed to comply with the Governor's Proclamation of a
State of Emergency and Order, issued on May 10, 2021.

5 (5) The specific action which Petitioner requests:

6 Rescind the Notice.

7 (6) A statement that copies of the petition and any accompanying materials have been sent to
8 all interested parties:

9 Copies of this Petition and accompanying materials have been sent to the SWRCB.

10 II. MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
11 PETITION FOR RECONSIDERATION

12 In accordance with Water Code section 1120 et seq., Byron-Bethany Irrigation District
13 (BBID) files this Petition for Reconsideration of SWRCB's Notice curtailing BBID's post-1914
14 appropriative water right. BBID and The West Side Irrigation District (WSID) consolidated
15 effective as of September 2, 2020, upon the San Joaquin Local Area Formation Commission's
16 recordation of a Certificate of Completion, and BBID is the successor agency. Through this
17 consolidation, BBID now holds WSID's post-1914 appropriative water right to divert water from
18 Old River (at a point of diversion referred to as Wicklund Cut) for irrigation, domestic, and
19 municipal and industrial uses with a priority date of April 17, 1916.

20 On June 15, 2021, Erik Ekdahl, SWRCB's Deputy Director, Division of Water Rights,
21 (Deputy Director), issued a Notice to BBID curtailing diversion of water under its and others'
22 post-1914 appropriative water rights with 1915 and later priority dates within the Sacramento-San
23 Joaquin River Delta watersheds. A copy of the Notice is attached as Exhibit A. The Notice states
24 that "water supply in the Sacramento-San Joaquin Delta (Delta) watershed is insufficient to
25 support *lawful diversion* under any post-1914 appropriative water right" and requests BBID
26 certify that it will immediately cease all diversions (unless the diversion qualifies for identified
27 exemption) under its post-1914 right. (Exhibit A at p. 1, emphasis added.) The Notice is cast as
28 "solely informational" (*id.* at p. 3), however, because it also unequivocally states the financial and

1 legal ramifications for continuing to divert water under a post-1914 appropriative water right after
2 receiving the Notice, the only reasonable interpretation of the Notice is it is an order of
3 curtailment. Specifically, the Notice states that after receipt of the Notice, any further diversion
4 of water under a post-1914 appropriative water right “when water is unavailable under [BBID’s]
5 priority of right” subjects BBID to the following:

6 Diverting water that is not lawfully available for your water right may subject you
7 to a cease and desist order, *prosecution in court*, or administrative fines as high as
8 \$1,000 per day of violation and \$2,500 for each acre-foot of water you divert or
use that is not lawfully available under your water right.

9 (Exhibit A at p. 3, citing Wat. Code, §§ 1052, 1055, emphasis added.) The Notice expressly
10 states that “**as of the date of this letter**” water is unavailable under BBID’s priority of right. (See
11 Exhibit A at p. 1, bold in original.)

12 The Notice was not issued after any hearing or proceeding before the SWRCB. BBID
13 was not provided an opportunity to test any evidence or information relied upon by SWRCB or its
14 Deputy Director, nor was it provided an opportunity to present SWRCB with evidence regarding
15 the availability of water diverted pursuant to BBID’s post-1914 appropriative water right.
16 SWRCB did solicit comments regarding the draft Methodology, which it purportedly considered
17 in developing the final Methodology relied on to determine water is unavailable in the Delta to
18 post-1914 water right holders. However, most of BBID’s comments alerting SWRCB to
19 deficiencies in the draft Methodology were not addressed in the final Methodology, and prior to
20 issuing the Notice. Indeed, only 20 calendar days passed between the close of written public
21 comments on the draft Methodology and publication of the final Methodology and issuance of the
22 Notice.

23 SWRCB may reconsider all or part of a water rights decision. (Wat. Code, § 1122.)
24 Water Code section 1126, subdivision (b), requires any party aggrieved by a decision issued
25 under authority delegated to an officer or employee of the SWRCB to seek reconsideration before
26 filing a petition for writ of mandate in a court of law. An allegedly informational curtailment
27 notice containing unequivocal language regarding cessation of diversions is a final agency action
28 subject to a petition for reconsideration. (*Phelps v. State Water Resources Control Bd.* (2007))

1 157 Cal.App.4th 89, 105.) BBID contests that the Deputy Director was lawfully delegated
2 authority to issue the Notice. Should SWRCB determine the Notice was issued under authority
3 lawfully delegated to the Deputy Director, BBID submits this Petition for Reconsideration in
4 accordance with Water Code section 1126, subdivision (b), to preserve its right to file a petition
5 for a writ of mandate.

6 BBID submits this Petition for Reconsideration because it believes the Notice constitutes
7 a “final action” of SWRCB subject to the provisions of Water Code section 1126. (Wat. Code,
8 § 1126, subd. (b).)

9 BBID believes that the Notice is unlawful for the reasons summarized below.

10 A. The Notice Relies on a Deficient Methodology for the Delta Watershed

11 The Methodology (both draft and final versions) is insufficient to support a finding of
12 water unavailability in the Delta Watershed. The Methodology, which the Notice relies on as
13 authority for the determination of water unavailability in the Delta, is merely a rebranded version
14 of the deficient Water Availability Analysis from 2014 and 2015 (Water Availability Analysis).
15 (See Exhibit A at p. 2; see also SWRCB Meeting, Division of Water Rights Presentation Slide for
16 Agenda Item 7: Update on Water Unavailability Methodology for the Delta Watershed on draft
17 Methodology (Jun. 1, 2021) attached as Exhibit B.) In 2016, the Hearing Unit in the Division of
18 Water Rights of SWRCB found the Water Availability Analysis insufficient to support
19 enforcement actions based on allegedly illegal diversions under substantially identical curtailment
20 notices. (SWRCB Order WR 2016-0015 (Order WR 2016-0015), attached hereto as Exhibit C.)
21 Specifically, the Hearing Unit found that the Water Availability Analysis lacking for the
22 following reasons: (1) it relied on data that was not the most accurate, available water supply and
23 demand information in the Delta in May and June 2015; (2) it included demand in tributary
24 watersheds that could not have been met with supply available to that tributary; and (3) it
25 included the San Joaquin River Exchange Contractors’ diversions as demand on the full natural
26 flow of the San Joaquin River, when those diversions were likely met with imported or stored
27 water. (Exhibit C at pp. 14-15.) In addition to these findings, the Hearing Unit determined that
28 the absence of testimony answering other questions raised by BBID collectively amounted to the

1 SWRCB failing to meet its burden of proof to pursue enforcement action against BBID.

2 Rather than using Order WR 2016-0015 as a template by which to methodically improve,
3 over the past six years, the Water Availability Analysis to account for the complexities of the
4 Delta as well as supply and demand data issues, SWRCB staff began developing the
5 Methodology in February 2021 and, on May 12, 2021, issued the notice of public workshop and
6 opportunity for public comment on the draft Methodology. (See Exhibit B; see also Notice of
7 Public Workshop and Opportunity for Public Comment on the Water Unavailability Methodology
8 for the Delta Watershed (May 12, 2021), attached hereto as Exhibit D.)

9 On May 25, 2021, BBID submitted numerous comments on the draft Methodology,
10 highlighting its concerns that the draft Methodology suffers from similar deficiencies noted in
11 Order WR 2016-0015 regarding the Water Availability Analysis. (Comments on SWRCB
12 May 2021 Draft Water Unavailability Methodology for the Delta Watershed, attached hereto as
13 Exhibit E.) However, many critical comments on the draft Methodology raised by BBID remain
14 unaddressed in the final Methodology. These include: (1) improper consideration of Delta return
15 flows as supply available to diverters upstream of the Delta; (2) failure to account for municipal
16 wastewater treatment plant discharges to rivers and Delta channels as additional sources of
17 supply; (3) failure to treat the Delta as its own supply and demand area; and (4) failure to account
18 for Delta hydrodynamics and residence time. (Water Unavailability Methodology for the Delta
19 Watershed (June 2021), attached hereto as Exhibit F, at pp. 10-11, 23-25, 37-38, 49-50.) In
20 addition, despite BBID's comments, SWRCB declines to include as available supply the stored
21 Project water released for instream flow that becomes abandoned after fulfilling the instream flow
22 requirement in the applicable stream reach. (Exhibit F at p. 2.) And, finally, despite the
23 availability of real-time information to inform anticipated 2021 water demands, SWRCB uses
24 historic data from 2018 and 2019 as proxy to evaluate the demand on various water rights to
25 determine available supply (Exhibit F at p. 27), which continues a practice identified as flawed in
26 Order WR 2016-0015 (Exhibit C at pp. 14-15).

27 Therefore, the Methodology is inadequate to support a water unavailability determination
28 in the Delta, rendering the Notice legally unsupported.

1 B. Executive Director Lacks Authority to Issue Notice

2 The Deputy Director issued the Notice. The Notice effectively curtails BBID's post-1914
3 right to divert water. SWRCB has not delegated authority to the Deputy Director to issue notices
4 of curtailments. (See SWRCB Res. No. 2012-0029.) Moreover, under Water Code
5 section 85230, the Delta Watermaster has exclusive authority over diversions in the Delta and
6 does not authorize delegation of his authority. Thus, the Deputy Director's attempt to curtail
7 BBID's post-1914 water right through the Notice is beyond the scope of the Deputy Director's
8 legal authority.

9 C. Violation of Due Process

10 While a water right is usufructuary in nature, once a post-1914 appropriative water right is
11 perfected it becomes a *vested right*. (See Wat. Code, § 1610 [SWRCB's issuance of license
12 confirms the right to appropriate water].) As such, BBID's post-1914 appropriative water right is
13 subject to procedural due process protection including proper notice and the opportunity to be
14 heard. While BBID's license provides the terms by which it may be modified and the amount of
15 water diverted reduced to prevent waste and unreasonable use, protect the public trust, or meet
16 water quality objectives, it also provides that notice and opportunity for hearing are required.
17 (Amended License for Diversion and Use of Water, Permit 270, License 1381 (Aug. 19, 2020)
18 attached hereto as Exhibit G, at p. 2.) SWRCB attempts to circumvent BBID's due process rights
19 by declaring water unavailable and all diversions under a post-1914 appropriative water right per
20 se illegal, resulting in the same effect as modification of BBID's license under the
21 aforementioned terms without any of the requisite due process. SWRCB, in curtailing BBID's
22 post-1914 appropriative water right by issuing the Notice, failed to provide BBID a hearing or
23 other opportunity to challenge the Notice. SWRCB and/or its Executive Director made the
24 decision to curtail BBID's post-1914 appropriative water right outside of any public process and
25 did not provide a notice, hearing, or administrative proceeding to BBID. By failing to provide
26 BBID with proper notice and a meaningful opportunity to be heard regarding the factual and legal
27 basis for issuing the Notice, SWRCB and/or its Executive Director deprived BBID of due process
28 to which it is entitled, constituting a failure to proceed in a manner required by law. (Code of

1 Civ. Proc., § 1094.5, subds. (b), (f).)

2 D. SWRCB Failed to Comply with the Governor's Order


3 On May 10, 2021, Governor Gavin Newsom issued a Proclamation of a State of
4 Emergency, which provides, among other things, that SWRCB "shall consider emergency
5 regulations to curtail water diversions when water is not available at water right holders' priority
6 of right or to protect releases of stored water." Contrary to this direction, SWRCB did not adopt
7 emergency regulations authorizing the issuance of curtailments. Instead, it curtailed all post-1914
8 appropriative water right holders' diversions in the Delta unilaterally and outside of a rulemaking,
9 emergency or otherwise. Thus, SWRCB failed to comply with the Governor's May 10, 2021
10 Proclamation, resulting in unauthorized and unlawful curtailment of BBID's water rights.

11 III. CONCLUSION

12 For the foregoing reasons, the Notice is unlawful and unsupported. Petitioner requests
13 that SWRCB rescind the Notice.

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16
17 Dated: July 15, 2021

SOMACH SIMMONS & DUNN
A Professional Corporation

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21 Byron-Bethany Irrigation District
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