

**In the Court of Appeal**

**of the**

**State of California**

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SIXTH APPELLATE DISTRICT

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*IN RE CALIFORNIA CURTAILMENT CASES*

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**RESPONDENTS' BRIEF [MERITS APPEAL]**

From Judgments of the Superior Court for the State of California,  
County of Santa Clara, Case No. 2015-1-CV-285182  
(Judicial Council Coordination Proceeding No. 4838)  
The Honorable Brian C. Walsh

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<b>CERTIFICATE OF INTERESTED ENTITIES OR PERSONS</b>		
(Check one): <input checked="" type="checkbox"/> INITIAL CERTIFICATE <input type="checkbox"/> SUPPLEMENTAL CERTIFICATE		
Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.		

1. This form is being submitted on behalf of the following party (name): Byron-Bethany Irrigation District
2. a. ☒ There are no interested entities or persons that must be listed in this certificate under rule 8.208.
- b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: December 22, 2021

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(TYPE OR PRINT NAME)

(SIGNATURE OF APPELLANT OR ATTORNEY)

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<b>CERTIFICATE OF INTERESTED ENTITIES OR PERSONS</b>	
<i>(Check one):</i> <input checked="" type="checkbox"/> <b>INITIAL CERTIFICATE</b> <input type="checkbox"/> <b>SUPPLEMENTAL CERTIFICATE</b>	
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1. This form is being submitted on behalf of the following party (*name*): Central Delta Water Agency (CDWA)

2. a. ☒ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

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<b>RESPONDENT/</b>			
<b>REAL PARTY IN INTEREST:</b>			
<b>CERTIFICATE OF INTERESTED ENTITIES OR PERSONS</b>			
(Check one): <input checked="" type="checkbox"/> INITIAL CERTIFICATE <input type="checkbox"/> SUPPLEMENTAL CERTIFICATE			
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1. This form is being submitted on behalf of the following party (name): Banta-Carbena Irrigation District and Patterson Irrigation District.
2. a. ☒ There are no interested entities or persons that must be listed in this certificate under rule 8.208.  
b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

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(SIGNATURE OF APPELLANT OR ATTORNEY)

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1. This form is being submitted on behalf of the following party (name): San Joaquin Tributaries Authority
2. a. ☒ There are no interested entities or persons that must be listed in this certificate under rule 8.208.
- b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

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Date: December 20, 2021

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(SIGNATURE OF APPELLANT OR ATTORNEY)

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1. This form is being submitted on behalf of the following party (name): South San Joaquin Irrigation District
2. a. ☒ There are no interested entities or persons that must be listed in this certificate under rule 8.208.
- b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

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Date: December 20, 2021

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<b>COURT OF APPEAL</b> <b>SIXTH APPELLATE DISTRICT, DIVISION</b>	<b>COURT OF APPEAL CASE NUMBER:</b> H047270 and H047927
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1. This form is being submitted on behalf of the following party (name): South Delta Water Agency
2. a. ☒ There are no interested entities or persons that must be listed in this certificate under rule 8.208.  
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<b>CERTIFICATE OF INTERESTED ENTITIES OR PERSONS</b> (Check one): <input checked="" type="checkbox"/> INITIAL CERTIFICATE <input type="checkbox"/> SUPPLEMENTAL CERTIFICATE		
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1. This form is being submitted on behalf of the following party (name): Oakdale Irrigation District
2. a. ☒ There are no interested entities or persons that must be listed in this certificate under rule 8.208.  
 b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

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 (SIGNATURE OF APPELLANT OR ATTORNEY)

## **TABLE OF CONTENTS**

	<b>Page</b>
I. INTRODUCTION.....	13
II. STATEMENT OF THE CASE .....	15
III. STATEMENT OF FACTS.....	16
A. <u>Factual and Procedural Background</u> .....	16
1. The State Board’s 2014-2015 Drought Actions .....	16
a. The 2014 Curtailment Notice.....	16
b. The 2014 State Board Emergency Regulations.....	17
c. The 2015 Curtailment Notices .....	18
d. The April and May 2015 Curtailment Notices to Post-1914 Water Right Holders .....	19
e. The June 2015 Curtailment Notice to Pre-1914 Water Right Holders.....	20
2. The Court Actions and the Temporary Restraining Order .....	20
3. Coordination of the Curtailment Cases .....	22
4. The 2015 “Clarification” Notice .....	22
5. The Enforcement Actions .....	22
6. Dismissal of the Enforcement Actions for the State Board’s Failure to Meet its Burden of Proof.....	23
7. The Trial Court Proceedings for the Coordinated Cases.....	25
8. The State Board’s Appeal .....	25
9. WSID and BBID Merger .....	25
B. <u>Legal Background</u> .....	26
IV. STATEMENT OF APPEALABILITY .....	28
V. STANDARD OF REVIEW .....	30

## **TABLE OF CONTENTS (Continued)**

	<b>Page</b>
VI. ARGUMENT .....	30
A. <u>The Trial Court Properly Interpreted Water Code           Section 1052</u> .....	30
1.   The Trial Court’s Interpretation Does Not Separate the Diversion and Use of Water From the Corpus.....	32
2.   The 2015 Curtailments Did Not Involve Diversions in Excess of a Valid Right .....	33
3.   The State Board’s Water Availability Analysis Was Fundamentally Flawed.....	37
4.   There Was No Evidence That Respondents’ Diversions Exceeded Respondents’ Rights.....	38
B. <u>The Legislative History Is Replete With Language           Limiting Liability for Trespass Under Section 1052           to Division 2 Water – Unappropriated Water</u> .....	38
1.   The Water Commission Act.....	40
2.   The 1943 Codification of the Water Commission Act – Senate Bill 945 .....	43
3.   The 1957 Legislative Amendment – Assembly Bill 1969 .....	44
4.   The 1987 Legislative Amendment – Assembly Bill 1487 .....	44
a.   Scope of Amendment.....	44
b.   Legislative Support for Limited State Board Jurisdiction .....	45
5.   The 1991 Legislative Amendment – Assembly Bill 2017 .....	47
6.   The 2003 Legislative Amendment – Senate Bill 1049 .....	48
7.   The 2014 Legislative Amendment – Senate Bill 104 .....	48
8.   There Is No Legislative Support for the State Board’s Position That a Section 1052 Trespass Applies to Any Character of Water Other Than Unappropriated Water.....	49
C. <u>The State Board’s Enforcement Authority Is           Limited to the Authority Granted by the Legislature</u> .....	50

## **TABLE OF CONTENTS (Continued)**

	<b>Page</b>
D. <u>The Trial Court Properly Interpreted Binding Precedent.....</u>	51
1.    The Limitations on the State Board's Authority are Recognized in <i>Young</i> and <i>Millview</i> .....	51
2. <i>Meridian Ltd. v. City and County of</i> <i>San Francisco</i> Does Not Support the State Board's Position.....	57
VII.   CONCLUSION .....	58
CERTIFICATE OF COMPLIANCE .....	61

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>Banta-Carbona Irrigation District v. SWRCB, et al.</i> , San Joaquin Superior Court Case No. 39-2015-00326421-CU-WM-STK (filed June 18, 2015) .....	20
<i>Butte Canal &amp; Ditch Co. v. Vaughn</i> (1858) 11 Cal. 143 .....	37
<i>Byron-Bethany Irrigation District v. SWRCB, et al.</i> , Contra Costa Superior Court Case No. MSN15-0967 (filed June 26, 2015) .....	20
<i>California Farm Bureau Federation v. State Water Resources Control Bd.</i> (2011) 51 Cal.4th .....	27
<i>Carlsbad Mut. Water Co. v. San Luis Rey Development Co.</i> (1947) 78 Cal.App.2d 900 .....	56
<i>Duarte Nursery, Inc. v. United States Army Corps of Engineers</i> (2014) 17 F.Supp.3d 1013 .....	21
<i>Eddy v. Simpson</i> 21 (1853) 3 Cal. 249 .....	55
<i>Frey v. Lowden</i> (1886) 70 Cal. 550 .....	27
<i>Goldstein v. California Unemployment Ins. Appeals Bd.</i> (2019) 34 Cal.App.5th 1006 .....	39
<i>Hewitt v. Story</i> (9th Cir. 1894) 64 F. 510 .....	14
<i>Mares v. Baughman</i> (2001) 92 Cal.App.4th 672 .....	57
<i>Meridian Ltd. v. City and County of San Francisco</i> (1939) 13 Cal.2d 424 .....	57
<i>Miller &amp; Lux v. Madera Canal &amp; Irr. Co.</i> (1907) 155 Cal. 59 .....	27
<i>Millview County Water Dist. v. State Water Resources Control Bd.</i> (2014) 229 Cal.App.4th 879 .....	14, <i>passim</i>
<i>Modoc Land &amp; Livestock Co. v. Booth</i> (1894) 102 Cal. 151 .....	55
<i>Nevada County &amp; Sacramento Canal Co. v. Kidd</i> (1869) 37 Cal. 282 .....	55

# **TABLE OF AUTHORITIES (CONTINUED)**

	Page(s)
<i>Ortman v. Dixon</i> (1859) 13 Cal. 33 .....	54
<i>Patterson Irrigation District v. SWRCB, et al.</i> , Stanislaus Superior Court Case No. 2015307 (filed June 19, 2015) .....	20
<i>Peabody v. Vallejo</i> (1935) 2 Cal.2d 351 .....	56
<i>People v. Shirokow</i> (1980) 26 Cal.3d 301 .....	14, 31
<i>People ex rel. State Water Resources Control Bd. v. Forni</i> (1976) 54 Cal.App.3d 743 .....	56
<i>Phelps v. State Water Resources Control Board</i> (2007) 157 Cal.App.4th 89 .....	17
<i>Prather v. Hoberg</i> (1944) 24 Cal.2d 549 .....	14
<i>San Joaquin Tributaries Authority, et al. v. SWRCB, et al.</i> , Stanislaus Superior Court Case No. 2015366 (filed June 19, 2015) .....	20
<i>State Water Resources Control Bd. Cases</i> (2006) 136 Cal.App.4th 674 .....	26, 30
<i>The West Side Irrigation District, et al. v. SWRCB, et al.</i> , Sacramento Superior Court Case No. 34-2015-80002121 (filed June 29, 2015).....	20
<i>United States v. State Water Resources Control Board</i> (1986) 182 Cal.App.3d 82 .....	38
<i>Wade v. Superior Court</i> (2019) 33 Cal.App.5th 694 .....	39
<i>Yamaha Corp. of America v. State Bd. of Equalization</i> (1998) 19 Cal.4th 1 .....	50
<i>Young v. State Water Resources Control Bd.</i> (2013) 219 Cal.App.4th 397 .....	27, <i>passim</i>

## TABLE OF AUTHORITIES (CONTINUED)

**Page(s)**

### **California Statutes**

#### **Statutes at Large**

Stats. 1913, ch. 586 .....	26, <i>passim</i>
Stats. 1943, ch. 368 .....	43
Stats. 1957, ch. 1932 .....	44
Stats. 1987, ch. 756 .....	45
Stats. 1991, ch. 1098 .....	47
Stats. 2003, ch. 741 .....	48
Stats. 2014, ch. 3 .....	49

#### **Water Code, section(s)**

102 .....	26
104 .....	26
105 .....	26
1051 .....	49
1052 .....	13, <i>passim</i>
1052, subd. (a) .....	30
1058.5 .....	16, 17, 50
1201 .....	26, <i>passim</i>
1202 .....	26, <i>passim</i>
1831 .....	30, 34, 35
1831, subd. (d)(1) .....	30
1831, subd. (e) .....	51, 52, 54
2000 .....	27
2017 .....	27
2019 .....	27
2750-2774 .....	27
7075 .....	37
12200-12220 .....	38
Division 2, pt. 3, ch. 3 .....	27

### **Other**

#### Assembly Bills

AB 642 (1913 Reg. Sess.), § 38, as amended Apr. 22, 1913 .....	42
AB 1969 (1957 Reg. Sess.), as introduced Jan. 19, 1957, § 38 .....	44
AB 1487 (1987-1988 Reg. Sess.), as introduced Mar. 4, 1987 .....	44, 45
AB 1487 (1987-1988 Reg. Sess.), as last amended Aug. 20, 1987 .....	44, 45

## TABLE OF AUTHORITIES (CONTINUED)

	<b>Page(s)</b>
AB 2017 (1991-1992 Reg. Sess.), as introduced Mar. 8, 1991 .....	47
<u>Senate Bills</u>	
SB 104 (2013-2014 Reg. Sess.), as amended Feb. 24, 2013 .....	48
SB 1049 (2002-2003 Reg. Sess.), as introduced Feb. 27, 2003 .....	48
SB 1049 (2002-2003 Reg. Sess.), as amended Sept. 5, 2003 .....	48
<u>Miscellaneous</u>	
Assem. Daily File, AB 1487 (1987-1988 Reg. Sess.), as amended Aug. 20, 1987, Legislative Counsel Digest .....	47
Attachment to Memo from State Board re: Legislative Summary for First Half of 1987-88 Session (Oct. 9, 1987) .....	47
California Legislature at Sacramento, Senate Final History (1943) .....	43
Hitchborn, Story of the Session of the California Legislature of 1913 (S.F. Press 1913), pp. 137-138 .....	41
Hutchins, The California Law of Water Rights State of Cal. (1956) .....	27, 42, 54
Legislative Analyst, Analysis of Assem. Bill No. 1487, as amended Apr. 30, 1987 (May 21, 1987) .....	46
Letter from J. Van De Kamp, Attorney General, to B. Hansen, Assemblyperson, re: Assem. Bill No. 1487 Unauthorized Diversion or Use of Water (July 10, 1987) .....	47
Memo from R. Ayala, Chairperson of Senate Committee on Agriculture and Water Resources, re: Assem. Bill No. 1487, as amended Apr. 30, 1987 .....	45, 46
Proposed Water Code, Divisions 1 to 4 (Inclusive) and Division 6 (1942) Cross Reference Table for Stats. 1913, ch. 586 .....	43
Report of the Conservation Commission of the State of California (Jan. 1, 1913) .....	41

## **TABLE OF AUTHORITIES (CONTINUED)**

	<b>Page(s)</b>
Senate Comm. On Appropriations File, Form Consent Calendar re Third Reading of Assem. Bill 1487, as amended Apr. 30, 1987 (Jun. 4, 1987) .....	46
Senate Fiscal Committee File, Bill Analysis of Assem. Bill No. 1487, as amended Apr. 30, 1987 (May 22, 1987) .....	46
Senate Rules Committee, Office of Senate Floor Analyses, Third Reading of Assem. Bill No. 1487, as amended Apr. 30, 1987 (Aug. 17, 1987) .....	46
Senate Rules Committee, Office of Senate Floor Analyses, Third Reading of Assem. Bill No. 1487, as amended Aug. 20, 1987 (Aug. 21, 1987) .....	46
Senate Rules Committee, Office of Senate Floor Analyses, Third Reading of Assem. Bill No. 1487, as amended Aug. 27, 1987 .....	46
Senate Rules Committee, Office of Senate Floor Analyses, Third Reading, Assem. Bill No. 2017 (Aug. 23, 1991) .....	47
Senate Rules Committee, Office of Senate Floor Analysis Third Reading of Sen. Bill No. 104, as introduced Jan. 10, 2013.....	48
Summary Digest of Statutes Enacted and Resolutions Adopted in 1987 and 1979-1987 Statutory Record, Vol.1 .....	44, 45

## I. INTRODUCTION

The gravity of successive dry water years and their resulting droughts, especially the one leading to these proceedings, is not lost on Respondents.<sup>1</sup> Droughts create unique and challenging circumstances for all Californians, including Respondents and the State Water Resources Control Board (State Board). However, this case is not about the drought. It is about the State Board's authority under Water Code section 1052 (Section 1052).<sup>2</sup> The drought did not expand the State Board's authority beyond that specifically provided by the Legislature. The trial court properly held that the State Board does not have jurisdiction under Section 1052 to curtail pre-1914 water right holders based on a general lack of water available under their particular priority of right.

Respondents are public water districts, irrigation districts, and municipalities providing water for various beneficial uses in and around the Delta, the San Joaquin Valley, and the City and County of San Francisco, for irrigation, domestic and municipal water supplies, and power production. Without Respondents' water, diverted under riparian and pre-1914 water rights, these beneficial uses are not possible.

During the 2014/2015 drought, the State Board sought to expand its authority under Section 1052 by issuing orders to Respondents, and other riparian and pre-1914 appropriative water right holders in the San Joaquin

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<sup>1</sup> "Respondents" collectively refers to Petitioners/Respondents Byron-Bethany Irrigation District (BBID), San Joaquin Tributaries Authority, Central Delta Water Agency, South Delta Water Agency, Patterson Irrigation District, Banta-Carbona Irrigation District, South San Joaquin Irrigation District, and Oakdale Irrigation District.

<sup>2</sup> Unless otherwise stated, all statutory references herein are to the Water Code.

Valley and the Delta, directing them to immediately stop diverting water. The State Board asserted that no water was purportedly available under diverters' priorities of right and, therefore, any continued diversions constituted a trespass under Section 1052. The State Board did not assert that continued diversion would be in excess of valid riparian and pre-1914 water rights (collectively, "Senior Rights")<sup>3</sup> – just that all diversions constituted trespasses because of the purported unavailability of water. Prior to issuing these orders, the State Board never provided Respondents with a hearing or other opportunity to contest the water unavailability finding or other conclusions they relied on to issue the orders.

The trial court correctly interpreted the limited statutory authority of the State Board under Section 1052. Because trespass under Section 1052 provides the State Board with jurisdiction over unappropriated water, and because diversions of water under Senior Rights does not involve unappropriated water, the trial court accurately concluded that the State

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<sup>3</sup> A riparian right does not confer a right to a given quantity of water (i.e., face value). (*People v. Shirokow* (1980) 26 Cal.3d 301, 306-307.) Instead, a riparian right holder is entitled to divert the amount of water required for reasonable and beneficial use on the riparian parcel and, as such, the amount of water to which the riparian user is entitled fluctuates with the present need of the landowner and the proportionate share to which it is entitled. (*Prather v. Hoberg* (1944) 24 Cal.2d 549, 559-560.)

Pre-1914 appropriative rights, on the other hand, do have a maximum face value that is generally limited to the quantity of water needed to achieve the purpose(s) intended at the time of initiation. (*Hewitt v. Story* (9th Cir. 1894) 64 F. 510, 514.) Pre-1914 appropriative water rights may be lost through non-use if the non-use continues for a period of time (i.e., forfeiture), so it is possible that a right holder's maximum face value may diminish over time. (See, e.g., *Millview County Water Dist. v. State Water Resources Control Bd.* (2014) 229 Cal.App.4th 879, 889 (*Millview*).) Riparian rights are not subject to forfeiture through non-use. (*Id.* at pp. 889-890.)

Board did not have authority to curtail Respondents' diversions of water under their valid Senior Rights.

This conclusion is consistent with the text of Section 1052, the legislative history, and case law holding that the State Board's authority over Senior Rights under Section 1052 is limited to answering two threshold questions: (1) whether Senior Rights are valid; and (2) if so, what is their scope, authorizing the State Board to determine whether or not water is lawfully diverted under Senior Rights. To the extent that the State Board determines a Senior Right authorizes water diversion and use, it lacks jurisdiction to pursue trespass for diversions made within the scope of that Senior Right. Accordingly, and for the reasons set forth herein, the Court should affirm the trial court's judgments regarding the State Board's jurisdiction under Section 1052.

The trial court also determined that the State Board's issuance of curtailment orders based on general findings of water unavailability violated Respondents' right to due process. The State Board's failure to challenge this finding makes this appeal moot. Without a challenge to the trial court's judgment regarding due process, the curtailment orders issued by the State Board remain invalid, regardless of this Court's review of its jurisdiction under Section 1052.

## **II. STATEMENT OF THE CASE**

The issue before the Court is whether the State Board has the authority to pursue, as trespass under Section 1052, water diversion made by Senior Right holders within the scope of their valid rights. This is distinct from the issue framed by the State Board. (See Appellant's Opening Brief (AOB), pp. 12-13, 28.)

This Court must determine whether the trial court correctly concluded that the State Board cannot regulate Senior Rights through trespass authority under Section 1052 based on a general finding of water unavailability. The trial court determined the State Board did not have such authority, relying on the long-established limits of the State Board's jurisdiction over rights existing prior to its formation.

### **III. STATEMENT OF FACTS**

#### **A. Factual and Procedural Background**

##### **1. The State Board's 2014-2015 Drought Actions**

###### **a. The 2014 Curtailment Notice**

On January 17, 2014, Governor Brown issued a Proclamation of a Drought State of Emergency. (Administrative Record for the California Water Curtailment Cases, Santa Clara County Superior Court No. 1-15-CV-2851852<sup>4</sup> (also designated as 2015-1-CV-285182) (Curtailment AR), 001581.) Shortly thereafter, the State Board issued a "Notice of Surface Water Shortage and Potential for Curtailment of Water Rights Diversions" informing diverters of the potential for water rights curtailments. (Curtailment AR 001580.) As the statewide water supply outlook worsened, on April 25, 2014, the Governor issued the Proclamation of a Continued State of Emergency, ordering the State Board to "adopt and implement emergency regulations pursuant to Water Code section 1058.5 . . . to require curtailment of diversions when water is not available under the diverter's priority of right." (Curtailment AR 001789.)

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<sup>4</sup> The State Board issued the certified Curtailment Administrative record on February 15, 2017, and thereafter amended the record on July 11, 2017. All further references are to the amended Curtailment Administrative Record, certified on July 11, 2017, unless otherwise indicated.

On May 27, 2014, without adopting emergency regulations under Section 1058.5, the State Board informed all post-1914 water right holders in the Sacramento and San Joaquin River Watersheds to immediately cease diversions, or face enforcement action because water was not available to divert under their priorities of right. (Curtailment AR 001871-001872.) The State Board did not pursue any enforcement actions in 2014.

**b. The 2014 State Board Emergency Regulations**

On July 2, 2014, the State Board adopted Resolution No. 2014-0031, creating emergency regulations for the curtailment of water rights to protect senior water right holders. (Curtailment AR 001926.) Resolution No. 2014-0031 stated:

To assure that the State Water Board is prepared for another dry year, it will engage with stakeholders in various watersheds over the next six months to refine data and gather input on how to most effectively implement and enforce the water rights priority system in future dry years. The primary objective is to improve the State Water Board's and the water users' confidence in the technical tools and analysis that will be used for making determinations on water availability relative to water rights priority.

(Curtailment AR 001930, ¶ 22.)

This stakeholder outreach process never occurred, except for a limited number of post-1914 appropriative water right holders.<sup>5</sup> In addition, the regulation, which expired on April 14, 2015, was authorized

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<sup>5</sup> Notably, the State Board only sought enforcement of Term 91 (a curtailment methodology that is used often by the State Board with respect to the Delta) after it had been (1) developed in a formal public process, and (2) imposed on specific water rights in conformance with due process. (See generally *Phelps v. State Water Resources Control Board* (2007) 157 Cal.App.4th 89, 94-99.)

by Resolution No. 2014-0031, and applied only to *post*-1914 water rights, included the following statement regarding Senior Rights:

Given complexities surrounding the relative priority of individual pre-1914 appropriative water rights and riparian water rights, the emergency regulation does not apply curtailment orders to these categories of water rights.

(Curtailment AR 001929, ¶ 21.)

These 2014 drought efforts provide factual context for the Court regarding the State Board's actions during the drought and its recognition of limited authority over Senior Rights.

**c. The 2015 Curtailment Notices**

From April to July of 2015, following expiration of drought efforts taken in 2014, the State Board released four separate notices of water unavailability directing 9,218 water rights holders to stop using water. (Curtailment AR 004220.) The State Board based such curtailment on its staff's internal, general determination of water unavailability under categories of water right priorities. (Curtailment AR 002717-002719, 002737.) Despite stakeholders' advocacy for State Board staff to refine the unavailability determinations (Curtailment AR 002612-002627, 002725-002726), staff proceeded, making unchecked policy decisions on complex factual issues fundamental to the relative priorities of Senior Rights holders. (See, e.g., Curtailment AR 002645-002646.) The State Board failed to work with Senior Right holders and abandoned its 2014 commitment to a transparent stakeholder process outlined in Resolution No. 2014-0031.

**d. The April and May 2015 Curtailment Notices to Post-1914 Water Right Holders**

On April 23, 2015, the State Board issued a curtailment notice to post-1914 appropriative water right holders in the San Joaquin River Watershed (April Curtailment Notice), ordering recipients to “immediately stop diverting under their post-1914 water rights.” (Curtailment AR 003470.) Recipients were required to complete a “Curtailment Certification Form” certifying “cessation of diversion under the specific post-1914 water right.” (*Ibid.*) The April Curtailment Notice further stated that “[c]ompletion of the Form is mandatory to avoid unnecessary potential enforcement proceedings.” (*Ibid.*) On May 1, 2015, the State Board issued a curtailment notice to post-1914 water right holders in the Sacramento River Watershed (May Curtailment Notice) containing identical language to the April Curtailment Notice. (Curtailment AR 003516-003517.)

The geographic scope of these two curtailments was enormous – covering all major and minor watersheds flowing into the Sacramento or San Joaquin Rivers. (See Administrative Record for State Board Water Right Order WR-2016-0015, certified December 30, 2016 (Enforcement AR), 009875-009876.) Despite this largescale impact, the State Board’s Executive Director based the curtailment on internal, staff-produced graphs comparing forecasted supply to historically reported demand. (See Enforcement AR 008397-008401; see also Curtailment AR 002717-002719, 002737 [email correspondence regarding the decision to curtail post-1914 water rights].) Neither the methodology nor the final determination of water unavailability underwent peer review or, cross-examination in a hearing, and recipients of the notices were provided zero opportunity to challenge the determination.

**e. The June 2015 Curtailment Notice to Pre-1914 Water Right Holders**

A subsequent June 12, 2015 curtailment notice (June Curtailment Notice) contained the same language as the April and May Curtailment Notices; the June Curtailment Notice directed pre-1914 appropriative right holders with a priority date later than 1903 in both the Sacramento and San Joaquin River watersheds to immediately stop diverting water and complete a form certifying cessation of all diversions. (Curtailment AR 004212-004213.) The June Curtailment Notice relied on the same watershed-wide spreadsheet methodology as the April and May Curtailment Notices.<sup>6</sup> (See Enforcement AR 008400-008401.)

**2. The Court Actions and the Temporary Restraining Order**

In June 2015, five separate lawsuits challenged the 2015 Curtailment Notices discussed above.<sup>7</sup> On June 30, 2015, the West Side Irrigation District (WSID), et al.<sup>8</sup> filed in the Sacramento Superior Court (Sacramento Superior Court Case No. 34-2015-80002121) an Ex Parte Application for Stay of the State Water Board's May and June Curtailment Notices or in

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<sup>6</sup> Hereinafter, Respondents refer to the April, May, and June Curtailment Notices collectively as the "2015 Curtailment Notices."

<sup>7</sup> *Banta-Carbona Irrigation District v. SWRCB, et al.*, San Joaquin Superior Court Case No. 39-2015-00326421-CU-WM-STK (filed June 18, 2015); *Patterson Irrigation District v. SWRCB, et al.*, Stanislaus Superior Court Case No. 2015307 (filed June 19, 2015); *San Joaquin Tributaries Authority, et al. v. SWRCB, et al.*, Stanislaus Superior Court Case No. 2015366 (filed June 19, 2015); *Byron-Bethany Irrigation District v. SWRCB, et al.*, Contra Costa Superior Court Case No. MSN15-0967 (filed June 26, 2015); and *The West Side Irrigation District, et al. v. SWRCB, et al.*, Sacramento Superior Court Case No. 34-2015-80002121 (filed June 29, 2015).

<sup>8</sup> Woods Irrigation Company was dismissed as a party following the Court's October 4, 2016 ruling on the State Board's demurrer.

the Alternative Temporary Restraining Order (TRO) and/or for Order to Show Cause Re: Preliminary Injunction on grounds that the 2015 Curtailment Notices violated Respondents' due process rights. Sacramento Superior Court Judge Shelleyanne Chang's July 10, 2015 Ruling found:

[T]he . . . 2015 Curtailment Letters<sup>9</sup> are coercive in nature and go beyond the "informational" purpose the Board claims prevents a stay. Consequently, Petitioners are likely to succeed on the merits. As in *Duarte*, even though the Curtailment Letters are not enforceable on their own and there are no separate penalties for violating them, the language used in the Curtailment Letters results in a "comman[d] by the . . . [g]overnment to stop [water diverting] activities." (*Duarte Nursery, Inc. v. United States Army Corps of Engineers* (2014) 17 F.Supp.3d 1013, 1018.) It is not a suggestion for "voluntary cessation of activities," but instead requires Petitioners to "immediately stop diverting water. [Citation.]"

(Curtilment AR 004914-004915.)

The Curtailment Letters, including the requirement that recipients sign a compliance certification confirming cessation of diversion, result in a taking of Petitioners' property rights without a pre-deprivation hearing, in violation of Petitioners' Due Process Rights.

(Curtilment AR 004917.)

Judge Chang granted a TRO "prohibiting . . . any action against [WSID] and landowners of the other petitioner districts on the basis of the 2015 Curtailment Letters." (Curtilment AR 004917.)

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<sup>9</sup> Herein and subsequent quotes from Judge Chang, the 2015 Curtailment Notices are referred to as "Letters."

### **3. Coordination of the Curtailment Cases**

On July 7, 2015, the State Board petitioned the Judicial Council to coordinate the five lawsuits challenging the Curtailment Notices. (Appellants' Appendix (AA MERIT), Vol. 1, at 20.) On August 10, 2015, the Judicial Council granted the State Board's Petition to coordinate the five actions (*ibid.*) and later assigned the coordinated cases to Santa Clara Superior Court.

### **4. The 2015 "Clarification" Notice**

Faced with the TRO, on July 15, 2015 the State Board issued a "Partial Rescission of April, May and June 2015 Curtailment Notices and Clarification of the State Board Position Re: Notices of Unavailability of Water" (Revised Curtailment Notice). (Curtilment AR 004918.) While the State Board's stated intent was "to rescind the 'curtailment' portions of the unavailability notices," it maintained its staff's determination "that there is insufficient water available for the categories of junior water users identified in the State Board's prior correspondence" and threatened enforcement under Section 1052 against those found diverting to protect Senior Rights. (*Ibid.*)

### **5. The Enforcement Actions**

On July 16, 2015, the State Board issued a Draft Cease and Desist Order (CDO) against WSID for "violation or threatened violation of the prohibition against unauthorized diversion of water" (WSID-CDO). (Enforcement AR 000001-000002.) A few days later, it issued an Administrative Civil Liability Complaint to BBID (BBID ACL) for "divert[ing] a total of approximately two thousand sixty-seven . . . acre-feet over the course of thirteen days . . . during which water was unavailable to serve BBID's water right." (Enforcement AR 000010-000011.) The BBID

ACL carried maximum potential fines of \$5,180,500 and the WSID CDO threatened fines of \$10,000 per day for non-compliance. (Enforcement AR 000002, 008471.) The penalties sought in the BBID ACL covered the time period following the June Curtailment Notice.

Early in the pre-hearing processes for the WSID CDO and BBID ACL, the Hearing Unit for the State Board consolidated the issues of fact and questions of law common to both enforcement actions into a single proceeding as Phase I. The issues of fact regarding penalties for BBID and WSID were separated into Phases II and III. (Enforcement AR 001364-001366.)

Phase I involved the State Board staff's internal and unvetted determination of water unavailability. The hearing for Phase I commenced on March 21, 2016, with the State Board Prosecution Team's case in chief, focused on supporting the State Board's determination that water was not available to BBID and WSID on the relevant dates. (Enforcement AR 007222-007565.) When the Prosecution Team rested on March 22, 2016, numerous parties moved for non-suit, alleging that the Prosecution Team failed to meet their burden of proof. (Enforcement AR 008389-008390.) The Hearing Unit heard the motion for non-suit on March 23, 2016 and, two days later, before any additional evidence was heard, the Hearing Unit suspended all remaining hearings dates. (Enforcement AR 008197.)

**6. Dismissal of the Enforcement Actions for the State Board's Failure to Meet its Burden of Proof**

On June 7, 2016, the State Board released Order WR 2016-0015, dismissing the two enforcement actions because the Prosecution Team failed to meet its burden of proof. (Enforcement AR 008386-008401.) The

Order criticized the State Board staff's water unavailability determination; it acknowledged the use of overstated actual diversions caused by including demand from water rights on tributaries where existing demand was not met by available supply, as well as including 1,500 cubic feet per second (cfs) of demand on the natural flow of the San Joaquin River met by stored water. (Enforcement AR 008400.) Even without hearing the issues raised by opposing parties, the State Board Hearing Unit conceded that the "potential magnitude of the discrepancies in the water availability analyses" was too great to support the water availability determination and dismissed the actions. (Enforcement AR 008400-008401.)

Thus, at no time prior to or after the State Board's issuance of the 2015 Curtailment Notices did the State Board make a supported or defensible factual finding that water was unavailable for Respondents to divert under their respective water rights. Not until *after* the State Board issued the 2015 Curtailment Notices and pursued enforcement actions against BBID and WSID did it attempt to establish water unavailability; findings in Order WR 2016-0015 evinces this fact:

We are asked to consider the accuracy of the water availability analysis to retrospectively determine the availability of water for particular right holders at particular times. For this purpose, we find that inconsistencies in the water availability analysis that the witnesses could not adequately explain preclude us from finding that the Prosecution Team has carried its burden of proof.

(Enforcement AR 008399.) Despite these findings, the State Board's Opening Brief assumes that the water unavailability determination formed a proper basis for issuing the 2015 Curtailment Notices. Such assumptions are blatantly untrue and are not supported by facts in the record.

## **7. The Trial Court Proceedings for the Coordinated Cases**

The five coordinated cases proceeded to trial in 2018. Thus, the trial occurred after the dismissal of the two enforcement actions discussed above, and after the State Board issued Order WR 2016-0015 finding that the State Board's water unavailability analysis was both unsupported and fatally flawed.

In its Final Statement of Decision, the trial court agreed with Respondents that the State Board's 2015 Curtailment Notices both (a) violated their due process rights, and (b) were issued in excess of the State Board's authority under Section 1052. (Final Statement of Decision [FSOD], 4 AA MERIT 2045-2085). Accordingly, the trial court entered judgments in favor of Respondents in June 2019.

Notably, the trial court did not reach the factual issue of water unavailability. It did not need to; the State Board already admitted that the water unavailability analysis was flawed in Order WR 2016-0015, and any factual issues related to water unavailability could not cure the otherwise unlawful actions of the State Board.

## **8. The State Board's Appeal**

The State Board timely appealed the final judgments, but limited its appeal to only one of the two bases for the trial court's ruling: the scope of the State Board's enforcement authority under Section 1052. The State Board did not appeal the trial court's finding that the State Board violated Respondents' due process rights.

## **9. WSID and BBID Merger**

During the pendency of this appeal, Respondents WSID and BBID merged and BBID is the surviving district.

## **B. Legal Background**

In 1913, the California Legislature enacted the Water Commission Act, establishing a comprehensive permit system for all appropriations of water occurring after 1914, and creating the predecessor to the State Board. (Stats. 1913, ch. 586.<sup>10</sup>) The Legislature established the State Board that exists today in 1967. (*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 696.)

The statutory scheme governing the State Board is found in Division 2 of the Water Code, beginning with Water Code section 1000. Notably, the 1913 Water Commission Act (Water Commission Act) did not give the State Board authority over Senior Rights (i.e., riparian or pre-1914 appropriative rights). (See Wat. Code, §§ 1201-1202.) Contrary to the State Board's position in its Opening Brief, the Legislature clearly provided that water diverted under pre-1914 rights *is neither* waters of the State nor unappropriated water subject to the State Board's permitting authority. (See AOB, p. 17, citing general policy provisions at Wat. Code, §§ 102, 104, 105, then compare specific State Board provisions at Wat. Code, §§ 1201-1202.) Notably, the Legislature has not modified Water Code sections 1201 and 1202 since 1943 when they were codified in the Water Code.

Today, the State Board's authority over Senior Rights remains limited and defined by statute. The State Board can investigate and make

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<sup>10</sup> See exhibit to accompanying the Motion for Judicial Notice (MJN), at 1 MJN\_0144-0165. The legislative materials which are the subject of the MJN are contained within 12 volumes, are attached to the Declaration of Theresa C. Barfield, a part of the MJN. Some of the legislative materials are described or referenced within this brief; cross-references to the materials are provided by detailing the volume and bates number(s) of where that material resides.

preliminary determinations of all water rights in a stream system as part of a statutory adjudication process (Wat. Code, div. 2, pt. 3, ch. 3); however, any ultimate decree defining water rights in such a process is entered by a court of law. (See *id.* §§ 2750-2774.) The State Board can also advise courts on water rights, but the State Board’s findings are subject to court review and approval, as well as party rebuttal. (*Id.* §§ 2000, 2017, 2019.)

Respondents acknowledge that courts have recently recognized that the State Board has limited enforcement authority over diversions *in excess of or outside the scope of* valid Senior Rights. (See *Young v. State Water Resources Control Bd.* (2013) 219 Cal.App.4th 397, 404, 406; *Millview*, *supra*, 229 Cal.App.4th at pp. 895-896). However, these cases confirm that the Legislature provided the State Board very limited authority over Senior Rights, which does not include authority to regulate them. (See *California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 429 [“The Water Rights Division [of the State Board] has no permitting or licensing authority over riparian or pueblo rights, or over appropriative rights acquired before 1914”].) Instead, disputes between Senior Right holders have long been addressed by courts through quiet title and declaratory relief actions.<sup>11</sup> (See generally Hutchins, *The California Law of Water Rights* State of Cal. (1956) (Hutchins), pp. 348-350 [explaining the greatest number of controversies over water rights have been determined in civil actions]; see also *Frey v. Lowden* (1886) 70 Cal. 550, 551-552 [“There is no doubt of the power of a court of equity to

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<sup>11</sup> Because Senior Rights are considered real property, “an action to quiet his title to such water must . . . be commenced in the county where the land or some part of it is situated.” (*Miller & Lux v. Madera Canal & Irr. Co.* (1907) 155 Cal. 59, 73.)

ascertain and determine the extent of the rights of property in water . . . and to regulate . . . the use of the flow of the water . . .”].) Simply put, the State Board has limited authority over Senior Rights, and that authority does not include using trespass under Section 1052 as a means to preclude (i.e., curtail) Senior Right holders from diverting water within the scope of their rights, regardless of the water year.

#### IV. STATEMENT OF APPEALABILITY

The State Board’s Opening Brief omits the required statement of appealability. This matter is not appealable because the State Board can only obtain an abstract advisory opinion regarding the scope of its authority under Section 1052, thus going beyond what was actually at issue before, and decided by the trial court. Further, even if the State Board were to prevail on its interpretation of Section 1052, Respondents would remain prevailing parties in the action because the trial court found that the State Board’s 2015 Curtailment Notices violated Respondents’ due process rights, which the State Board did not appeal.

The above notwithstanding, the manner in which the State Board framed the issue on appeal is simultaneously inaccurate and telling. “The Board’s appeal challenges only the trial court’s additional determination that Water Code section 1052 does not grant the Board enforcement authority over unauthorized diversions *at times when, due to water scarcity, there is no water available for diversion or use under any post-1914 water right.*” (AOB, p. 17, emphasis added.) The italicized language is not part of the trial court’s statement of decision; rather, it is a construct of assumed facts that the State Board employs solely for the purpose of trying to elicit an improper abstract, advisory opinion from this Court.

The trial court's decision is limited to the facts raised, including the State Board's failure to make defensible findings of water unavailability to support the 2015 Curtailment Notices. The trial court found that "section 1052 does not authorize the Board to 'curtail' or take enforcement action against pre-1914 appropriators *based on a general lack of available water under their priority of right, as opposed to a specific trespass against Division 2 water.*" (4 AA MERIT 2075:11-14, emphasis added.) This holding is not the same as the issue framed by the State Board in this appeal. It is not limited to a particular water year - wet or dry - nor is it applicable to post-1914 appropriative water rights. The trial court expressly stated the scope of its ruling: pre-1914 appropriative water right holders.

The State Board tried to argue in the trial court (as it does here) that due to a general lack of available water caused by drought, the trial court should assume that there was no water available under Respondents' own rights, and therefore Respondents must have been diverting stored water released by others (which is Division 2 water).<sup>12</sup> The trial court wisely refused to make this assumption given that the State Board had not made defensible factual findings to this effect at either the administrative level or in the trial court. The State Board attempts to twist the trial court's decision to bait this Court into granting it the authority to directly curtail Senior Rights through trespass under Section 1052 during drought,

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<sup>12</sup> As Respondents explain in the following sections, Division 2 water is either water of the state and the water subject to appropriation. (See Wat. Code, §§ 1201, 1202.) It does not encompass water diverted under a Senior Right.

regardless of whether non-Division 2 water is available in the system, or if the State Board's factual determination of unavailability is even defensible.

For all these reasons, this Court should dismiss the State Board's appeal.

## V. STANDARD OF REVIEW

This appeal raises only a single legal issue regarding the interpretation of Section 1052. A court's inquiry into whether the agency proceeded in the manner required by law is "subject to de novo review." (*State Water Resources Control Bd. Cases, supra*, at p. 722.) "The proper interpretation of a statute, and its application to undisputed facts, is a question of law." (*Ibid.*)

## VI. ARGUMENT

### A. The Trial Court Properly Interpreted Water Code Section 1052

The trial court properly interpreted Section 1052 based on its plain language and consistent with the statutory scheme of which it is a part. Water Code sections 1052 and 1831 are part of Division 2 of the Water Code. Section 1052 declares that "[t]he diversion or use of water *subject to this division other than as authorized in this division* is a trespass." (Wat. Code, § 1052, subd. (a), emphasis added.) Water Code section 1831 permits the State Board to issue a CDO in response to a violation or threatened violation of Section 1052's prohibition against the "unauthorized diversion or use of water *subject to this division*." (Wat. Code, 1831, subd. (d)(1), emphasis added.) Thus, the Legislature tied the State Board's authority under sections 1052 and 1831 to the diversion of water *subject to Division 2*.

Water Code sections 1201 and 1202 are also part of Division 2. These sections define, in general, the water of the state and the water

subject to appropriation, respectively, under Division 2; in other words, they define the water *subject to Division 2*. Section 1201 defines “public water of the State” and water “subject to appropriation” under Division 2 to *exclude* water diverted under Senior Rights. (See also Wat. Code, § 1202 [defining unappropriated water].) Thus, under the plain language of Section 1052, water diverted under Senior Rights in a manner that does not exceed the scope of the Senior Rights cannot form the basis of Section 1052 liability because they are neither “public water of the State” nor water “subject to appropriation” under Division 2.

The trial court explained:

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

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<sup>13</sup> “Fn. 13: The Court notes that references in its tentative [SOD] to ‘unappropriated’ waters under Sections 1201 and 1202 could be interpreted to mean not only waters that were unappropriated at the time the Water Commission Act was adopted, but waters that remain unappropriated under the Code. The Court has modified those references to clarify that it had only the former meaning in mind.”

prior to” 1914 are “conditioned upon compliance with the appropriation procedures of division 2”].)

(4 AA MERIT 2071:20-2072:6.)

For the reasons discussed above, the Court finds that section 1052 does not authorize the Board to “curtail” or take enforcement action against pre-1914 appropriators based on a general lack of available water under their priority of right, *as opposed to a specific trespass against Division 2 water.*

(4 AA MERIT 2075:11-14, emphasis added.)

The trial court correctly recognized that, in 2015, the State Board did not make any specific factual findings that water diversions by Senior Right holders were diversions of water subject to appropriation under Division 2 and, therefore, the State Board could not take enforcement action against Respondents for diverting under their pre-1914 rights was premised on an alleged trespass under Section 1052.

**1. The Trial Court’s Interpretation Does Not Separate the Diversion and Use of Water From the Corpus**

The State Board now argues that the trial court incorrectly focused on the nature of the water subject to Division 2 (i.e., the corpus), rather than its diversion and use, arguing that “[d]iversion or use that is not validly covered by any water right is subject to division 2 and not authorized by it.” (AOB, pp. 30-32.) Yet, the State Board made no assertions at trial, there is no evidence in the record, and thus no findings were made, that diversions by Respondents or any other party subject to curtailment in 2015 were “not validly covered by any water right.” (AOB, p. 32.) In fact, to the contrary, the water unavailability analysis assumed that all Senior Right claims were valid for purposes of estimating demand.

There is no meaningful way to separate the corpus of water from its diversion and use. When Respondents physically diverted and used water

in 2015, instigating the State Board's enforcement actions, the water was obviously physically available at their points of diversion. The State Board's curtailment of Respondents' valid pre-1914 appropriative water rights regulated their diversion and use of non-Division 2 water as there are no clear findings of any of the following facts: (1) that the *only* water available in the system was unappropriated under Division 2 of the Water Code; (2) that Respondents held no valid water rights; or (3) that Respondents' diversions exceeded their valid pre-1914 rights. The limited supply of water available to Senior Right holders in 2015 does not create any of the aforementioned factual findings necessary for the State Board to exercise its authority under Section 1052 against Respondents.

**2. The 2015 Curtailments Did Not Involve Diversions in Excess of a Valid Right**

The State Board tries to bootstrap its limited court-recognized authority to enforce against diversions *in excess of* a valid Senior Right to its misplaced authority to curtail Respondents' diversions under Section 1052. There is a material distinction between diversions under Senior Rights unlawfully exceeding the scope of the right and the State Board's assertion that there is insufficient water available for a Senior Right holder to divert under its right. Under Section 1052, diversions that do not exceed a valid Senior Right cannot form the basis for liability because such diversions do not divert water subject to appropriation (or "unappropriated water") under Division 2. However, diversions under a Senior Right that exceed the scope of the right may result in diversions of water subject to appropriation under Division 2 and could, therefore, form the basis for Section 1052 liability.

Two prior appellate cases validated the State Board's authority to enforce against diversions outside the scope of Senior Rights – *Young, supra*, 219 Cal.App.4th 397, and *Millview, supra*, 229 Cal.App.4th 879. Although, neither, authorized the State Board to curtail Senior Right holders when their diversions did not exceed the scope of their underlying rights - even during times of shortage.

In *Young*, the court held, in an enforcement action alleging that diversions exceeded the scope of the right, that the State Board can determine (1) whether a claimed Senior Right is valid, and (2) the size of the right. (*Young, supra*, 219 Cal.App.4th at pp. 406-407.) The court was clear, however, that if a water user's diversion is authorized under a pre-1914 right, then the State Board's task is at its end. "The Water Board does not have jurisdiction to regulate riparian and pre-1914 appropriative rights." (*Id.* at p. 404.)

*Young* arose out of a State Board enforcement proceeding against Woods Irrigation Company (Woods). The State Board relied on Water Code sections 1052 and 1831 to issue a CDO against Woods, alleging Woods' diversions exceeded its Senior Rights. (*Young, supra*, 219 Cal.App.4th at pp. 401-402.) After a hearing, the State Board issued a revised CDO limiting diversions in excess of the Senior Rights as quantified. Woods obtained a writ setting aside the order for lack of due process and jurisdiction. (*Id.* at p. 402.) The Court of Appeal reversed the trial court solely on the jurisdictional issue, ruling that the State Board has authority to pursue enforcement actions against a claimed Senior Right holder for the narrow purpose of defining the right and ceasing diversions in excess of that right. (*Id.* at p. 406.)

In *Millview*, the second case limiting the State Board’s authority to enforce against diversions in excess of a valid right, the State Board initiated an enforcement proceeding against a pre-1914 appropriative diverter – Millview County Water District (Millview). The State Board claimed that Millview’s pre-1914 appropriative right had been largely forfeited due to a prior period of diminished use. The appellate court held that the State Board had jurisdiction under Water Code section 1831 to issue a CDO to preclude diversions in excess of Millview’s pre-1914 right as diminished by any prior forfeiture for non-use. However, because the State Board had used the wrong legal standard to determine the extent of the alleged forfeiture, the court remanded the matter to the State Board. (*Millview*, *supra*, 229 Cal.App.4th at pp. 895, 899-904, 909.)

While the *Millview* court agreed that the State Board has jurisdiction to determine if a pre-1914 right has been partially forfeited, which would make water available for appropriation pursuant to Division 2 (*Millview*, *supra*, 229 Cal.App.4th at p. 894), it also agreed with the *Young* court’s statement that “the Board ‘does not have jurisdiction to regulate riparian and pre-1914 appropriative rights.’” (*Id.* at p. 893, citations omitted.) With this limitation in mind, the *Millview* court explained that the State Board’s authority over unauthorized diversions involving pre-1914 rights covers only three situations: (1) when a water user diverts “water under a claimed but invalid pre-1914 right”; (2) when a water user’s “diversion exceeds the maximum perfected amount of water under the right”; or (3) when a water user diverts in excess of a pre-1914 right because of “an intervening forfeiture.” (*Id.* at p. 895.) As the court explained, the State Board cannot regulate diversions that do not exceed the maximum perfected amount of a pre-1914 right: “water diverted under a *valid* pre-1914 water right is

protected from . . . regulation” (*Id.* at p. 894, emphasis in original) because water diverted under a valid pre-1914 right is not Division 2 water.

Central to the holdings in *Young* and *Millview* is the logic that *claimed* Senior Rights are not beyond the State Board’s reach; only valid pre-1914 rights are.

[I]t is necessary to determine whether the diversion and use that the diverter claims is authorized by riparian or pre-1914 rights. . . . [¶] Any other rule would permit a diverter to place his or her diversion beyond Board regulation merely by claiming to possess, as opposed to validly possessing, a pre-1914 water right.

(*Millview*, *supra*, 229 Cal.App.4th at pp. 894.) This distinction of the State Board’s jurisdiction is clearly stated in *Millview*: “[A]s *Young* noted, *only water diverted under a valid pre-1914 water right is protected from such regulation.*” (*Ibid.*, additional emphasis added.)

Nothing in the current case resembles the facts or procedural context of either *Young* or *Millview*. The June Curtailment Notice does not assert, and the State Board has never alleged, that the Senior Right holders subject to its curtailment were diverting more than what had been perfected under their rights, or that the claimed rights were in any way invalid.

(Curtailment AR 4212-004213; 4 AA MERIT 2050.) To the contrary, the State Board’s unavailability analysis assumed Senior Rights were valid and included these rights in its demand calculation. Rather, the June Curtailment Notice relied upon the State Board staff’s internally prepared and legally indefensible analysis of water unavailability as justification to regulate diversions under presumed valid Senior Rights in relation to other water rights during a time of shortage. (See Enforcement AR 008400-008401; 4 AA MERIT 2062.)

### **3. The State Board's Water Availability Analysis Was Fundamentally Flawed**

The State Board boldly argues that the trial court abused its discretion by presuming that there was no water available in the system “subject to diversion or use by a post-1914 diverter.” (See AOB, p. 35). The trial court made no such presumption. Rather, the trial court noted that, even if there was such water in the system (such as releases of stored water by others), the State Board failed to establish that Respondents were diverting stored water - or any water subject to Division 2. (4 AA MERIT 2075:11-14.)

The existence of water subject to appropriation in the system, including releases from storage, was not evaluated by the trial court because it was not a basis for the curtailments. (4 AA MERIT 2061, fn. 7.) When an appropriator releases stored water into a channel of another stream and co-mingles it with the supply of water present in the stream, the appropriator cannot diminish the supply in the stream available to the senior rights on that stream. (Wat. Code, § 7075.) Further, the burden rests with the appropriator causing the mixture of water in the stream to clearly show which portion it is entitled to in order to enforce its right to reclaim the water it turned in. (See *Butte Canal & Ditch Co. v. Vaughn* (1858) 11 Cal. 143, 152-53.) As the trial court correctly noted, this burden was not met. (4 AA MERIT 2075:11-14.)

Rather, the State Board relied solely on its staff's internally derived water unavailability analysis to support the 2015 Curtailment Notices and CDOs. As discussed above, this unavailability analysis suffered fundamental flaws, which the State Board admitted in Order WR 2016-0015 when it dismissed the CDOs, as the State Board Prosecution Team

could not meet its burden of proof. (Enforcement AR 008386-008401; 4 AA MERIT 2062). The reality is that there was both water available to serve Respondents' Senior Rights, and previously stored appropriated water in the system during 2015. Some of this stored water was in the system to meet the legal mandates of the Delta Protection Act (Wat. Code, §§ 12200-12220) for salinity control. See e.g. *United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 139). However, the State Board could not prove that water was unavailable to serve Respondents' Senior Rights during the summer of 2015, nor did it (or could it) prove that Respondents were diverting water appropriated by others.

**4. There Was No Evidence That Respondents' Diversions Exceeded Respondents' Rights**

The State Board boldly argues that the trial court erroneously construed Respondents' diversions because uses in excess of a valid right should be considered new diversions under Division 2. (See AOB, p. 43.) This argument is premised on the misplaced assumption that Respondents' diversions exceeded their rights. There are no facts demonstrating that Respondents' diversions exceeded their rights. Therefore, this argument is without merit.

**B. The Legislative History Is Replete With Language Limiting Liability for Trespass Under Section 1052 to Division 2 Water – Unappropriated Water**

There is nothing in the complete legislative history for Section 1052 demonstrating that the Legislature intended to authorize enforcement against water used and diverted under Senior Rights where such diversions and use are within the scope of those Senior Rights. To the contrary, as demonstrated below, the legislative history is replete with language limiting

the State Board’s authority under Section 1052 to unappropriated water, thus confirming the trial court’s decision. (See 4 AA Merit 2075:11-14.)

As the issue before the Court is one of statutory interpretation, the Court may analyze the legislative history to determine and/or confirm legislative intent. “Where a statute is unambiguous on its face . . . , courts may always test their construction of disputed statutory language against extrinsic aids bearing on the drafters’ intent” and such extrinsic aids include “the legislative history of the statute and the wider historical circumstances of its enactment. . . .” (*Goldstein v. California Unemployment Ins. Appeals Bd.* (2019) 34 Cal.App.5th 1006, 1013-14, internal quotes omitted; see also *Wade v. Superior Court* (2019) 33 Cal.App.5th 694, 712 [“To the extent the statutory language leaves any uncertainty of the Legislature’s intent, we turn to the legislative history . . . such as committee reports and digests of the Legislative Counsel”].) Simply put, legislative history is an additional tool that the Court may use when interpreting a statute.

The State Board asks this Court to judicially expand its authority under Section 1052, beyond that authorized by the plain language of the statute, because “the *Legislature* has consistently expanded the enforcement role of the Board.” (AOB, p. 46, emphasis added.) To the extent that the Legislature has expanded the State Board’s enforcement authority since 1913, it has done so through *legislation*. Thus, to the extent that the State Board desires to obtain greater authority under Section 1052, that request must be directed to the *Legislature*. Without a scintilla of legislative material to support its position regarding the legislative intent of Section 1052, the State Board is asking this Court to legislate from the bench.

The legislative history of Section 1052 reveals that its scope was (and remains) narrow and only includes water unappropriated when the State Water Commission Act became legally effective in 1914. Over its current 107-year lifetime, the Legislature amended Section 1052 only six times: in 1943, 1957, 1987, 1991, 2003, and 2014. Some of these amendments are more applicable than others because of the extent of their changes and the resultant discussions (or lack thereof) in the legislative materials regarding the State Board's authority under Section 1052.<sup>14</sup> Below, Respondents analyze the notable amendments to Section 1052, providing support for the trial court's finding that the scope of a trespass subject to enforcement under Section 1052 does not encompass any water other than Division 2 water – unappropriated water. (See 4 AA MERIT 2075:11-14.)

### **1. The Water Commission Act**

Two years before the Legislature enacted the Water Commission Act, Governor Johnson, in his inaugural address to the 1911 Legislature, discussed water rights and the then-current laws regarding appropriation, stating:

The present laws in this respect should be amended. If it can be demonstrated that claims are wrongfully or illegally held, those claims should revert to the State. A rational and equitable code and method of procedure for water conservation and development should be adopted.

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<sup>14</sup> Specifically, the 1943, 1957, and 2003 amendments are relatively minor and, as such, provide little color to the issue before the Court. Therefore, Respondents only state the statutory changes; a reading of these amendments demonstrates that they do not alter the legislative intent of Section 1052 in any way.

(Hitchborn, Story of the Session of the California Legislature of 1913 (S.F. Press 1913), pp. 137-138 [2 MJN\_0281-0282].) As the trial court stated, Section 1052 began as uncodified section 38 in the Water Commission Act. (See 4 AA MERIT 2070:20-23.)

The Conservation Commission of the State of California (Commission) drafted the Water Commission Act to “clear up” and determine title to water rights, enabling a state agency to know the “amount of water open to appropriation,” to protect that unappropriated water for the public, and to prevent illegal appropriations of water. (Report of the Conservation Commission of the State of California (Jan. 1, 1913) (Commission Report), pp. 21-22 [1 MJN\_0032-0033].) The Water Commission Act was not aimed at water already diverted and beneficially used under valid rights. Importantly, this new law did not strip from Senior Right holders their valid water rights, but instead respected those existing rights and limited their regulation. “As the proposed bill recognizes ‘vested and existing rights’ it will, instead of promoting litigation, the Conservation Commission believes, practically prevent further water litigation in this State.” (Commission Report, p. 26 [1 MJN\_0035].)

The changes to the water rights system under the Water Commission Act were prospective, targeted to address specific issues, such as the non-use of water rights (termed “cold storage”) and illegally acquired water rights.<sup>15</sup> (See, e.g., Commission Report, pp. 20-25 [1 MJN\_0032-0034];

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<sup>15</sup> The Water Commission Act also sought to create a state agency charged with the authority to investigate and recover those rights illegally appropriated after the state had permitted “the right to use water to become, by appropriation and later by riparian right, private property.” (Commission Report, p. 21 [1 MJN\_0032]; see also *id.* at p. 18 [“There should be, therefore, the power lodged in some state agency to examine into

see also Stats. 1913, ch. 586, § 11 [defining unappropriated waters and public waters (1 MJN\_0149-0150)].) This is supported by the Water Commission Act's provision defining unappropriated water as water never appropriated, or appropriated water that had not been put (either in process or fully) to beneficial use or ceased to be put to beneficial use in proportion to the magnitude of the project. (See Stats. 1913, ch. 586, § 11<sup>16</sup> [1 MJN\_0149-0150].)

Prior to passing the Water Commission Act, the Assembly made significant revisions to draft language. The provision regarding trespass that now resides in Section 1052 did not appear until the third round (of six) revisions. (See Assem. Bill. No. 642 (1913 Reg. Sess.), § 38, as amended Apr. 22, 1913 [1 MJN\_0096-0111].) The predecessor to Section 1052 was Section 38, which stated:

The diversion or use of water *subject to the provisions of this act other than it is in this act authorized* is hereby declared to be trespass, and the state water commission is hereby authorized to institute in the superior court in and for any county wherein such diversion or use is attempted appropriate action to have such trespass enjoined.

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water rights now claimed as private property and to initiate proceedings, where necessary, looking to the recovery to the public of those water rights which have not legally become private property" (1 MJN\_0031)].)

<sup>16</sup> This provision later became Water Code section 1201, which defines unappropriated water in substantially the same way. (See Wat. Code, § 1201.) Section 11 states that riparian rights not exercised for a period of 10 years is a conclusive presumption that they are not needed and will become subject to appropriation. (Stats. 1913, ch. 586, § 11 [1 MJN\_0149-0150].) Importantly, however, the Supreme Court of California declared such provision unconstitutional and omitted it from the Water Code. (Hutchins, p. 96, citing *Tulare Irrigation District v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489, 530-531.)

(Stats. 1913, ch. 586, § 38, emphasis added [1 MJN\_0164]; see generally 4 AA MERIT 2070:21-23.) Thus, when the Legislature enacted the first version of Section 1052, it limited trespass to diversions and use of water subject to the Water Commission Act, which expressly excluded water diverted and used under valid Senior Rights as such was not unappropriated at that time.

Nothing in the legislative material regarding Section 38 supports the State Board's assertion that the Legislature intended the provision to apply to water diverted under valid Senior Rights and used within the scope of those rights.

## **2. The 1943 Codification of the Water Commission Act – Senate Bill 945**

In 1943, Governor Warren signed Senate Bill 945, which created the Water Code and resulted in Section 38 becoming Section 1052 – the provision at issue before the Court. (Stats. 1943, ch. 368 (1943 Reg. Sess.) [3 MJN\_0493-0533]; see also California Legislature at Sacramento, Senate Final History (1943), p. 298 [3 MJN\_0535]; see also Proposed Water Code, Divisions 1 to 4 (Inclusive) and Division 6 (1942) Cross Reference Table for Stats. 1913, ch. 586, p. xiv [3 MJN\_0732].) The codification of the Water Commission Act did not change the substance of Section 38 or its scope. The only changes to the text of Section 38 reflect the codification and creation of the Department of Public Works and its role under the Water Code. (See Stats. 1943, ch. 368, ¶ 22 [definition of department (3 MJN\_0494)], §§ 225-228 [department's authority to survey, investigate, and distribute water (3 MJN\_0495)], 1052 [trespass (3 MJN\_0497)]; cf. Stats. 1913, ch. 586, §§ 1 [creation of state water commission

(1 MJN\_0145-0146)], 10 [commission’s authority to investigate (1 MJN\_0149)], 38 [trespass (1 MJN\_0164)].)

### **3. The 1957 Legislative Amendment – Assembly Bill 1969**

In 1957, the Legislature amended Section 1052 by replacing “department” with “board,” referencing the State Board. (See Assem. Bill No. 1969 (1957 Reg. Sess.) as introduced Jan. 19, 1957, § 38 [adding Wat. Code, § 1003.5 defining “board” (4 MJN\_0755)]; see also Stats. 1957, ch. 1932, § 44 [5 MJN\_1003].) The Legislature made no changes to the scope of Section 1052.

### **4. The 1987 Legislative Amendment – Assembly Bill 1487**

#### **a. Scope of Amendment**

The 1987 bill amending Section 1052, sponsored by the State Board, sought to change the process for enjoining a trespass – not the circumstances constituting trespass. This amendment restructured Section 1052 so that it had three distinct subdivisions regarding the remedies available for trespass. (See generally Assem. Bill No. 1487 (1987-1988 Reg. Sess.), as introduced Mar. 4, 1987 [7 MJN\_1208-1209]; see also Assem. Bill No. 1487 (1987-1988 Reg. Sess.), as last amended Aug. 20, 1987 [7 MJN\_1213-1216].)

Under the bill and its two subsequent amendments, the State Board could still institute an action in the superior court to enjoin trespass, but it added a requirement that the Attorney General bring the action for a trespass or threatened trespass “upon request of the board.” (Assem. Bill No. 1487 (1987-1988 Reg. Sess.), as last amended Aug. 20, 1987 Legislative Counsel’s Digest [7 MJN\_1213-1216]; see also Summary Digest of Statutes Enacted and Resolutions Adopted in 1987 and 1979-1987 Statutory Record, Vol.1, p. 233 (1987 Summary Digest)

[7 MJN\_1412].) The bill also provided the State Board with a new entitlement: authority to administratively impose civil liability for trespass in critically dry years. (Assem. Bill No. 1487 (1987-1988 Reg. Sess.), as last amended Aug. 20, 1987 [7 MJN\_1214]; 1987 Summary Digest, p. 233 [7 MJN\_1412]; see also 4 AA MERIT 2071:11-14.) Governor Deukmejian signed this bill into law on September 18, 1987. (Stats. 1987, ch. 756, § 1 [7 MJN\_1217].)

The 1987 legislative materials regarding the bill are rife with evidence directly supporting Respondents' position that "unauthorized diversions" as used in Section 1052 are limited to unappropriated water. These materials also demonstrate that the trial court properly determined that a trespass action under Section 1052 cannot lie for the diversion of water consistent with valid pre-1914 appropriative rights. (See 4 AA MERIT 2075:11-14.)

**b. Legislative Support for Limited State Board Jurisdiction**

The following quotations from the legislative material regarding the 1987 amendment demonstrate that Section 1052 limits the jurisdiction of the State Board to enjoining trespass against unappropriated water - Division 2 water.

"Under existing law, the diversion of water *subject to appropriation* other than as authorized by law is a trespass." (Assem. Bill No. 1487 (1987-1988 Reg. Sess.), as introduced Mar. 4, 1987 [7 MJN\_1208], emphasis added.) "Existing law specifies the diversion or use of water *subject to appropriation, other than as allowed by statute*, is a trespass. The [State Board] may take action to enjoin the trespass." (Memo from R. Ayala, Chairperson of Senate Committee on Agriculture and Water

Resources, re: Assem. Bill No. 1487, as amended Apr. 30, 1987 [7 MJN\_1273], emphasis added.)

“Under existing law, the diversion or use of water *except as authorized under permit or license conditions is a trespass.*” (See Senate Fiscal Committee File, Bill Analysis of Assem. Bill No. 1487, as amended Apr. 30, 1987 (May 22, 1987) [7 MJN\_1276]; Senate Rules Committee, Office of Senate Floor Analyses, Third Reading of Assem. Bill No. 1487, as amended Apr. 30, 1987 (Aug. 17, 1987) [7 MJN\_1283-1284]; Senate Rules Committee, Office of Senate Floor Analyses, Third Reading of Assem. Bill No. 1487, as amended Aug. 20, 1987 (Aug. 21, 1987) [7 MJN\_1285-1286]; Senate Rules Committee, Office of Senate Floor Analyses, Third Reading of Assem. Bill No. 1487, as amended Aug. 27, 1987 [7 MJN\_1492-1493].)

“Existing law: 1) Prohibits the diversion or use *of water subject to appropriation* other than as authorized by law. Violation of the law is a trespass.” (Senate Comm. On Appropriations File, Form Consent Calendar re Third Reading of Assem. Bill 1487, as amended Apr. 30, 1987 (Jun. 4, 1987) [7 MJN\_1278].) “This is simply a clarification of existing law.” (Analysis of Assem. Bill No. 1487, as amended Apr. 30, 1987 (May 21, 1987) [7 MJN\_1282].)

The Water Code currently contains a comprehensive statutory system for the appropriation of water in the state, and the [State Board] administers that system primarily through the issuance of permits and licenses. These permits and licenses contain terms and conditions that ensure the use of the water is reasonable and in the public interest. The difficulty, however, is that the authority of the [State Board] to seek injunctive relief against *threatened diversions that are not authorized by law* is only implied in current law. AB 1487 would clarify the [State] Board’s authority by authorizing the

[State Board] to require the Attorney General to bring an action for injunctive relief where an unauthorized diversion or use is occurring, has occurred, or is *threatened*.

(Letter from J. Van De Kamp, Attorney General, to B. Hansen, Assemblyperson, re: Assem. Bill No. 1487 Unauthorized Diversion or Use of Water (July 10, 1987) [7 MJN\_1304], emphasis in original.)

“AB 1487, as it passed the Assembly, among other things, permitted any person or entity committing a trespass *by the diversion or use of water subject to appropriation other than as authorized by law* to be held liable in a superior court proceeding[.]” (Assem. Daily File, Legislative Counsel Digest re Assem. Bill No. 1487, as amended Aug. 20, 1987 [7 MJN\_1322]; see also Attachment to Memo from State Board re: Legislative Summary for First Half of 1987-88 Session (Oct. 9, 1987), p. 23 [7 MJN\_1416].)

## **5. The 1991 Legislative Amendment – Assembly Bill 2017**

The 1991 Assembly Bill and subsequent legislative amendment to Section 1052 removed the limitation regarding the type of water year that must be declared for the State Board to pursue civil liability penalties. (See Assem. Bill No. 2017 (1991-1992 Reg. Sess.) § 1, subd. (b), as introduced Mar. 8, 1991 [8 MJN\_1548-1550]; see also Stats. 1991, ch. 1098, § 1 [8 MJN\_1571-1572].) This amendment changed only the water year in which the State Board could pursue a trespass action under Section 1052 itself (rather than referring the matter to the Attorney General), not the statutory limitations of what constitutes a trespass. (See Senate Rules Committee, Office of Senate Floor Analyses, Third Reading, Assem. Bill No. 2017 (Aug. 23, 1991), p. 2 [“the board indicates that unauthorized diversions occur throughout the state in all types of water years, not just critically dry years” (8 MJN\_1637)]; see also 4 AA MERIT 2071:16-18,

2704:5-7.) The same limitation - to unappropriated water - remained and was not altered by this amendment.

**6. The 2003 Legislative Amendment – Senate Bill 1049**

The 2003 amendment made no substantive changes to State Board authority and addressed only the disposition of funds recovered pursuant to Section 1052 enforcement. (Sen. Bill No. 1049 (2002-2003 Reg. Sess.), § 81, subd. (e), as introduced Feb. 27, 2003 [rather than depositing funds in the “general fund,” amendment required depositing funds “in the Water Rights Fund established pursuant to Section 1550” (9 MJN\_1929)]; Sen. Bill No. 1049 (2002-2003 Reg. Sess.), § 80, subd. (e), as amended Sept. 5, 2003 [9 MJN\_1929:18-19]; see also Stats. 2003, ch. 741, § 81 [9 MJN\_2079-2080].)

**7. The 2014 Legislative Amendment – Senate Bill 104**

In 2014, the Legislature “increased the penalties for violating Section 1052,” authorizing higher penalties for critically dry years. (AOB, p. 48; see also Sen. Bill 104 (2013-2014 Reg. Sess.) as amended Feb. 24, 2013, Legislative Counsel’s Digest ¶ (4) [12 MJN\_2720].) The changes to Section 1052 under this bill and the subsequent legislative amendment were largely budgetary. (See Senate Rules Committee, Office of Senate Floor Analysis Third Reading of Sen. Bill No. 104, as introduced Jan. 10, 2013 [“This bill expresses the intent of the Legislature to enact statutory changes related to the Budget Act of 2013 . . . . Senate bill 66 and Senate bills 70 through 105, inclusive, are to be considered as vehicles for the 2013-14 Budget Trailer Bills” (12 MJN\_2938)].) That is, despite the increased penalties, neither the bill nor the legislative amendment changed the character of a trespass under Section 1052 to water beyond that in Division 2’s unappropriated water. This change carried through to the

version of the bill that Governor Brown enacted on March 1, 2014. (See Stats. 2014, ch. 3, § 9, subd. (c)(1)(B) [12 MJN\_2765].)

This legislative amendment supports the trial court’s reasoning that Section 1052 “provides its own, narrower definition of a ‘trespass’ subject to enforcement.” (4 AA MERIT 2074:21-22; see also 4 AA Merit 2075:4-7 [*rejecting* State Board’s argument that its enforcement authority under Section 1052 is just as broad as investigatory authority under Section 1051].) The trial court relied on this narrower authority to reach its ultimate decision that Section 1052 does not authorize the State Board to “take enforcement action against pre-1914 appropriators based on a general lack of available water under their priority of right, as opposed to a specific trespass against Division 2 water.” (4 AA MERIT, 2075:11-14.)

**8. There Is No Legislative Support for the State Board’s Position That a Section 1052 Trespass Applies to Any Character of Water Other Than Unappropriated Water**

Since 1913, the legislative materials for Section 1052 establish that its purpose is to protect the water that, at the time of its enactment, belonged to the public: unappropriated water. This necessarily excludes water appropriated and used under Senior Rights predating the enactment of Section 1052 (i.e., pre-1914 appropriative water rights).

Water diverted under valid Senior Rights and used within the scope of those rights is not unappropriated water and, therefore, is not subject to regulation under Division 2. Accordingly, a State Board declaration of general water unavailability under the priority of a valid pre-1914 appropriative right holder does not render diversions by that right holder to be diversions of unappropriated water and, therefore, somehow making those diversions subject to Division 2.

Section 1052 does not provide the State Board with the authority to pursue as a trespass diversions made within the scope of otherwise valid pre-1914 right - *even during a water supply shortage*. If the Legislature so intended, it would have amended the statute accordingly. It did not. Section 1052 simply cannot serve as a basis for trespass in this case, as the trial court properly concluded. (See 4 AA MERITS 2075:11-14.)

**C. The State Board's Enforcement Authority Is Limited to the Authority Granted by the Legislature**

The State Board's self-serving opinion as to what constitutes "good policy" to enforce the rules of water rights priority in times of drought is irrelevant, particularly where its authority is defined by statute and the policy at issue is the extent of the State Board's own authority. (See generally *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11, fn. 4 [courts do not "defer to an agency's view when deciding whether a regulation lies within the scope of the authority delegated by the Legislature"].)

The State Board's contention that, if the trial court's interpretation is upheld, it will have no authority in times of drought is alarmist and unsupported. The Legislature granted the State Board emergency regulatory authority in times of drought in Section 1058.5. However, the State Board chose not to use that authority in 2015, choosing instead to rely solely on Section 1052.

The extent of the State Board's authority under Section 1058.5 is not before this Court. Nevertheless, the Legislature's decision to explicitly provide some authority during times of drought undermines the State Board's argument that this Court must read into Section 1052 a grant of

authority over pre-1914 water right holders which simply does not exist and without which it will be purportedly powerless to protect the water supply.

**D. The Trial Court Properly Interpreted Binding Precedent**

**1. The Limitations on the State Board's Authority are Recognized in *Young* and *Millview***

The cases of *Young* and *Millview* both restate the rule that “the Water Board does not have jurisdiction to regulate riparian and pre-1914 appropriative rights,” but does have some authority under Division 2 of the Water Code to prevent unauthorized diversions of unappropriated water. (*Young, supra*, 219 Cal.App.4th at p. 404 [“Unappropriated water includes (1) water that has never been appropriated [citation], (2) water subject to a pre-1914 right *but that was not perfected by putting the water to beneficial use with due diligence* [citation], and (3) water for which a right had been perfected by putting the water to use under a pre-1914 right *but where the use later ceased* [citation],” emphasis added]; see also *Millview, supra*, 229 Cal.App.4th at p. 894; see also Wat. Code, § 1831 subd. (e) [“This article shall not authorize the board to regulate in any manner, the diversion or use of water not otherwise subject to regulation of the board under this part”].)

In order to exercise its authority to prevent unauthorized diversions of unappropriated water, the State Board “necessarily must have jurisdiction to determine whether a diverter’s claim under a pre-1914 right of appropriation is valid” and, if so, the scope of that valid right. (*Millview, supra*, 229 Cal.App.4th at p. 894 [explaining the reasoning from *Young*].) But the State Board’s investigatory authority over Senior Rights is limited to answering these “threshold question[s]” of the existence and scope of

Senior Rights. (*Young, supra*, 219 Cal.App.4th at p. 404.) It is the answer to these preliminary questions “which will determine whether the Water Board has jurisdiction or not.” (*Ibid.*)

In other words, the State Board’s authority to investigate the existence and scope of Senior Rights, as recognized in *Young* and *Millview*, is merely an accompaniment to the State Board’s authority over unappropriated Division 2 water. A diversion under an invalid Senior Right claim, or a diversion exceeding the scope of a valid Senior Right, may constitute an unauthorized diversion of unappropriated water as the diverter has no right to such water, its use of such water would be in violation of Division 2 and could be enforced against it under Section 1052. Neither *Young* (which recognized the State Board’s authority to determine the existence of Senior Rights), nor *Millview* (which recognized the State Board’s authority to determine the scope of Senior Rights), undermine the rule expressly stated in both cases that the State Board “does not have jurisdiction to regulate riparian and pre-1914 appropriative rights.” (*Young, supra*, 219 Cal.App.4th at p. 404; see *Millview, supra*, 229 Cal.App.4th at p. 893; see also Wat. Code, § 1831 subd. (e).)

The trial court’s ruling is consistent with, and required by, both *Young* and *Millview*. “*Millview* and *Young* did not address the State Board’s authority to curtail or determine the relative priorities of riparian or pre-1914 rights.” (4 AA MERIT 2072:24-25.) Instead, as the trial court properly determined, the cases merely recognize that the State Board can make a “preliminary determination” of the existence or scope of a Senior Right because the result of that preliminary determination may reveal whether the water user is “making an ‘unauthorized’ diversion of water beyond the scope of their senior rights” and, thus, diverting water that is

“subject to appropriation under [Division 2 of the Water] Code.”

(4 AA MERIT 2073:13-15.) The trial court properly recognized that the holdings in *Young* and *Millview* are limited to the threshold or preliminary determination of whether a Senior Right is valid and, if so, the scope of that right.

The State Board attempts to analogize its authority to make threshold determinations of validity and scope (as recognized in *Young* and *Millview*), with the authority it exercised in this case when it ordered Senior Right holders to cease diversions on the purported basis that there was no water available under their priority of right. (See AOB, pp. 57-58 [“there is no proper basis to distinguish between the Board’s authority to prevent the diversion or use of water that is unauthorized because it is in excess of the quantity, place of use, or purpose of use of a diverter’s valid right, and the diversion or use of water that is unauthorized because it is in excess of a diverter’s priority of right.”].) The State Board is incorrect. There is a distinct, meaningful, and essential difference between the quantity, place, and purpose of use of a water right, on the one hand, and the priority of a water right, on the other hand. The quantity, place, and purpose of use of a water right are *absolute* values and characteristics, whereas the priority of a water right is a *relative* characteristic.

The State Board’s Opening Brief includes a useful hypothetical that is illustrative of this point, though the State Board’s analysis of its hypothetical omits a critical component. In the State Board’s hypothetical, Farmer Andrews and Farmer Brown both have a right to divert 100 cfs from the San Joaquin River in the month of June, but Farmer Andrews’ right has a priority of 1910, making that right senior to Farmer Brown’s 1911 priority right. (AOB, p. 22.) The State Board correctly notes that

Farmer Brown could not: (a) divert 120 cfs because doing so would exceed the absolute value of his perfected right by 20 cfs; (b) divert during the month of May because his right authorizes diversions only during June; or (c) divert from the Russian River because his right is limited to the San Joaquin River. However, the State Board's analysis errs when it proceeds to apply the rule of priority to its hypothetical.

If there is only 100 cfs of water available in the river, then Farmer Andrews is *entitled* to all of it. (See AOB, p. 23.) But the State Board seriously errs when it concludes, therefore, that Farmer Brown is not authorized "to divert or use any water" if there is only 100 cfs available in the river. (*Ibid.*) Although Farmer Andrews is *entitled* to divert and use all 100 cfs before Farmer Brown is allowed to divert and use any water, if Farmer Andrews elects to divert and use only 60 cfs, then Farmer Brown – as the next senior appropriator – is *entitled* to divert and use the remaining 40 cfs.

The law establishes that "[n]ot only may a junior claimant appropriate water in excess of the quantities to which a prior appropriation attach, but he may also use water to which a prior right attaches at such times *as the water is not needed by a prior [senior] appropriator.*" (Hutchins, p. 157, citing *Hufford v. Dye* (1912) 162 Cal. 147, 153-154, 159-160, emphasis added; see also *Ortman v. Dixon* (1859) 13 Cal. 33, 39.) Accordingly, Farmer Brown's authority to use water under his priority is *relative to* and dependent upon Farmer Andrews' use under a more senior right. In this regard, the priority of Farmer Brown's right differs from the various other, absolute limitations on it such as quantity, place of use, and purpose of use – none of which are dependent on Farmer Andrews' use or extent of use.

The relative nature of the rule of priority is entrenched in the rules of water law. “[T]he right of property in water is *usufructuary*, and consists not so much of the fluid itself as the advantage of its use.” (*Eddy v. Simpson* (1853) 3 Cal. 249, 252, emphasis in original.) Accordingly, “the right to appropriate [is] limited to the amount of water actually put to beneficial use by the diverter, rather than the amount claimed or diverted.” (*Millview, supra*, 229 Cal.App.4th at p. 891.) A prior appropriator is entitled only to what they need and when they need it and has no right to complain of another appropriator taking water for beneficial purposes when the prior appropriator has no use for it.

As stated by the Supreme Court, “the mere diversion or use of water by another [user] is no injury to a party claiming [use of that water] . . . during any cessation of his ability[] to use it. . . .” (*Nevada County & Sacramento Canal Co. v. Kidd* (1869) 37 Cal. 282, 313.)

Furthermore, the burden on senior water right holders who seek to restrain the use of junior water right holders is instructive here. Logic dictates that senior water right holders (who may be injured by a junior water right holder’s use) should have no greater burden than the State Board (who will not suffer any direct injury) when seeking to restrain the use of junior water right holders. It is well settled that a senior water right holder cannot obtain a court injunction restraining a junior water right holder’s use without showing that the amount diverted by the junior user would be reasonably and beneficially used by the senior water right holder absent such a diversion. (See *Modoc Land & Livestock Co. v. Booth* (1894) 102 Cal. 151, 156-157 [“a riparian owner ought not to be permitted to invoke the power of a court of equity to restrain the diversion of water above him by a nonriparian owner, when the amount diverted would not be

used by him”]; *Carlsbad Mut. Water Co. v. San Luis Rey Development Co.* (1947) 78 Cal.App.2d 900, 914.) The law requires more for curtailment than just a “threat” of harm. The California Supreme Court has confirmed that there must be substantial diminution of the supply in order for a senior appropriator to obtain relief against a junior, and that a “technical infringement of the right is not actionable. . . . This is but another way of saying that the appropriator may use the stream surface or underground or percolating water, so long as the land having the paramount right is not materially damaged.” (*Peabody v. Vallejo* (1935) 2 Cal.2d 351, 374, citation omitted.)

There is no justification for applying a different rule to actions by the State Board. Before the State Board can restrain diversions by junior water right holders on the basis of priority, there must be a showing that the water would be put to reasonable and beneficial use by senior right holders. To hold otherwise would allow the State Board to restrain water use based on the face value of water rights alone, contravening “the overriding constitutional consideration [that] the water resources of the state [are to be put] to a reasonable use and ma[d]e . . . available for the constantly increasing needs of all the people.” (*People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743, 751.)

To use the terms relevant here, the use of water by a junior appropriator that intrudes into the face value of a senior appropriator’s right is not unauthorized per se (as the State Board contends in its Opening Brief); it is only *unauthorized* to the extent that the senior appropriator is able to, or chooses to, put that water to use. This is distinguishable from a junior appropriator’s use that exceeds the face value of his or her own right, which is unauthorized per se. Because of this distinction, the State Board

cannot – as it did with the 2015 curtailment notices – impose blanket prohibitions on diversions across an entire watershed based on *assumed* use by Senior Right holders and presumed injury and violations of water right priority.

Contrary to the State Board’s assertions, there is a meaningful distinction between the authority to prevent the diversion or use of water that is in excess of the quantity, place of use, or purpose of use of a diverter’s valid right, and the diversion or use of water that intrudes into the face value of a more senior right. As this false analogy is the basis of the State Board’s contention that it has authority to prevent diversions under pre-1914 water rights that purportedly violate the rules of priority, this Court should reject the State Board’s interpretation.

**2. *Meridian Ltd. v. City and County of San Francisco* Does Not Support the State Board’s Position**

The State Board contends that the trial court erroneously distinguished the case of *Meridian Ltd. v. City and County of San Francisco* (1939) 13 Cal.2d 424. The State Board summarizes *Meridian* but does not articulate how the trial court’s decision purportedly conflicts with the holding. Indeed, there is no conflict.

The *Meridian* court resolved a dispute between the City and County of San Francisco and a riparian landowner on the San Joaquin River. The case did not involve - nor did the court evaluate - the propriety of any action taken by the State Water Commission, predecessor to the State Board. As “[c]ases do not stand for propositions that were never considered by the court,” *Meridian* does not support the State Board’s position here. (See generally *Mares v. Baughman* (2001) 92 Cal.App.4th 672, 679.)

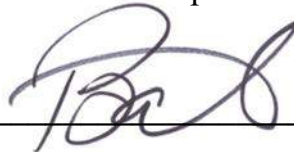
## VII. CONCLUSION

The Legislature never provided the State Board with the authority it now seeks from this Court. That is, the Legislature did not authorize the State Board to use trespass under Section 1052 as a means to preclude (i.e., curtail) Senior Right holders from diverting water within the scope of their rights, regardless of times of water shortage or surplus. To the contrary, the Legislature has been careful not to extend the right to regulate Senior Rights to the State Board, consistent with the fact that Senior Rights pre-date the State Board's existence and authority. In addition, no court has interpreted the State Board's other statutory authority to allow for such curtailment. Through this appeal, though, the State Board asks this Court to legislate from the bench, expanding its authority to curtail Senior Right holders in a manner that the Legislature has repeatedly not granted through the various amendments to Section 1052.

The trial court accurately concluded that the State Board did not have authority to curtail Respondents' diversions of water under their valid Senior Rights, and this Court should affirm the trial court's judgments regarding the State Board's jurisdiction under Section 1052.

Respectfully submitted,

SOMACH SIMMONS & DUNN  
A Professional Corporation



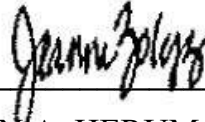
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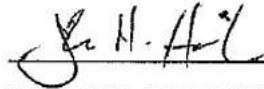


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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENTS' BRIEF [MERITS APPEAL]** uses a 13-point Times Roman font and 13,037 words, according to the word count function in Microsoft Word, the program used to create the document.

Dated: December 29, 2021

By: \_\_\_\_\_

A handwritten signature in dark ink, appearing to read 'T. Barfield', written over a horizontal line.

Theresa C. Barfield

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## CERTIFICATE OF SERVICE

Case Name: *IN RE CALIFORNIA CURTAILMENT CASES*

Case Nos. H047270 and H047927

I am employed in the County of Sacramento; my business address is 500 Capitol Mall, Suite 1000, Sacramento, California; I am over the age of 18 years and not a party to the foregoing action.

On December 30, 2021, I served the following document(s):

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**X** (via electronic mail) by causing to be delivered a true copy thereof to the person(s) and at the email addresses provided through CM/ECF system to the Service Lists below.

I declare under penalty of perjury that the foregoing is true and correct.  
Executed on December 30, 2021, at Sacramento, California.



Corene E. Rodder

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**Court of Appeal, Sixth Appellate District Court  
Case No. H047270**

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<p>The Hon. Brian C Walsh Department 1 c/o Superior Court Clerk Santa Clara Superior Court Downtown Superior Court 191 North First Street San Jose, CA 95113</p>	<p>California Water Curtailment Cases, Case No. 2015-1-CV-285182</p> <p><b>Served Via U.S. Mail</b></p>

**Court of Appeal, Sixth Appellate District Court  
Case No. H047927**

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