

1 SOMACH SIMMONS & DUNN  
A Professional Corporation  
2 MICHAEL E. VERGARA (SBN 137689)  
JARED S. MUELLER (SBN 257659)  
3 ALYSON E. ACKERMAN (SBN 315914)  
ELLEN M. MOSKAL (SBN 329144)  
4 500 Capitol Mall, Suite 1000  
Sacramento, California 95814-2403  
5 Telephone: (916) 446-7979  
Facsimile: (916) 446-8199  
6 [mvergara@somachlaw.com](mailto:mvergara@somachlaw.com)  
[jmueller@somachlaw.com](mailto:jmueller@somachlaw.com)  
7 [aackerman@somachlaw.com](mailto:aackerman@somachlaw.com)  
[emoskal@somachlaw.com](mailto:emoskal@somachlaw.com)

8 Attorneys for Petitioner/Plaintiff BYRON-  
9 BETHANY IRRIGATION DISTRICT

EXEMPT FROM FILING FEES PURSUANT  
TO GOVERNMENT CODE SECTION 6103

10  
11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12 FOR THE COUNTY OF SACRAMENTO

13  
14 Coordination Proceeding Special Title (Rule  
3.550)

15 STATE WATER RESOURCES BOARD  
16 CURTAILMENT CASES

Judicial Council Coordination Proceeding  
Case No. JCCP 5229

Sacramento County Superior Court Case No:  
34-2021-80003718

17 BBID'S EX PARTE APPLICATION FOR  
18 TEMPORARY RESTRAINING ORDER  
AND ORDER TO SHOW CAUSE;  
19 MEMORANDUM OF POINTS AND  
AUTHORITIES

20 **TELEPHONE APPEARANCE**

21 Hearing Date: TBD  
22 Judge: Hon. Steven M. Gevercer  
Dept.: 27

23 Trial Date: N/A  
24 Date Action Filed: September 1, 2021

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**TABLE OF CONTENTS**

MEMORANDUM OF POINTS AND AUTHORITIES ..... 7

I. INTRODUCTION ..... 7

II. PROCEDURAL HISTORY AND FACTUAL BACKGROUND ..... 7

III. ARGUMENT ..... 12

    A. Legal Standard ..... 12

    B. BBID Will Suffer Irreparable Harm from the Curtailment Orders..... 13

    C. BBID Is Likely to Succeed on the Merits of a Challenge to the  
    2022 Curtailment Orders..... 14

        1. The 2022 Curtailment Orders Were Issued Without Procedural Due  
        Process ..... 14

        2. The State Board Did Not Present Adequate Evidence to Support  
        the Findings of Unavailability Underpinning the 2022  
        Curtailment Orders..... 17

        3. The State Board Exceeded Its Jurisdiction in Issuing the  
        2022 Curtailment Orders..... 21

        4. The 2022 Curtailment Orders Are Improperly Based on a  
        Waste and Unreasonable Use Theory ..... 21

IV. CONCLUSION ..... 22

**TABLE OF AUTHORITIES**

**CASES**

1

2

3 *Aspen Grove Condominium Ass’n v. CNL Income Northstar LLC*

4     (2014) 231 Cal.App.4th 53 ..... 12

5 *Bank of America v. State Water Resources Control Bd.*

6     (1974) 42 Cal.App.3d 198..... 17

7 *Bixby v. Pierno*

8     (1971) 4 Cal.3d 130 ..... 17

9 *Butt v. State of California*

10     (1992) 4 Cal.4th 668 ..... 12

11 *Cal. Trout v. State Water Res. Control Bd.*

12     (1989) 207 Cal.App.3d 585..... 22

13 *Church of Christ in Hollywood v. Superior Court*

14     (2002) 99 Cal.App.4th 1244, 1251 ..... 12

15 *Fukuda v. City of Angels*

16     (1999) 20 Cal.4th 805 ..... 17

17 *IT Corp. v. County of Imperial*

18     (1983) 35 Cal.3d 63 ..... 12

19 *Nat’l Audubon Soc’y v. Superior Court*

20     (1983) 33 Cal.3d 419 ..... 14

21 *Stanford Vina Irrigation Co. v. State of California*

22     (2020) 50 Cal.App.5th 976 ..... 21, 22

23 *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.*

24     (1953) 3 Cal.2d 489 ..... 21

25 *United States v. State Water Resources Control Bd.*

26     (1986) 182 Cal.App,3d 82..... 15, 17

27 *Young. v. State Water Resources Control Bd.*

28     (2013) 219 Cal.App.4th 397 ..... 21

**STATUTES**

23 Civ. Code

24     § 3387..... 12

25 Wat. Code

26     § 100..... 22

27     § 102..... 14

28     § 1058.5, subd. (a)(1)..... 21

      § 1201..... 21

      § 1202..... 21

      § 1650..... 17

1  
2  
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**OTHER AUTHORITIES**

Miller & Starr, California Real Estate § 9:29 ..... 12

**REGULATIONS**

Cal. Code Regs.  
tit. 23, § 879.2, subd. (b) ..... 21

**CONSTITUTIONAL PROVISIONS**

Cal. Const.  
art. I, § 7, subd. (a) ..... 15

1 TO ALL PARTIES AND THE COURT:

2 PLEASE TAKE NOTICE that Byron-Bethany Irrigation District (BBID) hereby applies  
3 to this Court ex parte, pursuant to Local Rule 2.35, for a temporary restraining order and order to  
4 show cause why a preliminary injunction should not issue restraining and enjoining the State  
5 Water Resources Control Board (State Board) from curtailing BBID's water rights pending trial  
6 of this action. The Court will set a hearing upon filing of this application. BBID requests a  
7 hearing as soon as the Court is available.

8 This Application is made on the grounds that the State Board's July 6, 2022 curtailment  
9 orders (2022 Curtailment Orders) will cause irreparable harm and BBID is likely to succeed on  
10 the merits of its 2021 curtailment petition, as the 2022 Curtailment Orders were issued without  
11 due process, the 2022 Curtailment Orders are not supported by adequate evidence, the State  
12 Board exceeded its jurisdiction in issuing the 2022 Curtailment Orders, and the 2022 Curtailment  
13 Orders are improperly based on a waste and unreasonable use theory.

14 This Application is made pursuant to this Application; the Memorandum of Points and  
15 Authorities filed herewith; the Declarations of Jared S. Mueller, Kelley Geyer, Susan C. Paulsen,  
16 Ph.D., P.E., Greg Young, P.E., and Nick Bonsignore, P.E.; the [Proposed] Order filed herewith;  
17 all pleadings and records on file herein; and on such other oral and documentary evidence as may  
18 be presented at the hearing on this matter.

19 Pursuant to Rule 3.1202(a) of the California Rules of Court, attorneys for the parties are  
20 identified as follows:

21 a. The State Board (parties to all actions):  
22 Rob Bonta  
23 Attorney General of California  
24 Annadel A. Almendras  
25 Tracy L. Winsor  
26 Supervising Deputy Attorneys General  
27 Matthew G. Bullock, [Matthew.Bullock@doj.ca.gov](mailto:Matthew.Bullock@doj.ca.gov)  
28 Colleen R. Flannery, [Colleen.Flannery@doj.ca.gov](mailto:Colleen.Flannery@doj.ca.gov)  
Kate D. Fritz, [Kate.Fritz@doj.ca.gov](mailto:Kate.Fritz@doj.ca.gov)  
Daniel M. Fuchs, [Daniel.Fuchs@doj.ca.gov](mailto:Daniel.Fuchs@doj.ca.gov)  
Deputy Attorneys General  
1300 I Street, Suite 125  
P.O. Box 944255  
Sacramento, CA 94244-2550  
Telephone: (916) 210-7827

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22  
23  
24  
25  
26  
27  
28

- b. BBID (party to Contra Costa Case No. MSN21-1942):  
Somach Simmons & Dunn, APC  
Michael E. Vergara, [mvergara@somachlaw.com](mailto:mvergara@somachlaw.com)  
Jared S. Mueller, [jmueller@somachlaw.com](mailto:jmueller@somachlaw.com)  
Alyson E. Ackerman, [aackerman@somachlaw.com](mailto:aackerman@somachlaw.com)  
Ellen M. Moskal, [emoskal@somachlaw.com](mailto:emoskal@somachlaw.com)  
500 Capitol Mall, Suite 1000  
Sacramento, CA 95814-2403  
Telephone: (916) 446-7979
  
- c. BCID, PID, and WSID (parties to Sacramento Case No. 34-2021-80003718):  
Herum Crabtree Suntag, APC  
Steven A. Herum, [sherum@herumcrabtree.com](mailto:sherum@herumcrabtree.com)  
Jeanne M. Zolezzi, [jzolezzi@herumcrabtree.com](mailto:jzolezzi@herumcrabtree.com)  
Lilliana Freeman, [lselke@herumcrabtree.com](mailto:lselke@herumcrabtree.com)  
5757 Pacific Avenue, Suite 222  
Stockton, CA 95207  
Telephone: (209) 472-7700  
  
Spaletta Law PC  
Jennifer L. Spaletta, [jennifer@spalettalaw.com](mailto:jennifer@spalettalaw.com)  
Post Office Box 2660  
Lodi, CA 95241  
Telephone: (209) 224-5568
  
- d. CDWA and SDWA (parties to Sacramento Case No. 34-2021-80003720):  
Mohan Harris Ruiz LLP  
S. Dean Ruiz, [dean@mohanlaw.net](mailto:dean@mohanlaw.net)  
1806 W. Kettleman Lane, Suite L  
Lodi, CA 95242  
Telephone: (209) 888-6039  
  
Law Office of John Herrick  
John Herrick, [jherrlaw@aol.com](mailto:jherrlaw@aol.com)  
1806 W. Kettleman Lane, Suite L  
Lodi, CA 95242  
Telephone: (209) 224-5854
  
- e. SJTA (party to Fresno Case No. 21CECG02632):  
Paris Kincaid Wasiewski LLP  
Valerie C. Kincaid, [vkinaid@pariskincaid.com](mailto:vkinaid@pariskincaid.com)  
Timothy J. Wasiewski, [tw@pariskincaid.com](mailto:tw@pariskincaid.com)  
Jonathan R. Marz, [jmarz@pariskincaid.com](mailto:jmarz@pariskincaid.com)  
2617 K. Street, Suite 100  
Sacramento, CA 95816  
Telephone: (916) 264-2046
  
- f. Merced ID (party to Fresno Case No. Case No. 21CECG02643):  
Duane Morris LLP  
Thomas M. Berliner, [tberliner@duanemorris.com](mailto:tberliner@duanemorris.com)  
Jolie-Anne S. Ansley, [jsansley@duanemorris.com](mailto:jsansley@duanemorris.com)  
B. Alexandra Jones, [bajones@duanemorris.com](mailto:bajones@duanemorris.com)  
Spear Tower  
One Market Plaza, Suite 2200  
San Francisco, CA 94105-1127

1 Telephone: (415) 957-3000

2 Merced Irrigation District  
3 Phillip R. McMurray, [pmcmurray@mercedid.org](mailto:pmcmurray@mercedid.org)  
4 744 W. 20th Street  
Merced, CA 95340  
Telephone: (209) 722-5761

5 f. SSJID (party to San Joaquin Case No. STK-CV-UWM-2021-11503):

6 Paris Kincaid Wasiewski LLP  
7 Valerie C. Kincaid, [vkincaid@pariskincaid.com](mailto:vkincaid@pariskincaid.com)  
8 Timothy J. Wasiewski, [tw@pariskincaid.com](mailto:tw@pariskincaid.com)  
9 Jonathan R. Marz, [jmarz@pariskincaid.com](mailto:jmarz@pariskincaid.com)  
2617 K. Street, Suite 100  
Sacramento, CA 95816  
Telephone: (916) 264-2046

10 g. TID (party to Stanislaus Case No. CV-21-006717):

11 Law Offices of Robbins, Browning, Godwin & Marchini  
12 Arthur F. Godwin, [afg@rbgmlaw.com](mailto:afg@rbgmlaw.com)  
13 700 Loughborough Dr., Suite D  
P.O. Box 2067  
Merced, CA 95344-0067  
Telephone: (209) 383-9334

14 h. MID (party to Stanislaus Case No. CV-21-006717):

15 Paris Kincaid Wasiewski, LLP  
16 William C. Paris, III, [bparis@pariskincaid.com](mailto:bparis@pariskincaid.com)  
2617 K Street, Suite 100  
Sacramento, CA 95816  
Telephone: (916) 264-2046

17 Pursuant to Rule 3.1202(b) of the California Rules of Court, BBID joined all petitioners in  
18 an ex parte application to expedite the hearing on BBID's petition for coordination to the Judicial  
19 Council, filed with this Court on June 8, 2022, which the Court granted on June 15, 2022. The  
20 basis for the petitioners' ex parte application was the potential need to seek emergency relief if  
21 the State Board curtails their water rights. As the State Board has curtailed BBID's water rights,  
22 BBID now seeks emergency relief.

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Byron-Bethany Irrigation District (BBID) seeks ex parte relief from this Court to prevent  
4 irreparable harm caused by the State Water Resources Control Board's (State Board) curtailment  
5 orders against BBID and West Side Irrigation District (WSID).<sup>1</sup> The State Board reversed a  
6 decision that its curtailment methodology was not adequate for use in the Legal Delta, and issued  
7 curtailment orders after 5:00 p.m. on July 6, 2022, which applied to BBID's diversions as of the  
8 following day. The curtailment orders violate due process, are without jurisdiction, and were  
9 issued without adequate evidence and analysis to support curtailment. Further, the curtailment  
10 orders are improperly based upon the legal theory of waste and unreasonable use. Injunctive  
11 relief is necessary to prevent the complete loss of irrigated crops, and the loss of property rights  
12 by the improper regulatory action taken by the State Board.

13 II. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

14 BBID is a California Irrigation District, formed and operating within Contra Costa  
15 County, Alameda County, and San Joaquin County under Division 11 of Water Code section  
16 20500 et seq. (Declaration of Kelley Geyer in support of Ex Parte Application (Geyer Decl.),  
17 ¶ 2.) BBID diverts water under its pre-1914 appropriative water right and WSID's post-1914  
18 appropriative water right within the Sacramento-San Joaquin River Delta (Delta). (Geyer Decl.,  
19 ¶ 3.) BBID delivers water for a broad array of beneficial uses, including irrigation, domestic, and  
20 fire-protection uses. (Geyer Decl., ¶¶ 4-6.) BBID is the sole source of water for over 28,000  
21 people in the community of Mountain House, and the sole source of water for over 215  
22 agricultural customers that have planted thousands of acres of crops. (Geyer Decl., ¶¶ 5-6.) The  
23 Mountain House fire protection system and Mariposa Energy Project are both solely supplied by  
24 BBID and are necessary for fire protection. (Geyer Decl., ¶ 6.) In light of drought concerns,  
25 BBID and Mountain House had been implementing conservation measures including a 50% water  
26 delivery schedule to the WSID service area. (Geyer Decl., ¶¶ 7, 11, Exhibit B.)

27 <sup>1</sup> BBID consolidated with WSID as of September 2, 2020; BBID's pre-1914 appropriative water right is assigned  
28 identification number S021256, and WSID's post-1914 appropriative water right is assigned identification number  
A000301.



1 Last year, on August 3, 2021, the State Board adopted a regulatory framework titled,  
2 “Emergency Curtailment and Reporting Regulation for the Sacramento-San Joaquin Watershed”  
3 (Emergency Regulation). (Declaration of Jared S. Mueller in Support of Ex Parte Application  
4 (Mueller Decl.), ¶ 2.) The State Board subsequently issued curtailment orders based on the  
5 Emergency Regulation, ordering virtually all water right holders in the Delta to cease diversions;  
6 such curtailment orders for both of BBID’s water rights were issued on August 20, 2021. (*Ibid.*)  
7 As a result, and in anticipation of impending curtailment orders based on the State Board’s  
8 expansion of its authority, BBID and other local agencies timely filed seven related cases  
9 challenging the State Board’s various actions in and around adopting the Emergency Regulation.<sup>2</sup>  
10 (*Id.* at ¶¶ 3-4.)

11 This spring, on April 19, 2022, the State Board published its Notice of Availability of the  
12 Draft Emergency Curtailment and Reporting Regulation (April 2022 Draft Regulation) created to  
13 replace the Emergency Regulation, which expires on August 19, 2022. (Mueller Decl., ¶ 6.) On  
14 the same date, the State Board distributed a revised version of the Water Unavailability  
15 Methodology for the Delta Watershed (April 2022 Methodology). (*Ibid.*) BBID and its expert  
16 consultants submitted legal and technical comments to the above on May 19, 2022, raising  
17 fundamental issues pervasive throughout the April 2022 Methodology. BBID’s consultants  
18 concluded that the updated Methodology was still inappropriate for use as a curtailment tool due  
19 to quality control errors, failure to address return flows, and because the Delta residence water  
20 was improperly calculated, among other problems. (See Declaration of Susan C. Paulsen in  
21 Support of Ex Parte Application (Paulsen Decl.), ¶¶ 6-12.)

22 On June 7, 2022, the State Board issued via email its Weekly Update on Curtailment  
23 Status of Water Rights and Claims in the Delta Watershed (June 7th Update). (Geyer Decl., ¶ 9,  
24 Exhibit A.) The June 7th Update states:

25 **No curtailment of rights and claims within the Legal Delta.** In coordination  
26 with the Office of the Delta Watermaster, Division of Water Rights staff are in the  
27 process of updating several technical assumptions regarding water unavailability  
within the Legal Delta. **Pending completion of those updates, rights and claims**

28 <sup>2</sup> BBID hereinafter collectively refers to these actions as the “2021 Curtailment Cases.”

1           **within the Legal Delta will not be curtailed pursuant to the Drought**  
2           **Emergency Regulation.**

3 (Geyer Decl., ¶ 9, Exhibit A, emphasis added.)

4           On June 10, 2022, BBID Interim General Manager, Kelley Geyer, followed up with the  
5 Delta Watermaster, Michael George, requesting confirmation of no curtailments for BBID,  
6 located in the Delta. (Geyer Decl., ¶ 10, Exhibit A.) On June 14, 2022, the Delta Watermaster  
7 confirmed that “**neither pre-1914 nor riparian rights in the Legal Delta will be curtailed**  
8 **under the current Methodology.**” (Geyer Decl., ¶ 9, Exhibit A, emphasis added.) He went on  
9 to state that, “[f]or now, however (and probably through at least the rest of the current water  
10 **year end on September 30, 2022), BBID does not face threatened curtailment of its pre-1914**  
11 **water right.**” (*Id.* (emphasis added).)

12           On June 15, 2022, the Watermaster provided the same assurance to Bert Michalczyk, of  
13 the Mountain House Community Service District, conceding that the State Board’s Methodology  
14 cannot, with specificity, determine whether there is water in the Legal Delta to serve a particular  
15 diverter’s right, stating:

16           The Division has decided not to apply the Water Unavailability Methodology  
17 (approved as part of the emergency curtailment regulations) within the Legal Delta  
18 at the current time. The Division concluded that **the complexity of the Legal**  
19 **Delta is not represented at a sufficiently granular scale to allow a**  
20 **determination of unavailability at the individual diversion level within the**  
21 **Legal Delta.**

22 (Geyer Decl., ¶ 11, Exhibit B.)

23           In reliance on the State Board’s notice, BBID prepared its June 2022 Bulletin to its water  
24 users. Water users rely upon BBID’s bulletin to make decisions dependent on water availability.  
25 (Geyer Decl., ¶¶ 12-13, Exhibit C.) As just one example of the reliance on BBID’s June 2022  
26 Bulletin, one farmer planted approximately 150 acres of corn for the Labor Day holiday. (Geyer  
27 Decl., ¶ 13.)

28           On June 27, 2022, the State Board distributed its Revised Draft Emergency Regulation  
(June Draft Regulation) and Updated Water Unavailability Methodology (June 2022  
Methodology). (Mueller Decl., ¶ 7.) The State Board required comments on the June Draft

1 Regulation and a limited portion of the June Methodology by July 8, 2022. (*Ibid.*) The following  
2 day, on June 28, 2022, the State Board issued its Weekly Update on Curtailment Status of Water  
3 Rights and Claims in the Delta Watershed (June 28th Update), *reversing* the State Board’s prior  
4 position that water rights in the Legal Delta would not be curtailed and advising that Delta water  
5 users would be curtailed. (*Ibid.*)

6 On July 6, 2022, less than 48 hours before comments on the June Draft Regulation and  
7 June Methodology were due, the State Board staff published a *draft* “corrected redline” of the  
8 June Draft Regulation, making significant legal revisions. (Mueller Decl., ¶ 7.) After 5:00 p.m.  
9 that day, the State Board updated its online Curtailment Status List, showing both BBID’s  
10 pre-1914 and post-1914 appropriative water rights as curtailed (2022 Curtailment Orders). (State  
11 Board, Delta Watershed Curtailment Status List website, update Jul. 6, 2022, effective July 7,  
12 2022 [“This serves as a water right curtailment order.”].<sup>3</sup>) The 2022 Curtailment Orders are,  
13 according to the State Board, effective less than 24 hours later, on July 7, 2022. (Geyer Decl.,  
14 ¶ 14, Exhibit D.)

15 On July 7, 2022, when the Delta Watermaster was asked for confirmation that BBID’s  
16 water right had been curtailed despite his prior assurance of no curtailments during the remainder  
17 of the water year, the Delta Watermaster responded:

18 I acknowledge that this curtailment of BBID’s diversion right is contrary to my  
19 guidance delivered to you on June 15. That prior guidance was based on the  
20 policy decision communicated officially in the Division’s June 7 drought update.  
21 The **change in the Division’s policy** reflected in yesterday’s update has been  
22 **caused by** (1) the worsening drought conditions throughout the watershed, (2)  
23 **feedback from diverters who had voluntarily reduced their diversions**  
24 **complaining that their sacrifices, reflected in the Methodology as reduced**  
25 **system demand, unfairly benefitted other water users who thus escaped**  
26 **appropriate curtailment**, and (3) the consistent application of the Methodology  
27 to all similarly situated appropriative water rights, regardless of location within the  
28 watershed.

(Geyer Decl., ¶ 15, Exhibit D, emphasis added.)

26 BBID does not have groundwater wells to make up for the State Board’s curtailment and,  
27 of the few private wells that exist, none have enough groundwater supply to handle their own

<sup>3</sup> Available at: <https://www.waterboards.ca.gov/drought/delta/#tableau>.

1 water demands. (Geyer Decl., ¶ 21.) BBID’s sole option to mitigate these damages is to identify  
2 and purchase large quantities of costly replacement water. (*Id.* at ¶ 22.) However, due to the  
3 shifting policy position of the State Board, ongoing drought conditions, and curtailment of so  
4 many other water right holders, the little water available is either too cost prohibitive to BBID’s  
5 customers or not available in time to prevent crop loss. (*Ibid.*)

6 If the State Board makes several suggested changes to improve its Methodology, as  
7 provided by BBID’s technical experts, the irreparable harm to BBID can be avoided and/or  
8 mitigated. Instead, the State Board’s failure to implement changes as proposed by BBID’s  
9 experts lead to the State Board’s July 6, 2022 curtailment order despite evidence that water was in  
10 fact available. This is in part due to the significant complexity of the State Board’s Methodology,  
11 particularly for the Delta. “The State Board’s documentation includes a Methodology report,  
12 appendices to the report, and a complex Excel spreadsheet containing numerous tabs and a  
13 significant amount of input information to evaluate Delta watershed supply and demand in 2021  
14 and 2022.” (Bonsignore Decl., ¶ 4). In addition, multiple versions of the Methodology have been  
15 prepared and revised. While the State Board made minor revisions to the Methodology  
16 implementing suggestions from BBID, the State Board curtailed BBID before it implemented  
17 QA/QC steps. For example, BBID’s expert Nicholas F. Bonsignore notes he repeatedly  
18 commented “that an expanded Quality Assurance / Quality Control (QA/QC) process is necessary  
19 to avoid overestimated demands, including my comments at the State Board’s workshop on  
20 May 12, 2022, and my comment letter to the State Board dated May 19, 2022. However, it  
21 appears the State Board has not implemented enhanced QA/QC procedures, and certainly has not  
22 completed them.” (Bonsignore Decl., ¶ 9). Based on this failure to update the Methodology, “the  
23 uncertainty in the accuracy of the Methodology’s demand values remain uncertain, and hence the  
24 validity of the Methodology results (i.e., scope of curtailments) remains questionable.”  
25 (Bonsignore Decl., ¶ 9). Because of these various errors in the Methodology, BBID was  
26 curtailed, in error, while there was still available water in the Delta. This action is causing and  
27 will continue to cause irreparable harm absent a judicial Order halting curtailment until changes  
28 suggested by BBID are incorporated into a Methodology for administration purposes.

1 If the Methodology could instead implement the DSM2 model developed and adopted by  
2 the California Department of Water Resources, far more detailed and current information can  
3 guide administration in this historically dry time. The DSM2 model has been extensively  
4 calibrated and validated for a broad range of hydrologic conditions, from wet to critically dry, and  
5 incorporates detailed information describing the configuration and interconnected channels of the  
6 Delta. Compared to all prior and current iterations of the Methodology, the DSM2 model  
7 provides more accurate representations of hydrodynamics, salinity, and fingerprinting – at any  
8 location within the Legal Delta.” (Paulsen Decl., ¶ 12). By implementing a modeled approach  
9 under DSM2, the State Board could be far more certain “that curtailments are adequately  
10 supported by actual conditions”. (*Ibid.*) However, absent this effort, the existing curtailment  
11 order causes crop loss, tree loss and potentially entire community businesses to fail based on a  
12 flawed methodology, that is more suited to forecasting than for priority administration.  
13 Declaration of Greg Young, P.E. in Support of Ex Parte Application (Young Decl.), ¶ 8).

### 14 III. ARGUMENT

#### 15 A. Legal Standard

16 When considering whether to grant a temporary restraining order, trial courts evaluate the  
17 likelihood that the moving party will succeed on the merits at trial and the balance of harms that  
18 would be suffered by plaintiff if relief is not granted, as compared to the harms that would be  
19 incurred by the opposing party if relief is granted. (*Church of Christ in Hollywood v. Superior*  
20 *Court* (2002) 99 Cal.App.4th 1244, 1251 (*Hollywood*), citing *IT Corp. v. County of Imperial*  
21 (1983) 35 Cal.3d 63, 69-70.) Trial courts have discretion to balance the relative weight of each  
22 consideration: “the greater the plaintiff’s showing on one, the less [that] must be shown on the  
23 other to support [a restraining order....]” (*Hollywood, supra*, at pp. 1251-52, citing *Butt v. State*  
24 *of California* (1992) 4 Cal.4th 668, 678.)

25 Water rights are real property rights (Miller & Starr, California Real Estate § 9:29.) Real  
26 property rights are unique in that injury or loss cannot be compensated in monetary damages,  
27 necessitating injunctive relief. (See Civ. Code, § 3387; *Aspen Grove Condominium Ass’n v. CNL*  
28 *Income Northstar LLC* (2014) 231 Cal.App.4th 53.)

1 B. BBID Will Suffer Irreparable Harm from the Curtailment Orders

2 As detailed by BBID Interim General Manager, Kelley Geyer, the 2022 curtailment orders  
3 present BBID with two harmful options: (1) disregard the curtailment orders and continue to  
4 divert under BBID's pre-1914 and/or post-1914 water rights in order to prevent the economic  
5 injury and threats to public health and safety that will ensue as a result of ceasing water diversion  
6 and deliveries, and face enforcement proceedings and the threat of monetary penalties; or (2)  
7 comply with the curtailment orders to cease diversions, leaving communities within BBID  
8 without an adequate source of drinking water, water for fire protection, landowners losing crops,  
9 the closing of agricultural businesses, and the loss of jobs that will follow the cessation of farming  
10 within BBID. (Geyer Decl., ¶¶ 17-20.)

11 Curtailments will require fallowing of thousands of acres of land, putting farmers out of  
12 business. (Geyer Decl., ¶ 18.) Businesses will then be forced to lay off hundreds of people,  
13 including entire families that have been working in this region for generations. (*Ibid.*) This will  
14 cause extreme hardship, with not only millions of dollars in economic damage to the community,  
15 but also the emotional stress and financial duress to the individual community members. (*Ibid.*)  
16 For example, the farmer that planted 150 acres of corn on the basis of the State Board's notice  
17 will now be unable to irrigate those crops. (*Id.* at ¶ 19.) There are countless examples of this,  
18 with nearly 10,000 acres of unharvested crops that are just weeks away from harvest. (*Ibid.*)

19 The harm to BBID will extend beyond the community, as every seed is planted in  
20 furtherance of a purchase contract. (*Id.* at ¶ 20.) Thus, not only will farmers in the community  
21 lose revenues derived from fulfillment of their contracts, but their business partners in and outside  
22 of the community will lose the subject of the contracts: agricultural products. (*Ibid.*) This will  
23 only exacerbate supply shortages that are being felt throughout this state and the country. (*Ibid.*)  
24 Furthermore, all those who provide goods and services to the community are harmed by the  
25 curtailment order, and these concentric circles of economic damage extend well beyond BBID's  
26 boundaries.

27 BBID's harm is exacerbated by the ultimately false assurances that the State Board and  
28 the Delta Watermaster provided to BBID. On June 7, 2022, the State Board advised that, pending

1 completion of updates to the Methodology, for which comments were not due until July 8, 2022,  
2 “rights and claims within the Legal Delta will not be curtailed pursuant to the Drought  
3 Emergency Regulation.” (Geyer Decl., ¶ 9.) The Delta Watermaster confirmed on June 14, 2022  
4 that “neither pre-1914 nor riparian rights in the Legal Delta will be curtailed under the current  
5 Methodology.” (Geyer Decl., ¶ 10.) In fact, on June 15, 2022, he stated that “the complexity of  
6 the Legal Delta is not represented at a sufficiently granular scale to allow a determination of  
7 unavailability at the individual diversion level within the Legal Delta.” (Geyer Decl., ¶ 11.)

8 As a result, BBID prepared an important water supply update for its customers that  
9 depend on current water supply information. (Geyer Decl., ¶ 12, Exhibit C.) Had it not been for  
10 the State Board and the Delta Watermaster’s assurances, it is unlikely that farmers relying on  
11 water supply updates would take the risk of planting crops – such as one that planted  
12 approximately 150 acres of corn for harvest before the Labor Day holiday. (Geyer Decl., ¶ 13.)

13 According to the Delta Watermaster, the State Board’s reversal of its decision not to  
14 curtail came, at least in part, on the basis of political reasons. On July 7, 2022, the Delta  
15 Watermaster mentioned, as a cause for the State Board’s change in policy, “feedback from  
16 diverters who had voluntarily reduced their diversions complaining that their sacrifices, reflected  
17 in the Methodology as reduced system demand, unfairly benefitted other water users who thus  
18 escaped appropriate curtailment. (Geyer Decl., ¶ 15, Exhibit D.) Of course, having nothing to do  
19 with the availability of water, political pressure is not a sound or lawful basis on which to curtail  
20 BBID’s water rights. Therefore, the balance of harms suffered by BBID as a result of the State  
21 Board’s actions greatly outweigh the speculative “harms” to be suffered by the State Board if  
22 relief is granted here.

23 C. BBID Is Likely to Succeed on the Merits of a Challenge to the 2022 Curtailment Orders

24 1. The 2022 Curtailment Orders Were Issued Without Procedural Due Process

25 “All water within the State is the property of the people of the State, but the right to the  
26 use of water may be acquired by appropriation in the manner provided by law.” (*Nat’l Audubon*  
27 *Soc’y v. Superior Court* (1983) 33 Cal.3d 419, 441, citing Wat. Code, § 102.) BBID’s  
28 appropriative water rights (both pre-1914 and post-1914) are usufructuary real property rights,

1 and the fact that they are based in use rather than legal ownership does not change this fact.  
2 (Mueller Decl., ¶ 11, Exhibit C (Santa Clara County Superior Court’s Final Statement of Decision  
3 (FSOD), p. 34, citing *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App,3d  
4 82, 101 [“It is. . . axiomatic that once rights to use water are acquired, they become vested  
5 property rights. As such, they cannot be infringed by others or taken by governmental action  
6 without due process and just compensation.”]).) Curtailments of its pre-1914 or post-1914  
7 appropriative water rights are, therefore, subject to procedural due process protections. (*Ibid.*)  
8 Thus, BBID is entitled to due process, which includes notice and an opportunity to be heard, prior  
9 to issuing the 2022 Curtailment Orders. (See Cal. Const., art. I, § 7, subd. (a).) A fair hearing  
10 necessarily includes the ability to test the evidence and/or information the State Board relies on in  
11 issuing curtailments, or effective rescission of water rights. (Mueller Decl., ¶ 11, Exhibit C  
12 (FSOD, p. 39 [“The Board violated petitioners’ due process rights by issuing the curtailment  
13 notices, which ordered immediate curtailments and threatened large fines accruing from the time  
14 the notices issued, without first providing water users with an opportunity to challenge the  
15 findings upon which they were based.”]).) Instead, the State Board issued the 2022 Curtailment  
16 Orders without any meaningful notice and devoid of any opportunity to be heard.

17 Indeed, the State Board bases the 2022 Curtailment Orders on the Water Unavailability  
18 Methodology in the Emergency Regulation, which is a threshold issue in the 2021 Curtailment  
19 Cases that are not yet venued, as coordinated proceedings, in any particular court. In addition, in  
20 2022, the lack of due process became more acute when the Delta Watermaster’s curtailment  
21 decision was summarily reversed. By June 27, 2022, there was an eighth version of the State  
22 Board’s Methodology where it (1) failed to rely on important and readily available current data or  
23 do quality control improvements that it recognized (Bonsignore Decl., ¶ 9), (2) entirely reworked  
24 the basis behind the Delta’s Methodology (Paulsen Decl., ¶¶ 7-12), and (3) did not account for  
25 return flows, including groundwater return flows (Young Decl., ¶ 5). The 2022 Curtailment  
26 Orders were posted during the afternoon of July 6, 2022, less than twelve hours before becoming  
27 effective on July 7, 2022 and less than 48 hours prior to the deadline to submit written comments  
28 on the proposed 2022 iteration of the Emergency Regulation. (Paulsen Decl., ¶ 8.) The State



1 Board takes the position that posting curtailment orders on its website, with no personal  
2 notification to water right holders, is legally sufficient notice.

3 Moreover, the 2022 Curtailment Orders are contrary to communications between BBID  
4 and the Delta Watermaster, stating that BBID’s water rights would not be subject to curtailment  
5 until at least September 2022, due to a policy change. An internal policy decision, not based on  
6 available science, and not reviewed by the regulatory process is just an underground regulation,  
7 reflecting pressure from various diverters, as explained by the Water Master. (Geyer Decl., ¶ 15,  
8 Exhibit D.)

9 Contrary to these representations, however, on July 6, 2022, the State Board issued the  
10 2022 Curtailment Orders curtailing BBID’s pre-1914 and post-1914 appropriative water rights.  
11 (Geyer Decl., ¶ 14, Exhibit D.) Finally, the State Board does not provide factual or legal findings  
12 that water is unavailable to BBID at its specific points of diversion or priorities of right. (*Id.*;  
13 Paulsen Decl., ¶ 7.) Instead, they are ostensibly based on the application of the June  
14 Methodology, which was published on June 27, 2022 – nine days before the 2022 Curtailment  
15 Orders were issued. (Geyer Decl., ¶ 14, Exhibit D; Paulsen Decl., ¶ 8.) At the time of issuance,  
16 BBID had not completed and submitted its written comments on the June Methodology, which  
17 are/were due on July 8, 2022. (Paulsen Decl., ¶ 9.) The June Methodology was fundamentally  
18 revised at the last moment. For instance, the revisions present a new “mass balance accounting”  
19 method that is undefined and unclear, which could result in the curtailment of water rights and  
20 claims for which water is available. (Paulsen Decl., ¶ 8.) The June Methodology changed  
21 significantly from prior iterations in regard to applying curtailments to Delta water users by  
22 incorrectly appearing to “ limit Delta diversions in any given month to the volume of natural and  
23 abandoned flows entering the Delta in the same month, apparently on the basis that “total Delta  
24 outflow”” – as newly defined by the State Board to exclude significant volumes of inflow and  
25 exports, i.e., Project water – needs to be maintained at a certain level to control salinity intrusion.”  
26 (Paulsen Decl., ¶ 9.) The State Board has not yet held a hearing, or even public meeting, to  
27 discuss either the 2022 Curtailment Orders or the June Methodology on which they are based.

28 ///

1 (Paulsen Decl., ¶ 8.) BBID simply seeks due process from this Court which the State Board  
2 refuses to provide.

3  
4 2. The State Board Did Not Present Adequate Evidence to Support the Findings of  
Unavailability Underpinning the 2022 Curtailment Orders

5 An agency’s final decisions concerning a vested, fundamental right must be supported by  
6 findings and the weight of the evidence in the record. (*Fukuda v. City of Angels* (1999)  
7 20 Cal.4th 805, 810-811; *Bank of America v. State Water Resources Control Bd.* (1974) 42  
8 Cal.App.3d 198, 207.)

9 Once rights to use of water are acquired, they become vested property rights. (*United*  
10 *States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 101; see Wat. Code,  
11 § 1650.) Thus, BBID’s pre-1914 and post-1914 appropriative rights are vested rights. “In  
12 determining whether the right is fundamental the courts do not alone weigh the economic aspect  
13 of it, but the effect of it in human terms and the importance of it to the individual in the life  
14 situation.” (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 144.) The water that BBID diverts irrigates  
15 farms that employ hundreds of people that depend on this employment for their livelihood.  
16 (Geyer Decl., ¶¶ 18-19.) Further, BBID is currently the sole source of water and the only entity  
17 that supplies water to Mountain House, a growing community of more than 28,000 people that  
18 contains several elementary schools and a high school. (Geyer Decl., ¶ 6.) Cal Fire also taps into  
19 the Mountain House fire protection system to fight wildfires in the Altamont Pass. (*Ibid.*) In this  
20 regard, BBID’s water rights are vested, fundamental rights, and the State Board’s findings must  
21 be supported by the weight of the evidence.

22 First, the 2022 Curtailment Orders are not supported by specific findings as to  
23 unavailability at BBID’s specific priorities of right and points of diversion. It is unclear whether  
24 the June Methodology or a prior version of the Water Unavailability Methodology was used to  
25 make the unavailability determinations supporting the 2022 Curtailment Orders, though it appears  
26 that the June Methodology was employed. (Geyer Decl., ¶ 14, Exhibit D; Paulsen Decl., ¶ 7.)  
27 Regardless, the June Methodology lacks key details to inform stakeholders how curtailment  
28 decisions will be made by the State Board. (Paulsen Decl., ¶ 7.) Thus, the 2022 Curtailment

1 Orders are not only unsupported by findings, but they are not even clearly supported by any  
2 specific methodology to generate findings.

3 To the extent that the 2022 Curtailment Orders are ostensibly supported by the June  
4 Methodology, the weight of the evidence related to the June Methodology does not support the  
5 finding of water unavailability.

6 The June Methodology purports to use a new “mass balance accounting” method that  
7 limits diversions of water from the Delta in any given month to the volume of natural and  
8 abandoned flows entering the Delta in the same month. (Paulsen Decl., ¶ 9.) This is apparently  
9 based on a need to control salinity intrusion. (*Ibid.*) However, this results in underestimating  
10 water available for diversion in the Delta due to several errors in the June Methodology’s  
11 analysis. (Paulsen Decl., ¶ 9.) For example, the June Methodology excludes significant volumes  
12 of inflow and exports of water, particularly water associated with the State Water Project and  
13 Central Valley Project. It does not explain the calculations for volumes of natural and abandoned  
14 flows expected to enter the Delta this year. (*Ibid.*) As in prior iterations of the Water  
15 Unavailability Methodology, the June Methodology also fails to properly account for residence  
16 time, which is the amount of time specific water molecules spend in the Delta, or the “pool” of  
17 remaining water from prior months that is available in the Delta. (*Ibid.*) Finally, it continues to  
18 ignore historic practices of Delta diverters, who have used water from the “pool” of remaining  
19 supplies from prior months in the summer and fall months. (*Ibid.*) These serious errors combine  
20 to appear to support curtailment orders when there may be ample water available for diversion.  
21 (*Ibid.*)

22 The June Methodology further fails to clarify how the priority of diverters’ water rights  
23 and relative locations upstream and downstream of other diverters is considered resulting in  
24 upstream diverters with lower priority to divert at the expense of Delta diverters with more senior  
25 priority rights. (Paulsen Decl., ¶ 10.) No evidence suggests that the 2022 Curtailment Orders  
26 were properly imposed with respect to water rights priority. (*Ibid.*)

27 The June Methodology further misstates available supply of water by treating the South  
28 Delta as an isolated unit. The June Methodology assumes saline water from the West Delta

1 would function as replacement water when depletion, i.e., diversions from the South Delta,  
2 exceed inflows from natural and abandoned flows of water. (Paulsen Decl., ¶ 11.) This  
3 distinction does not reflect the reality of hydrodynamics in the Delta. (*Ibid.*) In fact, high salinity  
4 water from the West Delta mixes with Sacramento River water and other sources, flowing  
5 through the Central Delta before arriving in the South Delta. (*Ibid.*)

6 Rather than struggle with a new and insufficient Methodology, the State Board could use a  
7 more accurate model developed by the Department of Water Resources: DSM2. (Paulsen Decl.,  
8 ¶ 12.) The DSM2 model has been extensively calibrated and validated for a broad range of  
9 hydrologic conditions, including critically dry years, incorporating detailed information  
10 describing the configuration and interconnected channels of the Delta. (*Ibid.*) Application of this  
11 alternative model would not only be internally consistent between state agencies, but would also  
12 serve to address many of the Water Unavailability Methodology’s shortcomings described herein;  
13 namely, hydrodynamics, salinity, and fingerprinting. (*Ibid.*) As such, the DSM2 Model would  
14 ensure that curtailments are adequately supported by actual conditions. (*Ibid.*) In response to the  
15 State Board’s concerns regarding implementation, BBID’s expert consultant has offered to assist  
16 the State Board in developing a method to complete modeling using the DSM2 Model. (*Ibid.*)

17 There are other reasons that the Methodology is an unsound basis and does not provide  
18 adequate evidence to curtail BBID. First, the Board developed the Methodology without using  
19 readily available data. “All iterations of the Methodology, including the most recent  
20 Methodology, have significantly overestimated demand from diverters in the Delta by including  
21 outdated data with duplicative water diversions.” (Young Decl., ¶ 4). The Methodology uses  
22 2018 demand information, even where there is 2019 and 2020 data readily available. “As a result,  
23 application of the Methodology may result in the curtailment of water rights for which water is, in  
24 fact, available.” (Young Decl., ¶ 4).

25 The Board’s Methodology also disregards the fundamental concept of return flows. “The  
26 State Board’s calculations of supply in the Delta also fail to accurately consider return flows of  
27 water that return to surface water supplies after beneficial use, such as return flows from use of  
28 previously stored water and groundwater.” (Young Decl., ¶ 5). The State Board ignores return

1 flows from groundwater used upstream, resulting in “an underestimation of supply available for  
2 diversion in the Delta.” (*Ibid.*)

3 Similarly, the Methodology does not account from return flows from stored water upstream  
4 of the Delta. BBID’s expert “recommended to the State Board that return flows from re-diversion  
5 of stored water be included in the Methodology and suggested a way that this could be  
6 accomplished using data already available. “Without this change, the Methodology uses an  
7 inconsistent and inadequate approach to account for return flows as a component of supply, and  
8 thus could result in the curtailment of water rights for which water is available.” (Bonsignore  
9 Decl., ¶ 10). This failure in the Methodology “undercounts seasonal supply by about 82,000  
10 acre-feet (AF).” (Bonsignore Decl., ¶ 11).

11 For July 2022 alone, if the State Board accounted for various errors in assessing quality  
12 assurance and quality control, accounting for return flows and appropriately using current data,  
13 then “BBID and West Side Irrigation District’s water rights potentially would not have been  
14 curtailed. By not accounting for these errors, the Methodology is not a proper basis for  
15 curtailments.” (Bonsignore Decl., ¶ 11).

16 Finally, other significant internal inconsistencies plague the Methodology. The State  
17 Board has developed the Unavailability Methodology without managing inconsistent information  
18 appropriately. This also results in curtailments even though more water is in the system than the  
19 Board has calculated. For example, the “Methodology further fails to appropriately classify  
20 riparian and pre-1914 appropriative water rights.” (Young Decl., ¶ 6). Additionally, the  
21 Methodology groups riparian rights together to assess demand, but does not account for whether a  
22 riparian water right could physically take water from a sub-watershed. (*Id.* at ¶ 7).

23 The State Board consistently excuses its inconsistent use of data by claiming it does not  
24 have resources to be more granular in calculating water availability. Nonetheless, “the  
25 Methodology is still not granular enough to impose curtailments using a very granular (i.e., right-  
26 by-right) method.” (Bonsignore Decl., ¶ 12).

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28 ///

1           Because the 2022 Curtailment Orders are not supported by any specific findings or the  
2 weight of the evidence, the State Board fails to meet the standards established in *Fukuda* and  
3 related authority.

4           3. The State Board Exceeded Its Jurisdiction in Issuing the 2022 Curtailment Orders

5           The State Board has limited jurisdiction over pre-1914 appropriative water rights.  
6 (*Young. v. State Water Resources Control Bd.* (2013) 219 Cal.App.4th 397, 404; see also Wat.  
7 Code, §§ 1201, 1202.) The 2021 Emergency Regulation, on which the 2022 Curtailment Orders  
8 rely, purports to use Water Code section 1058.5 as authority to curtail pre-1914 appropriative  
9 water rights. However, section 1058.5 only expressly authorizes “curtailment of diversions when  
10 water is not available under the diverter’s priority of right.” (Wat. Code, § 1058.5, subd. (a)(1).)  
11 As stated hereinabove, the State Board used its June 2022 Methodology, with its multiple errors  
12 and inconsistencies, and has not made any such finding specific to BBID or its point of diversion.  
13 Absent an explicit statement of legislative intent to fundamentally expand the State Board’s  
14 jurisdiction, section 1058.5 does not expand the State Board’s authority to include curtailments of  
15 pre-1914 appropriative water rights.

16           4. The 2022 Curtailment Orders Are Improperly Based on a Waste and Unreasonable  
17 Use Theory

18           The 2022 Curtailment Orders rely on the 2021 Emergency Regulation, which purports to  
19 find that “[w]hat may be a reasonable beneficial use, where water is present in excess of all needs,  
20 would not be a reasonable beneficial use in an area of great scarcity and need.” (Resolution  
21 2021-0028 at p. 4, recital 14, citing *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.*  
22 (1953) 3 Cal.2d 489, 567.) To make a waste and unreasonable use determination, the State Board  
23 must evaluate whether the specific use is unreasonable in light of its impacts on another specific  
24 use. (See, e.g., *Stanford Vina Irrigation Co. v. State of California* (2020) 50 Cal.App.5th 976,  
25 999-1004.)

26           Despite this requirement, the State Board merely states that failure to comply with its  
27 curtailment orders constitutes a waste and unreasonable use of water. (Cal. Code Regs., tit. 23,  
28 § 879.2, subd. (b).) This is insufficient because the State Board relied upon the Methodology

1 with the problems described above. As such, the “Methodology should not be viewed as an  
2 absolute determinant of curtailments. Use of real-time circumstances of supply and demand on  
3 specific stream courses should be the basis that dictates curtailment determinations.” (Young  
4 Decl., ¶ 8). Further, the Board should be cognizant that before assessing reasonableness and  
5 waste, California law also specifically declares “that because of the conditions prevailing in this  
6 State the general welfare requires that the water resources of the State *be put to beneficial use to*  
7 *the fullest extent* of which they are capable...” (Wat. Code § 100, emphasis added.) The  
8 Methodology does not include appropriate calculations to support the fullest extent of possible  
9 beneficial use by Delta users like BBID. If the State Board implemented some changes suggested  
10 by comments, the analysis would show that curtailment was incorrectly imposed when there was  
11 water available, and as such there was not waste or unreasonable use. The Emergency Regulation  
12 does not provide articulable criteria to determine whether the use of water is reasonable, as it did  
13 in the cases the State Board cited as authority for the Emergency Regulation. (See *Stanford Vina*,  
14 *supra*, 50 Cal.App.5th at pp. 999-1004; see also *Cal. Trout v. State Water Res. Control Bd.* (1989)  
15 207 Cal.App.3d 585, 622-625.) Without this analysis, the Emergency Regulation is legally  
16 insufficient to support the issuance of the 2022 Curtailment Orders.

#### 17 IV. CONCLUSION

18 The State Board’s Methodology has been an unsound and unlawful basis to curtail water  
19 rights since 2015, as concluded by the State Board itself: it is a tool for forecasting – not  
20 curtailment.

21 The water availability analysis ... was, and will likely continue to be, and  
22 indispensable planning tool to forecast water availability for categories of rights  
23 when shortages are anticipated. These proceedings are not, however, an exercise  
in forecasting.

24 (Mueller Decl., ¶ 12, Exhibit D, p. 14; Young Decl., ¶8.) The State Board has used various  
25 iterations of the Methodology as an unsound and unlawful basis to violate BBID’s water rights  
26 since 2015, as concluded by the Santa Clara County Superior Court. (Mueller Decl., ¶ 11,  
27 Exhibit C, p. 39.) On numerous occasions, BBID’s experts have offered to assist the State Board

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1 to implement sound and lawful bases to evaluate water availability in the Legal Delta; the State  
2 Board has refused.

3 After soliciting additional comments on an update to the Methodology, and advising  
4 BBID that it would not be used to issue curtailments, the State Board reversed itself – partially on  
5 the basis of political pressure – even before receiving comments on the Methodology, and after  
6 BBID’s water users relied on the State Board’s assurances, to curtail BBID’s water rights and,  
7 therefore, subject it to irreparable harm. For these reasons, the Court should order a temporary  
8 restraining order to protect BBID from the State Board’s unsound and unlawful curtailment  
9 orders.

10  
11  
12 Dated: July 11, 2022

SOMACH SIMMONS & DUNN  
A Professional Corporation

13 By: 

14 Michael E. Vergara

Jared S. Mueller

Alyson E. Ackerman

15 Ellen M. Moskal

Attorneys for Petitioner/Plaintiff

16 Byron-Bethany Irrigation District



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PROOF OF SERVICE

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 July 11, 2022, I served a copy the following document(s):

BBID'S EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE; MEMORANDUM OF POINTS AND AUTHORITIES

XX Electronic Mail: I served the documents on the person or persons in the attached Service List by transmitting a true copy of the document(s) via electronic mail to the electronic mail addresses listed in the attached Service List.

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 11, 2022, at Sacramento, California.

  
\_\_\_\_\_  
Sue Langley

**SERVICE LIST**

<p>1 2 3 4 5 6 7</p>	<p>Daniel M. Fuchs: <a href="mailto:daniel.fuchs@doj.ca.gov">daniel.fuchs@doj.ca.gov</a>          Colleen Flannery: <a href="mailto:Colleen.flannery@doj.ca.gov">Colleen.flannery@doj.ca.gov</a>          Kate D. Fritz: <a href="mailto:Kate.Fritz@doj.ca.gov">Kate.Fritz@doj.ca.gov</a>          Matthew Bullock: <a href="mailto:Matthew.Bullock@doj.ca.gov">Matthew.Bullock@doj.ca.gov</a>          Tracy Winsor: <a href="mailto:Tracy.Winsor@doj.ca.gov">Tracy.Winsor@doj.ca.gov</a>          Annadel Almendras:  <a href="mailto:Annadel.Almendras@doj.ca.gov">Annadel.Almendras@doj.ca.gov</a>          Regina Tochterman:  <a href="mailto:Regina.Tochterman@doj.ca.gov">Regina.Tochterman@doj.ca.gov</a>          Valerie Tamulevich: <a href="mailto:Valerie.Tamulevich@doj.ca.gov">Valerie.Tamulevich@doj.ca.gov</a></p>	<p><i>Attorneys for California State Water Resources Control Board; Erik Ekdahl, Deputy Director of California State Water Resources Control Board</i></p>
<p>8 9 10 11</p>	<p>Jennifer L. Spaletta: <a href="mailto:jennifer@spalettalaw.com">jennifer@spalettalaw.com</a>  <a href="mailto:diana@spalettalaw.com">diana@spalettalaw.com</a>          Steven A. Herum: <a href="mailto:sherum@herumcrabtree.com">sherum@herumcrabtree.com</a>          Jeanne M. Zolezzi: <a href="mailto:jzolezzi@herumcrabtree.com">jzolezzi@herumcrabtree.com</a>          Lilliana K. Selke: <a href="mailto:lselke@herumcrabtree.com">lselke@herumcrabtree.com</a></p>	<p><i>Attorney for Banta-Carbona Irrigation District; West Stanislaus Irrigation District; and Patterson Irrigation District</i></p>
<p>12 13 14</p>	<p>S. Dean Ruiz: <a href="mailto:dean@mohanlaw.net">dean@mohanlaw.net</a>          John Herrick: <a href="mailto:jherrlaw@aol.com">jherrlaw@aol.com</a>          Dante John Nomellini: <a href="mailto:ngmplcs@pacbell.net">ngmplcs@pacbell.net</a>          Dante John Nomellini, Jr.: <a href="mailto:dantejr@pacbell.net">dantejr@pacbell.net</a>          Brett George Baker: <a href="mailto:brettgbaker@gmail.com">brettgbaker@gmail.com</a></p>	<p><i>Attorney for Central Delta Water Agency; and South Delta Water Agency</i></p>
<p>15 16</p>	<p>Valerie C. Kincaid: <a href="mailto:vkincaid@pariskincaid.com">vkincaid@pariskincaid.com</a>          Timothy J. Wasiewski: <a href="mailto:tw@pariskincaid.com">tw@pariskincaid.com</a>          Jonathan R. Marz: <a href="mailto:jmarz@pariskincaid.com">jmarz@pariskincaid.com</a>          Betty Paradee: <a href="mailto:bparadee@pariskincaid.com">bparadee@pariskincaid.com</a></p>	<p><i>Attorneys for San Joaquin Tributaries Authority</i></p>
<p>17 18 19 20</p>	<p>Thomas M. Berliner: <a href="mailto:tmbertliner@duanemorris.com">tmbertliner@duanemorris.com</a>          Jolie-Anne S. Ansley: <a href="mailto:jsansley@duanemorris.com">jsansley@duanemorris.com</a>          B. Alexandra Jones: <a href="mailto:bajones@duanemorris.com">bajones@duanemorris.com</a>          Phillip R. McMurray: <a href="mailto:pmcmurray@mercedid.org">pmcmurray@mercedid.org</a>          Michelle M. Sangalang:  <a href="mailto:mmsangalang@duanemorris.com">mmsangalang@duanemorris.com</a></p>	<p><i>Attorney for Merced Irrigation District</i></p>
<p>21 22</p>	<p>Arthur F. Godwin: <a href="mailto:afg@rbgmlaw.com">afg@rbgmlaw.com</a>          William C. Paris: <a href="mailto:bparis@pariskincaid.com">bparis@pariskincaid.com</a></p>	<p><i>Attorney for Turlock Irrigation District and Modesto Irrigation District</i></p>
<p>23 24 25</p>	<p>Valerie C. Kincaid: <a href="mailto:vkincaid@pariskincaid.com">vkincaid@pariskincaid.com</a>          Timothy J. Wasiewski: <a href="mailto:tw@pariskincaid.com">tw@pariskincaid.com</a>          Jonathan R. Marz: <a href="mailto:jmarz@pariskincaid.com">jmarz@pariskincaid.com</a>          Bryan A. Boersma: <a href="mailto:bboersma@pariskincaid.com">bboersma@pariskincaid.com</a></p>	<p><i>Attorneys for South San Joaquin Irrigation District</i></p>