JEANNE M. ZOLEZZI, SBN: 121282
KARNA E. HARRIGFELD, SBN: 162824
JANELLE KRATTIGER, SBN: 299076
HERUM\CRABTREE\SUNTAG
A California Professional Corporation
5757 Pacific Avenue, Suite 222
Stockton, CA 95207
Telephone: (209) 472-7700

Attorneys for PATTERSON IRRIGATION DISTRICT
and BANTA-CARBONA IRRIGATION DISTRICT

BEFORE THE STATE WATER RESOURCES CONTROL BOARD

ENFORCEMENT ACTION ENFO1949 DRAFT CEASE AND DESIST ORDER REGARDING UNAUTHORIZED DIVERSIONS OR THREATENED UNAUTHORIZED DIVERSIONS OF WATER FROM OLD RIVER IN SAN JOAQUIN COUNTY	**WRITTEN OPENING STATEMENT OF PATTERSON IRRIGATION DISTRICT AND BANTA-CARBONA IRRIGATION DISTRICT** Hearing Date: March 21, 2016 Hearing Officer: Frances Spivy-Weber

I. INTRODUCTION

The above Enforcement Actions against The West Side Irrigation District ("**WSID**" or "**District**") is based upon the conclusions reached by the Division of Water Rights staff ("**Staff**"), who also happen to serve as the Prosecution Team, that insufficient water was available for WSID to divert under Water Right License 1381. Unfortunately, the methodology, standards and rules utilized by Staff to decide there was no water available for WSID's lawful diversion did not comport with legal requirements and following these new methodologies, standards and rules destabilizes the historical understanding of water rights priorities.

II. ARGUMENT

A. A Determination of Water Unavailability Cannot Be Premised Upon the Unsupported Presumption that any Available Water Might be Needed by Senior Water Right Holders Downstream

The May 1, 2015 Notice of Unavailability states "the State Water Board has determined that the existing water supply in the Sacramento River watershed is insufficient to meet the needs of all water rights holders." (WR-34 at p. 1). The July 15, 2015 Clarification Letter states "information available to the State Water Board continues to indicate that there is insufficient water available for the categories of junior water users identified . . .". (WR-40 at p. 1. *Emphasis added.*) Similarly, the Prosecution Team asserts "[b]ased on the Division's drought water availability supply and demand analysis conducted by my staff prior to the State Water Board staff's May 1, 2015, Notice of Unavailability, no water was available under the priority of License 1381 as of May 1, 2015". (WR-7 at p. 3)

The Prosecution Team further expressly argues that the "purpose of the Division's drought water availability determination analyses…was to protect the rule of priority" (PT Br. at 7:5-23), implying this purpose must be served regardless of whether the established priority is actually threatened by WSID's diversion. These arguments reveal that no investigation was ever conducted by the State Board staff about the actual amount of water available for diversion under License 1381 itself; rather, a naked conclusions was arrived at that, theoretically there was generally not enough water available for a certain group of rights after assuming that the senior right holders all fully exercised their rights to divert the water to which they were entitled at the same precise moment in time[1]. Based upon that grossly generic determination, the Prosecution Team asserts "[d]iversions when water is *not available* under the priority of the water right are unauthorized diversions, and actual or threatened unauthorized diversions are subject to cease and desist orders under Water Code section 1831." WR-7 at p. 4 (italics added). However, the Prosecuting Team declines to define the term "not available" because a sufficient water supply is *actually* but perhaps not *theorectically* available after applying their extreme and unrealistic assumption. Furthermore no controlling legal precedent establishes this theory as the applicable standard to curtail the rights of junior water rights holders. Indeed by this action the State Board staff asks the agency, without following the mandatory rule making process, to materially change

[1] Since the State of California started regulating water diversions there is no reliable historic evidence that the extreme condition described here has ever occurred.

the method and standard for regulating Constitutionally protected property rights. While the Prosecution Team repeats this statement *ad nauseum*, it does not represent the correct statement of the law.

It is not enough to state, as the Prosecution Team has, without support or evidence of any kind, that protecting senior water right holders "requires that some water remain in most streams to satisfy senior demands at the furthest downstream point of diversion. . ." (WR-7 at Page 2). It is not enough to make a bare statement that "[t]he failure of junior diverters to cease diversion when no water is available under their priority or right has a direct, immediate impact on other diverters" (WR-7 at p. 2) unless accompanied by some evidence demonstrating an immediate threat to senior water right holders. Water rights, possessing indicia of property rights, are entitled to something more; they are entitled to protection "against unlawful hostile acts of injury inflicted by others, whether they be other appropriators, or riparian proprietors, or those without valid claim of right." *Peabody v. Vallejo* 2 Cal. 2d 351, 374 (1935). Water rights are entitled to no less protection from actions of the State Water Resources Control Board, especially when it appears the enforcement action grossly outpaces circumstances on the ground.

Junior appropriators are not required to forego water based upon the mere theroteical *possibility* that downstream senior water right holders will need the water. Such a requirement is a violation of the reasonable use requirement set forth in Article X Section 2 of the California Constitution. *Herminghaus v. Southern Cal. Edison Co*., (1926) 200 Cal. 81, 252 P. 607. To the contrary, "whenever water in a watercourse, whether the water is foreign or part of the natural flow, is not reasonably required for beneficial use by the owners of existing rights to that water, those owners cannot prevent its beneficial use by other persons." *Miller & Lux, Inc. v. Bank of America* (1963) 212 Cal. App. 2d 719, 729. The same protections afforded senior right holders are also afforded junior appropriators:

> The right of the junior appropriator is entitled to protection to its full extent, just as the right of a prior appropriator. The supreme court stated in 1872 'that if the person who first appropriates the waters of a stream only appropriates a part, another person may appropriate a part or the whole of the residue; and when appropriated by him his right thereto is as perfect, and entitled to the same protection, as that of the first appropriator to the portion appropriated to him.' This protection of the junior appropriative right may be had against unlawful acts by senior appropriators as well as others.

Hutchins, The California Law of Water Rights at p. 264, citing *Smith v. O'Hara* 43 Cal. 371, 375 (1875). Moreover, adopting the rule proposed by the Prosecuting Team, which is necessary in order to rule in their favor, creates an unworkable and chaotic regulatory scheme. Under the Prosecuting Team's proposed rule junior water rights holders would be limited to the amount of water available after assuming that more senior water rights users are fully exercising their full rights to divert the maximum amount of water at all times. Applying this proposed rule statewide would essential end junior water rights as we currently know them.

1. **The Prosecution Team Has Not Proven Injury to Any Senior Water Right Holder.**

The Prosecution Team has not met its burden of establishing that WSID's diversions were unauthorized because it provids no evidence that any senior water holders were actually, as opposed to theoretically, injured by WSID's diversions. Determining whether or not a water use is unauthorized is "**is a question of fact to be determined according to the circumstances in each particular case**.'" *Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal. 2d 132 (bolding added). In the final analysis, the State Water Resources Control Board is not empowered to arbitrarily choose when to apply, enforce and protect the reasonable and beneficial uses of the state's waters based on theoretical rather than factual conditions. Article X, section 2 of the California Constitution cannot be applied only when it best suits the Board's agenda – it must be upheld and respected at all times. Thus, for a finding of unauthorized diversion by WSID, the Prosecution Team must compile and investigate all applicable and necessary evidence thereto. Endorsing the Prosecuting Team's extreme proposed rule, which is necessary to uphold the enforcement action, eviscerates any stability and certainty to the State Board's priority regime concerning junior water rights holders.

It is not incumbent upon WSID to prove surplus water is available. To the contrary, "the plaintiffs must recover upon the strength of their own title and not upon the weakness of defendant's title." Hutchins, *id.*, citing *Tulare Irr. Dist. V. Lindsay-Strathmore Irr. Dist* 1935) 3 Cal. 2d 489, 547-548.

> The trial court must now determine whether the complaining riparian…considering all the needs of the those in the particular water field, is putting the water to any reasonable

> beneficial use, giving consideration all factors involved, including reasonable methods of use and reasonable methods of diversion…The court must find expressly the quantity of water required and used for the riparian's reasonable and beneficial uses **before** enjoining the appropriator from interfering with those uses.

Hutchins at p. 279; *see also Tulare*, *supra*, generally. More recently, the Supreme Court teaches us: "It follows that any person having a legal right to surface or ground water may take only such amount as he reasonably needs for beneficial purposes, and any water not needed for the reasonable beneficial use of those having prior rights is excess or surplus water and may rightly be appropriated. *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1241, citing *California Water Service Co. v. Edward Sidebotham & Son* (1964) 224 Cal. App. 2d 715, 725-726. When a surplus exists, the holder of prior rights is prevented from enjoining its appropriation:

> Before one can invoke the power of a court of equity to restrain a diversion above his lands, it is necessary for him to show first, that there is a wrongful diversion of water above such lands, and second, that the amount wrongfully diverted would be rightfully used by him and the water is being used or would be used for reasonable and beneficial purposes.

Hutchins, *supra* at p. 278, citing *Carlsbad Mutual Water Co. v. San Luis Rey Development Co.* (1947) 78 Cal. App. 2d 900, 914.

> The effect of this rule, then, is not to prohibit the appropriator from making any use of the water, but is to prohibit his use of the water only at such times as the riparian owner under his paramount right wishes to use it, and to prevent the destruction or impairment of the riparian right by adverse use on the part of the appropriator.

Hutchins, *supra* at p. 279.

2. **California Law Requires Proof that a Senior Water Right Holder is Substantially Injured**.

Article X, section 2 of the California Constitution, and the cases upholding it, essentially abolishes the common law doctrine that entitled riparian owners, as against appropriators, to the entire natural flow of a stream even if the use of the water was wasteful or unreasonable. *Mojave, supra,* at p. 1242. The California Supreme Court provided direction to the States Water Resources Control Board:

> When a senior water right holder such as a riparian, brings an action against an appropriator, it is not sufficient to find that the plaintiffs are senior right holders and then issue an injunction or curtailment based on such a finding. It is now necessary for the trial court to determine whether such owners, considering all the needs of those in a

> particular water field, are putting waters to any reasonable beneficial uses, giving consideration to all factors involved, including reasonable methods of use and reasonable methods of diversion. After a consideration of such uses, the trial court must then determine whether there is a surplus of water subject to appropriation.

Mojave, supra at p. 1242, citing *Tulare, supra* at pp. 524-525. Therefore, the determination as to whether unappropriated water is available for a junior appropriator by the Board or the court requires first examining prior riparian and appropriative rights, whether they are putting water to reasonable and beneficial uses, and then determining whether any excess water is available for junior users. *El Dorado Irr. Dist. v. SWRCB* (2006) 142 Cal. App. 4th 937; *United States v. State Water Resources Control Board* (1986) 182 Cal. App. 3d 82.

Contrary to the Prosecution Team's assertion that water must be left in a stream in case a senior water right holder might have a theoretical need, California law requires a senior water right holder to prove more than simple trouble and expense due to a junior's use, instead requiring something more substantial to evidence a material injury to the senior. Where a junior appropriator diverts the entire surplus water supply upstream, the senior appropriator is required to use all reasonable diligence in handling what is left. "If with such diligence and the use of ordinary means of diversion he can obtain all the water that he is entitled to, he cannot complain of the trouble and expense involved." Hutchins, *supra* at p. 265, *citing Natomas Water & Min. Co. v. Hancock* (1892) 101 Cal. 42, 50-52. In short the ambulatory and elastic standard or rule proposed by the Prosecuting Team cannot cohere to controlling legal precendent

3. **Water Right Curtailments are Disfavored by the Courts**.

Even where a curtailment may be lawfully imposed, it is only available in specific circumstances. Curtailing the diversion and use of water is typically a last resort, especially when the water rights are for agriculture or domestic purposes. *Peabody v. Vallejo* (1935) 2 Cal. 2d 351, 382. Even if the Prosecution Team meets its burden here, which they have not, and prove (1) legal, substantial (as opposed to mere technical) injury or harm to a paramount right; and (2) that such harm is to the paramount right holder's actual reasonable and beneficial uses; and (3) that there is no other adequate remedy for the harm (this is a high burden), then a curtailment may issue to enjoin the junior right only to the extent it infringes on the reasonable and beneficial uses of the senior right. However, California Code of Civil Prosecution sections

530, 532, and 534 can then apply to dissolve the injunction, despite adequate demonstration in support of (1) – (3) above.

These California Code of Civil Procedure sections apply to issuing injunctions to protect water rights. These sections prevent issuing an injunction or curtailment against a junior diversion for irrigation or domestic use if: (1) surplus water is available for diversion and thus no actual damage to a senior user, or (2) the defendant junior would suffer irreparable harm as a result of the injunction. Section 530 (regarding an injunction to protect water rights; notice; and effect of defendant's bond) in relevant part states:

> In all injunctions which may be hereafter brought when an injunction or restraining order may be applied for to prevent the diversion, diminution or increase in the flow of water in its natural channels, to the ordinary flow of which the plaintiff claims to be entitled…[and] it be made to appear to the court that plaintiff is entitled to the injunction, but that the issuance thereof pending the litigation will entail great damage upon the defendant, and that plaintiff will not be greatly damaged by the acts complained of pending the litigation, and can be fully compensated for such damage as he may suffer, the court may refuse the injunction upon the defendant giving a bond such as provided for in section 532; and upon the trial the same proceedings shall be had, and with the same effect as in said section provided.

These three code sections underline the rule that the Prosecution Team's actions, involving a truncated analysis of merely identifying priorities between competing users of water and then curtailing the junior users, is insufficient under California water law. In enacting sections 530, 532, and 534, the Legislature acknowledged that it is necessary to balance competing uses, and that it is also sometimes appropriate to protect the interests of junior irrigators as against senior users. This rule may apply even in situations where junior irrigators are trespassing seniors' water rights. Here the Prosecution Team dispensed with the indepth investigation and study of the actually underlying facts and particular circumstances required by the statute thereby making the truncated process toward prosecution legally deficient,

This interpretation of sections 530, 532, and 534 is consistent with relevant case law and with the adoption of the reasonable use doctrine in the California Constitution (Article X, section 2). In requiring water be put to reasonable and beneficial uses, the Legislature recognized that circumstances exist such that the priority water rights system should not be strictly applied. At times, a junior may be allowed to continue diverting under their water right simply due to a

determination that the junior will be unduly harmed if forced to curtail his use to prevent a lesser harm to a senior. To determine this, the court must balance the relative harms suffered by each the junior and the senior(s). If the harm to the junior irrigator greatly outweighs that suffered by the senior, the court may dissolve the injunction and provide an alternative remedy to the senior. *Tulare Irr. Dist. v. Lindsay Strathomore Irr. Dist., supra,* discusses the effect of adopting section 534: "[S]ection [534] was undoubtedly intended to ameliorate the rule formerly prevailing that a riparian as against an appropriator was entitled to an injunction regardless of damage…" *Tulare, supra* at p. 534. These CCP provisions, predecessors to the Article X, section 2 reasonable beneficial use doctrine, affirm that a junior's competing use of water does not *per se* entitle a senior to an injunction against him. Careful balancing between interests and a consideration of the damage involved in relation to each party must be considered by the court before it may be deemed appropriate to curtail a junior's use. Sections 530, 532, and 534 are so closely related to the reasonable and beneficial use doctrine that immediately after Article X, section 2's addition to the California Constitution some critics argued that the reasonable use doctrine should supersede CCP sections 530, 532, and 534. It was argued that Article X, section 2 superseded the CCP provisions because the reasonable use doctrine performs a similar function by balancing interests in water rights, and by taking into consideration factors outside of the strict application of the priority system.

> Under this [Article X, section 2], it is clear that when a riparian or overlying owner brings an action against an appropriator, it is no longer sufficient to find that the plaintiffs in such action are riparian or overlying owners, and, on the basis of such finding, issue the injunction. It is now necessary for the trial court to determine whether such owners, considering all the needs of those in a particular water field, are putting the waters to any reasonable beneficial uses, giving consideration to all factors involved, including reasonable methods of use and reasonable methods of diversion. From a consideration of such uses, the trial court must then determine whether there is a surplus in the water field subject to appropriation. If the riparian is putting the water to any reasonable beneficial uses, it is now necessary for the trial court to find expressly the quantity so required and so used. A finding…to the effect that the riparian requires a "reasonable" amount for such uses, under the new doctrine [in Article X, section 2], is clearly insufficient and a judgment based thereon must be reversed. The trial court, under the new doctrine [in Article X, section 2], must fix the quantity required by each riparian for his actual reasonable beneficial uses, the same as it would be in the case of an appropriator."

Tulare, supra at pp. 524-525.

Contrary to the Prosecution Team's assertion here, it is no longer sufficient to determine who has the senior right. Under section 534, after a senior files suit and requests an injunction against a junior's diversion, as a defense the junior may set forth the required facts mentioned in 534, "for the purpose of having the court, in the event that the court should find that the riparians did not require all the waters of the stream to which their lands are riparian for their reasonable and beneficial uses, determine the damages such riparians would suffer by reason of the taking of the excess over such requirements." *Tulare, supra* at p. 531. Yet, the BBID enforcement action contains no evidence, or even allegations, that BBID's diversions injured a prior right holder or unlawfully diverted stored water. The concept that the Prosecution Team can simply allege that these injuries may occur in the abstract, and then declare water unavailable, is untenable as it would directly violate due process and the constitutional requirement that all water be put to maximum beneficial use. Practically speaking this public enforcement action is unprecedented and extreme: it assumes the legal duty of a senior water rights holder to protect its private water rights even when, as in this instance, no senior water right holder has complained about WSID's diversion of water.

Date: February 29, 2016

HERUM\CRABTREE\SUNTAG
A California Professional Corporation

By: _____
JEANNE M. ZOLEZZI
Attorneys for
Patterson Irrigation District
and Banta-Carbona Irrigation District

HERUM \ CRABTREE \ SUNTAG ATTORNEYS