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Water Resources Control Board, et al.*

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF
9
10 SAN JOAQUIN

11
12 BANTA-CARBONA IRRIGATION
DISTRICT,

13 Petitioner/Plaintiff

14 vs,

15 CALIFORNIA STATE WATER
16 RESOURCES CONTROL BOARD;
THOMAS HOWARD, EXECUTIVE
17 DIRECTOR OF THE CALIFORNIA STATE
WATER RESOURCES CONTROL BOARD

18 Respondents/Defendants
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Case No. 39-2015-00326421-CU-WM-WTK

**Declaration of John O'Hagan in
Opposition to Petitioner/Plaintiff's
Application for Stay and/or in the
Alternative Temporary Restraining Order
and/or Preliminary Injunction**

Hearing Date: June 23, 2015

Time: 9:15 a.m.

Dept: 41

Judge: The Honorable Carter P. Holly

Trial Date: TBA

Action Filed: June 18, 2015

By Fax

1 I, John O'Hagan, declare:

2 1. I have been an employee of the State Water Resources Control Board (State Water
3 Board) for the past 34 years, and I am currently employed by the Board. Since May 2003 I have
4 overseen the Enforcement Section of the State Water Board's Division of Water Rights
5 (Division). Since April 2014, I have been the Division's Assistant Deputy Director overseeing the
6 Enforcement Section and the Permitting and Licensing Section. As Assistant Deputy Director, I
7 supervise the State Water Board's analyses for determining if water supplies are sufficient to
8 meet current water use demands in critical watersheds during the 2014 and 2015 drought. I am
9 responsible to meet with stakeholders of the watershed and ensure our information is transparent
10 and I provide monthly updates to the Board at its monthly Board Meetings. I have a 1980
11 Bachelor of Science Degree in Civil Engineering from California State University at Sacramento,
12 and I have been registered as a Professional Civil Engineer in California since 1984.

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14
15 2. As part of my responsibility for overseeing the Enforcement Section, I am
16 responsible for the work of the Enforcement Section that includes, but is not limited to, statewide
17 compliance and complaint investigations of water diversion projects and initiating formal
18 enforcement actions. Part of these activities is monitoring diversions to ensure compliance with
19 the state's water rights priority system. These activities include monitoring for the purpose of
20 determining whether any diversion and use of water is authorized under the Water Code.
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22 3. The State Water Board has been vested by the Legislature with the authority to
23 prevent unauthorized diversions and supervise the water right priority system. (See, e.g. Wat.
24 Code §§ 174, 186, 1050, 1051, 1051.5, 1052, 1825.)

25 4. The water right priority system provides the primary basis for determining which
26 users may divert, and how much, when there is insufficient water in the stream for all users.
27 Riparian right holders generally have the most senior priority to natural flows in a stream, and
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1 older, more senior appropriative water rights have priority over more junior appropriative water
2 rights. Senior water right holders are more likely to receive water at times of shortage than more
3 junior water right holders. However, once water is stored or imported from another watershed,
4 the entity that stored or imported the water has the paramount right to that water. Other
5 appropriative water rights holders may divert any abandoned return flows. Riparian water right
6 holders are only entitled to divert natural flow, so are not entitled to divert releases, or the return
7 flows from upstream releases of stored water.
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9 5. When the amount of water available in a surface water source is not sufficient to
10 support the needs of existing water right holders, the more junior right holders must cease
11 diversion in favor of more senior right holders. However, it is not always clear to a junior
12 diverter whether there is sufficient flow in the system to support their diversion and at the same
13 time support senior water uses downstream. It can also be difficult to determine whether releases
14 of stored water are abandoned flows that may be diverted or whether those flows are not available
15 for diversion because they are being released for downstream purposes. Similarly, it can be
16 difficult for a riparian to know if water is natural flow, or stored or imported water and whether
17 and when and to what extent correlative reductions in water use are needed due to the need to
18 share limited supplies amongst riparians. In accordance with the State's water right priority
19 system, the State Water Board notifies diverters of the need to curtail water diversions when
20 sufficient flows in a watershed are not available for a water user's needs, based on their priority
21 of right.
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24 6. A curtailment notice is a notification to water right holders of a certain priority of
25 right that, due to water shortage conditions, the State Water Board has determined water is not
26 available under their priority of right. A notice of curtailment is not an enforceable decision or
27 order of the State Water Board. The notice provides the affected water right holder with the State
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1 Water Board's findings of the unavailability of water under their priority of right for a certain
2 right and the need to cease diversion under that right, the exceptions to the notice for direct
3 diversion of water for power, and for continued use of previously stored water, and the potential
4 for future enforcement for unauthorized diversions. A curtailment notice does not consider any
5 particular diverter's other senior water rights or other facts such as water supply contracts,
6 agreements, transfers or groundwater supplies that may allow the diverter to continue to divert
7 lawfully. The notice is therefore not a State Water Board determination that any individual
8 diverter is taking water without authorization under the Water Code. A diverter who continues to
9 divert after receiving a notice of curtailment is not subject to penalties for violation of the
10 curtailment notice, but may be subject to enforcement for an unauthorized diversion if their
11 diversions do not fall within the exceptions enunciated in the notice and are not entirely
12 authorized by other, non-curtailed water rights.
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15 7. I have reviewed the Notice of Unavailability of Water and Need for Immediate
16 Curtailment dated June 12, 2016 and addressed to Patterson Irrigation District and attached as
17 Exhibit A to the petitioner's petition for writ of mandate. This notice is the type of curtailment
18 notice that I described in paragraph 6. This notice does not constitute a decision or order of the
19 State Water Board or a determination that Patterson Irrigation District, petitioner, or any other
20 individual diverter has engaged in an unauthorized diversion of water under the Water Code.
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22 8. Diversion of water when it is unavailable under a diverter's priority of right
23 constitutes an unauthorized diversion and a trespass against the state. The State Water Board may
24 subject such unauthorized diversions to an Administrative Civil Liability (ACL) of up to \$1,000
25 per day and \$2,500 per acre-foot of water unlawfully diverted in a drought year, or refer a diverter
26 to the Attorney General's office for enforcement. The State Water Board may also issue
27 administrative cease and desist orders and request court injunctions to require that diversions
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1 stop.

2 9. Before issuing such an order, the State Water Board must have particularized
3 information regarding an unlawful diversion or the potential of such a diversion: the Board may
4 not issue an enforceable order requiring diversion to cease simply based on lack of water
5 availability, absent information that there is a risk of or actual continued diversion. Additionally,
6 before issuing a final enforcement order, the State Water Board must first issue a draft Cease and
7 Desist Order or an ACL Complaint. If such enforcement action is proposed, a water right holder
8 is entitled to, upon written request within 20 day of receipt of the draft enforcement action, an
9 evidentiary hearing on all issues before the order takes effect.
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11 10. The general analysis for determining the necessity for curtailment of water rights
12 in any watershed compares the current and projected available water supply with the total water
13 right diversion demand. For the water availability determination of the curtailment analysis, the
14 State Water Board relies upon the full natural flows of watersheds calculated by the Department
15 of Water Resources (DWR) for certain watersheds in its Bulletin 120, and in subsequent monthly
16 updates. "Unimpaired Runoff" or "Full Natural Flow" represents the natural water production of
17 a river basin, unaltered by upstream diversions, storage, or by export or import of water to or
18 from other watersheds. The full natural flow amount is different than the measured stream flows
19 at the given measurement points because the gauged flows are increased or decreased to account
20 for these upstream operations. Forecasted flow data is uncertain so DWR provides the data in the
21 form of "levels of exceedance" or simply "exceedance" to show the statistical probability that the
22 forecasted supply will occur. The exceedance is simply the percent of the time that the actual
23 flow is expected to exceed the projected flow. The 90 percent exceedance hydrology assumes
24 inflows from rainfall and snowmelt at levels that are likely to be met or exceeded by actual flows
25 with a 90 percent probability, or in other words, there is a ten percent or less chance of actual
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1 conditions turning out to be this dry or drier. The 50 percent exceedance is the 50/50 forecast.
2 The State Water Board uses both exceedances for its analyses.

3 11. Specifically, for the San Joaquin River watershed, the State Water Board totaled
4 DWR's full natural flows for the Stanislaus, Tuolumne, Merced, Upper San Joaquin, Cosumnes
5 and Mokelumne rivers on a monthly basis as the monthly available water supply for the San
6 Joaquin River watershed. State Water Board staff also increased these total full natural flow
7 amounts by adding monthly quantities for smaller watersheds and estimated return flows based on
8 the DWR's May, 2007 Report of Unimpaired Flow Data. Estimates in the report for 1977 were
9 used for these adjustments. The monthly adjusted water supply is provided in acre-feet per month
10 and the State Water Board converts these amount into average monthly cubic feet per second for
11 graphic purposes (at two exceedance levels). The State Water Board also shows DWR's daily
12 full natural flow calculations on the graph for consideration before any curtailment. DWR's daily
13 full natural flow calculations are less accurate because they are based on less data than is
14 available at the completion of each month. Due to the lag between the effect of upstream
15 operations and downstream flow measurements, calculated daily FNF will fluctuate from day to
16 day. State Water Board staff also checks available forecast information from the California-
17 Nevada River Forecast Center, real time flow conditions from the DWR and United States
18 Geological Survey. This real time information and forecasted precipitation events can delay the
19 curtailment notice.
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23 12. For water right demands, the State Water Board relies on information supplied by
24 water right holders on annual or triennial reports of water diversion and use required to be true
25 and accurate to the best of the knowledge of the diverters. The State Water Board also received
26 2014 diversions data from water right holders that represents 90 percent of the water diverted
27 from April through September in the Delta, and 90 percent of the water diverted from the upper
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1 Sacramento and San Joaquin Rivers. This information was required pursuant to Order WR 2015-
2 0002 dated February 4, 2015. All reported monthly water diversion data is compiled by
3 watershed, type of right and priority dates. The State Water Board performs quality control
4 checks and removes obvious errors, excess reporting, removes demand for direct diversion for
5 power, and makes additional changes based on stakeholders comments. The corrected demand
6 data includes the 2014 reported data for 90% of the watershed demand plus for the remaining
7 diverters, an averaged diversion amount for 2010 through 2013. These monthly diversion
8 demands are grouped into water right types (riparian, pre-1914 and post-1914 rights) and by
9 priority dates for pre-1914 and post-1914 rights. For the Sacramento-San Joaquin River
10 Watersheds, special consideration of the Delta diversions is made. To be most conservative for
11 the San Joaquin River, the State Water Board performs a proportional analysis based on the
12 inflows from the watersheds. For example, for the month of June, the proportional full natural
13 flow of the San Joaquin River watershed based on 90% exceedance, was 17 percent. Therefore,
14 the San Joaquin watershed Delta demand was 17 percent of the total Delta demand.

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17 13. The State Water Board provides graphical summations of these priorities with
18 monthly demands for the total riparian demand at bottom, the pre-1914 demands added to riparian
19 and depicted above the riparian demand. The monthly amounts are averaged into cubic feet per
20 second for graphical purposes.

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22 14. The State Water Board is consistently making adjustments to its analyses based on
23 new information obtained from stakeholders, or adjustments to projected flows from the DWR.
24 State Water Board staff reviews this information and provides revisions to its data set and graphs
25 that are all shown on the Drought Website.

26
27 15. The goal of curtailments is principally to ensure that water to which senior water
28 right holders are entitled is actually available to them. To ensure that this occurs generally

1 requires that some water remain in most streams to satisfy senior demands at the furthest
2 downstream point of diversion of these senior water rights.

3 16. Attached as Exhibit ~~B~~^I is a water supply and demand chart prepared by the State
4 Water Board and issued on June 11, 2015 entitled "2015 San Joaquin River Basin Senior
5 Supply/Demand Analysis with Proportion Delta Demand." The bar graph data discloses in terms
6 of cubic feet per second the anticipated demand for water by riparian and pre-1914 water users
7 for the period of March through September, 2015. The variable solid blue line displays the daily
8 full natural flow from March 1, 2015 through June 7, 2015 of the San Joaquin River basin. The
9 declining dotted lines represent the forecasted full natural flow through September, 2015 for the
10 adjusted 50% and 90% exceedance levels. Based upon the data and information from which
11 Exhibit ~~B~~^I was derived and other relevant data, the State Water Board concluded that there is
12 insufficient water in the San Joaquin River basin to satisfy water right claimants with priorities of
13 1903 or later.
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16 17. On January 17 and April 2, 2014, the State Water Board issued a Notice of Surface
17 Water Shortage and Potential for Curtailment of Water Right Diversions. The notice advised that
18 if dry weather conditions persist, the State Water Board will notify water right holders of the
19 requirement to limit or stop diversions of water under their water rights, based on water right
20 priority.
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22 18. In April, the State Water Board began issuing drought-related curtailment notices
23 to water right holders in a number of water-short watersheds.

24 The following notices of curtailment have been mailed to water right holders:

25 April 3, 2015- Antelope Creek Fishery Protection Regulation

26 April 17, 2015- Deer Creek Fishery Protection Regulation

27 April 23, 2015- Post-1914 and Surplus Class Rights in Scott River
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April 23, 2015- All post-1914 rights in the San Joaquin River Watershed.

April 30, 2015- all Permits and Licenses subject to Term 91 in Sacramento-San Joaquin watersheds and Delta.

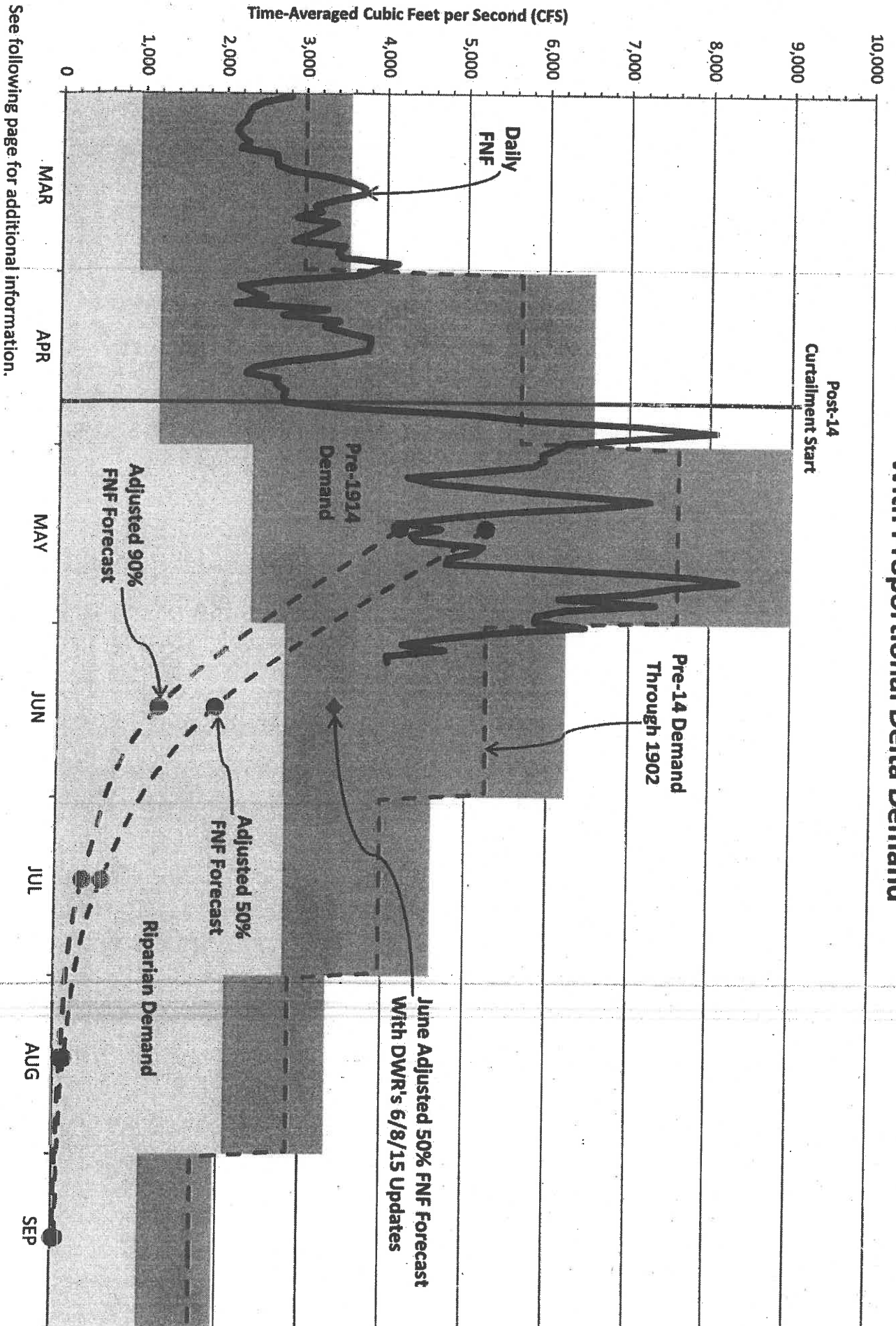
May 1, 2015- All post-1914 rights in Sacramento River Watershed and Delta

June 12, 2015- Pre-1914 rights with a priority dated of 2003 or later in the Sacramento-San Joaquin watershed and Delta.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge. Executed this 22 day of June, 2015 in Sacramento, California


JOHN O'HAGAN

2015 San Joaquin River Basin Senior Supply/Demand Analysis With Proportional Delta Demand



See following page for additional information.