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9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA

11 COUNTY OF SANTA CLARA

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13
14 Coordination Proceeding Special title (Rule
3.550)

15 CALIFORNIA WATER CURTAILMENT
16 CASES,

17 BYRON-BETHANY IRRIGATION
18 DISTRICT,

19 v.

20 STATE WATER RESOURCES CONTROL
21 BOARD, et al.

Case No. 1-15-CV-285182

JUDICIAL COUNCIL COORDINATION
PROCEEDING NO. 4838

MEMORANDUM OF POINTS AND
AUTHORITIES OF RESPONDENTS
STATE WATER RESOURCES CONTROL
BOARD, ET AL., IN SUPPORT OF
DEMURRER TO PETITIONER BYRON-
BETHANY IRRIGATION DISTRICT'S
FIRST AMENDED PETITION FOR WRIT
OF MANDATE AND COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF AND DAMAGES

22 Date: February 19, 2016

23 Time: 9:00 a.m.

24 Dept: 1

Judge: The Honorable Peter H. Kirwan

25 Action Filed: June 26, 2015

TABLE OF AUTHORITIES

1
2
3
4
5
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7
8
9
10
11
12
13
14
15
16
17
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21
22
23
24
25
26
27
28

Page

CASES

Abelleira v. District Court of Appeal.
(1941) 17 Cal.2d 280 6

Agins v. City of Tiburon
(1979) 24 Cal.3d 266 13

Allen v. City of Sacramento
(2015) 234 Cal.App.4th 41 14

Aubry v. Tri-City Hospital Dist.
(1992) 2 Cal.4th 962 5

Blank v. Kirwan
(1985) 39 Cal.3d 311 5

Cal. Assn. of Health Facilities v. Dept. of Health Services
(1997) 16 Cal.4th 284 10

Camp v. Board of Supervisors
(1981) 123 Cal.App.3d 334 14

City of Los Angeles v. County of Los Angeles
(1983) 147 Cal.App.3d 952 1

City of Santee v. Superior Court
(1991) 228 Cal.App.3d 713 13

City of South Pasadena v. Department of Transportation
(1994) 29 Cal.App.4th 1280 14

Costa v. State of Cal.
(1986) 177 Cal.App.3d 62 (*County of Contra Costa*) 6, 7

County of Alameda v. Superior Court
(2005) 133 Cal.App.4th 558 1

El Dorado Irrigation Dist. v. State Water Resources Control Board
(2006) 142 Cal.App.4th 937 2

Farmers Ins. Exch. v. Superior Court (People)
(1992) 2 Cal.4th 377 6

TABLE OF AUTHORITIES
(continued)

	<u>Page</u>
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	

<i>Livingston Rock & Gravel Co. v. County of Los Angeles</i> (1954) 43 Cal.2d 121	14
<i>McAllister v. County of Monterey</i> (2007) 147 Cal.App.4th 253	6
<i>Millview County Water District v. SWRCB</i> (2014) 229 Cal.App.4th 879	2
<i>Mobil Oil Corp. v. Superior Court</i> (1976) 59 Cal.App.3d 293	13
<i>National Assn. of Wine Bottlers v. Paul</i> (1969) 268 Cal.App.2d 741	1, 12
<i>Pacific Legal Foundation v. California Coastal Comm.</i> (1982) 33 Cal.3d 158,169 (<i>Pacific Legal</i>)	9, 10
<i>People v. Murrison</i> (2002) 101 Cal.App.4th 349	1
<i>PG&E Corp. v. P.U.C.</i> (2004) 118 Cal.App.4th 1174 (<i>PG&E Corp.</i>)	9, 10, 11
<i>Rakestraw v. California Physicians' Service</i> (2000) 81 Cal.App.4th 39	5
<i>Scott v. City of Indian Wells</i> (1972) 6 Cal.3d 541	12
<i>Selby Realty Co. v. City of San Buenaventura</i> (1973) 10 Cal.3d 110	12, 13
<i>State of California v. Superior Court (Veta)</i> (1974) 12 Cal.3d 237	12, 13
<i>Steinhart v. County of Los Angeles</i> (2010) 47 Cal.4th 1298	7
<i>Taylor v. Swanson</i> (1982) 137 Cal.App.3d 416	13
<i>Tejon Real Estate, LLC v. City of Los Angeles</i> (2014) 223 Cal.App.4th 149	6, 7, 13

1
2
3
4
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16
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27
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TABLE OF AUTHORITIES
(continued)

Page

Temescal Water Co. v. Dept. of Public Works
(1955) 44 Cal.2d 90 7

Walter Leimert Co. v. Calif. Coastal Comm.
(1993) 149 Cal.App.3d 222 12, 13

Wilson & Wilson v. City Council
(2011) 191 Cal.App.4th 1559 10

STATUTES

California Coastal Act 13

Code of Civil Procedure

 § 430.10(f) 1, 5

 § 430.70 1

 § 1060 13

 § 1094.5 7, 13

Public Records Act 1

Water Code

 § 1052 4

 § 1055 4

CONSTITUTIONAL PROVISIONS

California Constitution 6

INTRODUCTION

In this unprecedented drought year, Respondent State Water Resources Control Board (Board) staff have issued water curtailment notices which inform the public about the availability of water for diversion in individual watersheds based upon the hydrologic information in Board staff’s possession. These notices are informational only and have no binding effect on individual water right holders. In addition, the Board has commenced water right enforcement proceedings as to specific diverters to determine whether those diverters are taking water outside of the scope of their claimed water rights. Petitioner Byron-Bethany Irrigation District (BBID) objects to these drought mitigation efforts and asks this Court, *inter alia*, to: 1) set aside the Board’s curtailment notices, and 2) interrupt and enjoin the pending Board administrative enforcement action against BBID.

BBID’s challenges to the curtailment notices and the pending enforcement action should be dismissed under the doctrines of ripeness and exhaustion of administrative remedies. In addition, because the remedy for challenging these Board actions is by way of a petition for writ of mandate, BBID’s declaratory and injunctive relief claims are an improper method for contesting a Board administrative action.¹

The Board respectfully requests that this Court sustain the Board’s demurrer to BBID’s first amended petition for writ of mandate and complaint for declaratory and injunctive relief and damages without leave to amend.

BACKGROUND

California is in the midst of the most severe drought in the State’s history. On January 17, 2014, Governor Brown issued a Proclamation of a State of Emergency resulting from the drought. (Board Second Request for Jud. Not. (Board Second RJN, Exh 1).)² The Governor called for

¹ It appears that all sixteen of BBID’s causes of action, with the exception of the Eighth Cause of Action arising under the Public Records Act, directly challenge either the Board’s water curtailment notices and/or the Board’s enforcement action. The Eighth Cause of Action appears to be an indirect challenge to the water curtailment notices and/or the Board’s enforcement action. To the extent that BBID intends the Eighth Cause of Action to challenge some other Board action, the respondents demur to the claim on the grounds that the claim is uncertain, ambiguous, and unintelligible. (Code Civ. Proc., § 430.10, subd. (f).)

² A demurrer may be based on judicially noticeable matters. (Code Civ. Proc., § 430.70.)

1 statewide reductions in water use and directed the State Water Board to “put water right holders
2 throughout the state on notice that they may be directed to cease or reduce water diversions based
3 on water shortages.” (*Id.*, ¶ 7.) On April 25, 2014, the Governor issued a continued proclamation
4 of drought emergency, which maintained the previous emergency orders (Board Second RJN,
5 Exh. 2, ¶ 1), and further ordered the Board “to require curtailment of diversions when water is not
6 available under the diverter’s priority of right.” (*Id.*, ¶ 17.)

7 On April 1, 2015, Governor Brown issued Executive Order B-29-15. (Board Second RJN,
8 Exh. 3.) It again extends the state of emergency (*Id.*, ¶ 1) and orders that:

9 The Water Board shall require frequent reporting of water diversion and use by water
10 right holders, conduct inspections to determine whether illegal diversions or wasteful
11 and unreasonable use of water are occurring, and bring enforcement actions against
12 illegal diverters and those engaging in the wasteful and unreasonable use of water.
(*Id.*, ¶ 10.)

13 On June 12, 2015, Board staff issued a notice indicating that, based upon the hydrological
14 data available to it, there was insufficient water supply in the Sacramento-San Joaquin river and
15 Delta watersheds to satisfy appropriative water rights with a priority date of 1903 or later. (Board
16 Second RJN, Exh. 4).³ On June 26, BBID filed an action in Contra Costa County Superior Court,
17 challenging the June notice. On June 29, West Side Irrigation District (WSID), Central Delta
18 Water Agency, South Delta Water Agency, and Woods Irrigation Company (hereafter “the WSID
19 Petitioners”) filed a similar action in Sacramento County Superior Court.

20
21 ³ California maintains a “dual system” of water rights, which distinguishes between the
22 rights of “riparian” users, those who possess water rights by virtue of owning the land by or
23 through which flowing water passes, and “appropriators,” those who hold the right to divert such
24 water for use on both contiguous and noncontiguous lands. (See *El Dorado Irrigation Dist. v.*
25 *State Water Resources Control Board* (2006) 142 Cal.App.4th 937, 961.) For historical reasons,
26 California further subdivides appropriators into those whose water rights were established before
27 and those after 1914. Post-1914 appropriators may possess water rights only through a permit or
28 license issued by the Board, and their rights are circumscribed by the terms of the permit or
license. Riparian users and pre-1914 appropriators do not need a permit or license to divert water.
(*Millview County Water District v. SWRCB* (2014) 229 Cal.App.4th 879, 888-889.) In times of
shortage, riparian water rights holders generally have priority over appropriators. Among
appropriators, senior appropriators---those who acquired their rights first in time---are entitled to
satisfy their reasonable needs before more junior appropriators are entitled to any water. (*Id.* at p.
890.)

1 On July 7, Sacramento County Superior Court Judge Shelleyanne W.L. Chang held an ex
2 parte hearing in the WSID case. On July 10, Judge Chang partially granted the WSID
3 Petitioners' application for a temporary restraining order, finding that the notices could be
4 construed as coercive orders to cease diversions, and issued an order to show cause why a
5 preliminary injunction should not issue. (Board Second RJN, Exh. 5.)

6 On July 15, the Board modified the curtailment notices, consistent with Judge Chang's
7 order, and issued a revised notice to all diverters who previously received curtailment notices
8 (hereafter "revised notice"). (Board Second RJN, Exh. 6.) This revised notice rescinded the
9 curtailment notices to the extent the notices may have been construed as "an order requiring
10 [anyone] to stop diversions under [their] affected water rights." (*Ibid.*)

11 The revised notice fully addressed the alleged procedural due process deficiencies of the
12 initial curtailment notices. First, the revised notice states that "[t]he purpose of this notice is to
13 rescind the 'curtailment' portions of the unavailability notices you received." (*Ibid.*) Second, the
14 notice declares that "[t]o the extent that any of the notices described above contain language that
15 may be construed as an order requiring you to stop diversions under your affected water right,
16 that language is hereby rescinded." (*Ibid.*) Third, the notice announces that "any language that
17 may be construed as requiring affected water right holders to submit curtailment certification
18 forms is hereby rescinded." (*Ibid.*) Fourth, the notice informs the recipient that there is
19 insufficient water available for certain categories of junior water rights holders, but provides that
20 "[i]f you believe you received this notice in error, or have information that you want to provide in
21 response to this notice, or have information you believe the State Water Board staff should
22 otherwise consider, you may submit that information" to the Board. (*Ibid.*) Finally, the notice
23 makes clear that it "does not establish or impose any compliance responsibilities." (*Ibid.*)
24 Contrary to BBID's allegations, the plain language of the revised notice makes clear that it is not
25 a binding document and does not "command" BBID or any other water user to cease diverting
26 water, and therefore does not deprive BBID of its right to divert water. As described below,
27 Judge Chang confirmed the purely informational nature of the revised notice in her order denying
28 a preliminary injunction. (Board Second RJN, Exh. 7 [Chang order].)

1 On July 20, the Board's enforcement unit of the Division of Water Rights issued charging
2 documents commencing an administrative civil liability (ACL) proceeding against BBID. (Board
3 Second RJN, Exh. 8.) The predicate issue in that proceeding will be the determination of whether
4 there was sufficient water available to divert pursuant to BBID's own water rights at the time of
5 the alleged unauthorized diversion, and if not, whether BBID was engaging in the unauthorized
6 diversion of water in violation of Water Code section 1052. (Board Second RJN, Exh. 9, p. 2.)
7 On August 6, BBID requested a hearing before the Board under section 1055 of the Water Code
8 based on its disagreement with the facts and allegations set forth in the July 20 ACL complaint.
9 (Board Second RJN, Exh. 10.)

10 On July 30, Judge Chang heard argument on the order to show cause why a preliminary
11 injunction should not issue. In response to a coordination motion filed by the Board, the BBID
12 action and four related matters were referred by the Judicial Council to the Alameda County
13 Superior Court for a coordination motion hearing; on July 31 that court, through Judge Evelio
14 Grillo, signed an order staying all five included actions pending a hearing on the coordination
15 motion. On Monday, August 3, the Sacramento County Superior Court, through Judge Chang,
16 issued a minute order denying the preliminary injunction in the WSID case, which order also had
17 the effect of lifting the TRO. (Board Second RJN, Exh. 7.) Later that day, the parties and the
18 Sacramento County Superior Court received notice of the stay issued by Judge Grillo. (Board
19 Second RJN, Exh. 11.)

20 The five included actions were subsequently transferred to the Santa Clara County Superior
21 Court for a coordinated trial. After filing amended petitions and complaints, BBID and WSID
22 moved this Court to stay the pending Board enforcement proceedings against the districts. On
23 September 24, 2015 this Court issued its Order after Hearing on September 22, 2015, denying
24 BBID and WSID's respective stay motions. As this Court observed in its order, "[i]n the instant
25 case, both BBID and WSID will have the opportunity to present evidence at the administrative
26 enforcement hearing regarding their respective rights to the water before a tribunal that is
27 required to be impartial, fair and neutral, and has the specific expertise to adjudicate these issues."
28 (Sept. 24, 2015, Order After Hearing at pp. 5-6 (hereafter Sept. 24 Order).)

1 **STANDARD OF REVIEW**

2 A demurrer is used to test whether the complaint alleges facts sufficient to state a cause of
3 action. (Code Civ. Proc., § 430.10, subs. (e), (f).) In deciding a general demurrer, the court
4 should: (1) “treat the demurrer as admitting all material facts properly pleaded, but not
5 contentions, deductions or conclusions of fact or law”; (2) “consider matters which may be
6 judicially noticed”; and (3) “give the complaint a reasonable interpretation, reading it as a whole
7 and its parts in their context.” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; see also *Aubry v. Tri-*
8 *City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.) When a demurrer is sustained, it is the
9 plaintiff’s burden to demonstrate that a reasonable possibility exists that amendment may cure the
10 defects in the complaint. (*Rakestraw v. California Physicians’ Service* (2000) 81 Cal.App.4th 39,
11 43.) To satisfy this burden, the plaintiff must show in what manner the complaint can be
12 amended and how that amendment will change the legal effect of the pleading. (*Ibid.*) The
13 plaintiff must describe the elements of the cause of action and authority for it plus factual
14 allegations that sufficiently state all required elements of that cause of action. (*Ibid.*) As
15 explained below, there is no legal basis for BBID’s claims against the Board; thus, BBID will not
16 be able to successfully amend its petition and complaint. Accordingly, the Board asks that this
17 Court sustain this demurrer without leave to amend.

18 **ARGUMENT**

19 **I. THE EXHAUSTION OF ADMINISTRATIVE REMEDIES DOCTRINE BARS CAUSES OF**
20 **ACTION ONE THROUGH TWELVE AND FOURTEEN THROUGH SIXTEEN BECAUSE**
21 **THEY CHALLENGE THE BOARD’S PENDING ENFORCEMENT ACTION DIRECTED**
22 **AGAINST BBID**

23 BBID’s Causes of Action One through Twelve and Fourteen through Sixteen challenge
24 the Board’s enforcement action directed at BBID.⁴ However, as this Court has stated “[i]n the

25 ⁴ The challenges to the enforcement action are contained in the following paragraphs:
26 First Cause of Action (¶ 98); Second Cause of Action (¶ 107); Second Cause of Action (¶¶ 121-
27 126); Fourth Cause of Action (¶ 134); Fifth Cause of Action (¶¶ 136-141); Sixth Cause of Action
28 (¶¶ 143-151, 154); Seventh Cause of Action (¶¶ 159-166); Eighth Cause of Action (¶¶ 174-179);
Ninth Cause of Action (¶ 187); Tenth Cause of Action (¶ 200); Eleventh Cause of Action (¶
Twelfth Cause of Action (¶ 210); Fourteenth Cause of Action (¶ 226); Fifteenth Cause of
Action (¶¶ 229, 231); and Sixteenth Cause of Action (¶¶ 235-241).

1 instant case, both BBID and WSID will have the opportunity to present evidence at the
2 administrative enforcement hearing regarding their respective rights to the water before a tribunal
3 that is required to be impartial, fair and neutral, and has the specific expertise to adjudicate these
4 issues.” (Sept. 24, 2015, Order at pp. 5-6.) As explained below, this Court should apply the same
5 reasoning here and grant the demurrer as to the above-listed causes of action for failure of BBID
6 to exhaust its administrative remedies.

7 As the Sixth Appellate District has held, “[u]nder the doctrine of administrative
8 exhaustion, the long-standing general rule is this: where an adequate administrative remedy is
9 provided by statute, resort to that forum is a jurisdictional prerequisite to judicial consideration of
10 the claim.” (*McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 274.) Under this
11 doctrine, “a controversy is not ripe for adjudication until the administrative process is completed
12 and the agency makes a final decision that results in a direct and immediate impact on the
13 parties.” (*Ibid*; *Tejon Real Estate, LLC v. City of Los Angeles* (2014) 223 Cal.App.4th 149, 156.)
14 The doctrine is a “fundamental rule of procedure.” (*Abelleira v. District Court of Appeal*. (1941)
15 17 Cal.2d 280, 293.) It is “principally grounded on concerns favoring administrative autonomy
16 (i.e. courts should not interfere with an agency determination until the agency has reached a final
17 decision) and judicial efficiency (*i.e.* overworked courts should decline to intervene in an
18 administrative dispute unless absolutely necessary).” (*Farmers Ins. Exch. v. Superior Court*
19 (*People*) (1992) 2 Cal.4th 377, 391.) The doctrine applies even when a petitioner challenges the
20 administrative proceedings on constitutional grounds. (*McAllister, supra*, 147 Cal.App.4th at p.
21 276.)

22 The separation of powers principle derived from the California Constitution provides the
23 constitutional basis for the exhaustion doctrine. (*County of Contra Costa v. State of Cal.*. (1986)
24 177 Cal.App.3d 62, 76-77 (*County of Contra Costa*.) The *County of Contra Costa* court
25 observed that because an “administrative procedure is part of the legislative process,” separation
26 of powers mandates that “a judicial action before the legislative process has been completed is
27 premature and a court is without jurisdiction until administrative remedies have been exhausted.”
28 (*Id.* at p. 77.) Likewise here, if the courts are permitted to enjoin an ongoing quasi-judicial

1 agency procedure, this “would be to permit the courts to engage in an unwarranted interference”
 2 with the agency’s process and also would contravene the separation of powers. (*Ibid.*, citing
 3 *Santa Clara County v. Super. Ct.* (1949) 33 Cal.2d 552, 556.)

4 In *Temescal Water Co. v. Dept. of Public Works* (1955) 44 Cal.2d 90, 94, the California
 5 Supreme Court specifically addressed the question of whether a water right determination of the
 6 “existence of unappropriated water” was a matter to be considered first by the Department of
 7 Public Works (the Board’s predecessor) or whether a private party is “entitled to a trial de novo”
 8 before the superior court. According to the Supreme Court, “a holding that such danger is so
 9 imminent as to justify an independent judicial proceeding to determine the availability of
 10 unappropriated water *before* the department considers an application, would deprive the
 11 administrative proceeding of all of its proper functions.” (*Id.* at p. 106, emphasis added.)
 12 Judicial relief from a water right determination is only proper under section 1094.5 of the Code of
 13 Civil Procedure *after* the agency has issued the water right permit and *after* the aggrieved party
 14 has exhausted all administrative remedies. (*Ibid.*) In the present case, the exhaustion doctrine
 15 similarly bars petitioners from “depriv[ing] the [Board’s] administrative proceeding of all of its
 16 proper functions” by having a trial de novo before this Court regarding the contested water rights
 17 issues prior to a final Board determination of those issues. (*Ibid.*)

18 BBID may assert that the “futility” exception to the exhaustion doctrine allows it to obtain
 19 a stay of proceedings. However, the California Supreme Court has held that this “exception
 20 applies only if the party invoking it can positively state that the administrative agency has
 21 declared what its ruling will be in a particular case.” (*Steinhart v. County of Los Angeles* (2010)
 22 47 Cal.4th 1298, 1313.) A statement by an agency representative “other than the body charged
 23 with hearing and deciding” is not sufficient to invoke the “futility” exception. (*Tejon, supra*, 223
 24 Cal.App.4th at p. 158.) In the present case, BBID’s petition at best only suggests that certain
 25 Board *staff* have rendered opinions on issues to be considered in the pending enforcement
 26 proceedings.⁵ Since the Board, not its staff, is the “body charged with hearing and deciding,” the

27 ⁵ As with any enforcement action by any agency, some staff in the enforcement unit must,
 28 of necessity, be of the opinion that an enforcement action is appropriate. Otherwise no

(continued...)

1 “futility” exception does not apply here, and the exhaustion doctrine precludes the relief
2 requested by BBID.

3 Based on the foregoing, this Court should confirm its exhaustion of administrative
4 remedies ruling in its Sept. 24, 2015, Order and dismiss BBID’s Causes of Action One through
5 Twelve and Fourteen through Sixteen to the extent that the causes of action request this Court to
6 enjoin or otherwise challenge the Board’s pending administrative enforcement proceedings
7 directed against BBID. To the extent that any remaining causes of action can be read as
8 challenging the enforcement proceedings, the Board requests dismissal of those claims as well.

9 **II. THE RIPENESS DOCTRINE BARS BBID’S CAUSES OF ACTION ONE THROUGH**
10 **FOURTEEN BECAUSE BBID IS CHALLENGING THE BOARD’S JUNE 21, 2015,**
11 **CURTAILMENT NOTICE AND JULY 15, 2015, REVISED NOTICE, WHICH HAVE NO**
12 **BINDING EFFECT ON BBID**

13 BBID’s Causes of Action One through Fourteen challenge the Board’s issuance of the
14 June 21, 2015, water curtailment notice as revised by the July 15, 2015, notice.⁶ To the extent
15 that BBID is grounding its claims against the Board on these curtailment notices, and not the
16 pending enforcement proceedings, BBID’s claims should be dismissed for lack of ripeness. The
17 June notice provided collective notification to all diverters whose diversions from the
18 Sacramento-San Joaquin rivers and the Delta were based on pre-1914 appropriative rights with a
19 priority date of 1903 or later, that “due to ongoing drought conditions, there is insufficient water
20 in the system to service their claims of right.” (Board Second RJN, Exh. 4.) While the June
21 notice stated that “[t]hose who *are found* to be diverting water beyond what is legally available to
22 them *may* be subject to administrative penalties,” nothing in the generic notice “found” that any
23 individual diverter had been actually diverting without authorization, nor did the notice initiate

24 (...continued)
25 administrative actions would ever commence.

26 ⁶ The challenges to the Board notices are contained in the following paragraphs: First
27 Cause of Action (¶¶ 89-98); Second Cause of Action (¶¶ 100-107); Third Cause of Action (¶¶ 112,
28 125); Fourth Cause of Action (¶¶ 128-131, 134); Fifth Cause of Action (137-139); Sixth Cause
of Action (¶¶ 147-151); Seventh Cause of Action (¶¶ 156-157, 162); Eighth Cause of Action (¶
179); Ninth Cause of Action (¶¶ 182, 187); Tenth Cause of Action (¶¶ 193-194, 198-200);
Eleventh Cause of Action (¶ 207); Twelfth Cause of Action (¶¶ 209-211); Thirteenth Cause of
Action (¶¶ 217-221); and Fourteenth Cause of Action (¶¶ 223, 226).

1 any enforcement action against any diverter. (*Ibid.*, italics added.)

2 As noted above, on July 15, 2015, the Board revised and clarified the June notice “to
3 rescind the ‘curtailment’ portions of the unavailability notices.” (Board Second RJN, Exh. 6.)
4 Specifically, the revised notice states that “[t]o the extent that any of the notices described above
5 contain language that may be construed as an order requiring you to stop diversions under your
6 affected water right, that language is hereby rescinded.” (*Ibid.*) While the revised notice, like the
7 June notice, does state that “[t]hose who *are found* to be diverting water beyond what is legally
8 available to them *may* be subject to administrative penalties,” nothing in the revised notice finds
9 that any diverter has been actually diverting without authorization, nor does the notice commence
10 any enforcement action against any diverter. (*Ibid.*, italics added.) To underscore the non-
11 binding nature of the curtailment notices, the revised notice further states that “[t]his notice does
12 not establish or impose any new compliance responsibilities.” (*Ibid.*)

13 In light of the above, BBID has not alleged, nor can it allege, a ripe controversy requiring
14 resolution by this Court. A basic prerequisite to judicial review of administrative acts is the
15 existence of a ripe controversy. (*Pacific Legal Foundation v. California Coastal Comm.* (1982)
16 33 Cal.3d 158,169 (*Pacific Legal*)). The ripeness requirement, a branch of the doctrine of
17 justiciability, prevents courts from issuing purely advisory opinions. (*Id.* at p. 170.) The
18 controversy must be definite and concrete, touching the legal relations of parties having adverse
19 legal interests. (*Id.* at p. 171.) A controversy is ripe when it has reached, but has not passed, the
20 point that the facts have sufficiently congealed to permit an intelligent and useful decision to be
21 made. (*Id.* at p. 172.)

22 As the California Supreme Court has observed, the purpose of the ripeness doctrine is “to
23 prevent the courts, through avoidance of premature adjudication, from entangling themselves in
24 abstract disagreements over administrative policies, and also to protect the agencies from judicial
25 interference until an administrative decision has been formalized and its effects felt in a concrete
26 way by the challenging parties.” (*Pacific Legal, supra*, 33 Cal.3d at p. 171, quoting *Abbott*
27 *Laboratories v. Gardner* (1967) 387 U.S. 136, 148-149); accord *PG&E Corp. v. P.U.C.* (2004)
28 118 Cal.App.4th 1174, 1216 (*PG&E Corp.*)). Generally, courts “will not decide the correctness

1 of an administrative agency's construction of a statute unless the party requesting relief has been
2 cited or in some way concretely penalized by the agency based on that purportedly erroneous
3 construction." (*Cal. Assn. of Health Facilities v. Dept. of Health Services* (1997) 16 Cal.4th 284,
4 290, fn. 3.)

5 In *Pacific Legal, supra*, 33 Cal.3d 158, the California Supreme Court set forth a two-
6 pronged test for determining whether an action is ripe. (33 Cal.3d at p. 171.) Under that test,
7 reviewing courts evaluate both: (1) the fitness of the issues for judicial decision; and (2) the
8 hardship to the parties of withholding court consideration. (*Ibid.*) BBID's causes of action
9 challenging the June notice and revised notice do not satisfy this test. First, BBID's challenges to
10 the notices are not fit for judicial review because the notices do not find that BBID has been
11 diverting water illegally, nor do they commence any action against BBID. As the First Appellate
12 District has held, "the mere fact the parties have adverse positions" does not "render the issues
13 appropriate for immediate judicial resolution." (*PG&E Corp., supra*, 118 Cal.App.4th at p.
14 1217.) "Where the posture of a case may require a court to speculate about unpredictable future
15 events in order to evaluate the parties' claims," the claims are not ripe for judicial review. (*Ibid.*;
16 see also *Wilson & Wilson v. City Council* (2011) 191 Cal.App.4th 1559, 1582.) Second, BBID
17 cannot claim it has suffered any hardship as a result of the notices because the notices are just that
18 – notices – and do not require BBID to take any particular action in response to them.

19 In *PG&E Corp.*, the Public Utilities Commission had issued an interpretive "interim
20 opinion" on a condition the Commission had imposed on its approval of the electric utilities'
21 request to be reorganized as holding companies. This "holding company condition" set certain
22 minimum capital requirements. (*PG&E Corp., supra*, 191 Cal.App.4th at pp. 1181-1182.) The
23 utilities vigorously disputed the Commission's interpretation of the condition and sought judicial
24 review. However, the First Appellate District rejected the utilities' claim that their challenge was
25 "fit" for judicial review because "the PUC made no finding that any holding company or utility
26 had violated the first priority condition." (*Id.* at p. 1191.) Because the Commission had "yet to
27 apply its interpretation ... to a concrete set of facts, the dispute petitioner would like this court to
28 resolve is abstract," and thus the claim was not fit for judicial review. (*Id.* at p. 1217.) The court

1 further found that the utilities could not meet the second ripeness factor by claiming hardship,
 2 even though at least one utility alleged that the interim opinion adversely affected its stock prices
 3 and its ability to raise funds on the capital market. Because the Commission had not determined
 4 that any specific utility had violated the contested condition, the Court of Appeal held that the
 5 utilities' alleged hardships were not "concrete," but were "in fact speculative." (*Id.* at p. 1219.)

6 BBID's challenge to the curtailment notices is strikingly similar to the facts in *PG&E*
 7 *Corp.* Like the Commission's interim opinion in *PG&E Corp.*, the Board's notices do not find
 8 that any specific party has engaged in illegal conduct. Likewise, the Board notices do not initiate
 9 any enforcement proceeding against any specific party. Thus, BBID's challenge to the Board's
 10 curtailment notices similarly "are not ripe for review" because the issues posed are abstract and
 11 therefore not fit for review and the claimed hardships are speculative at best. (*PG&E Corp.*,
 12 *supra*, 191 Cal. App.4th at p. 1222.)⁷

13 The Board therefore asks that this Court dismiss BBID's Causes of Action One through
 14 Fourteen for lack of a ripe controversy. To the extent that any of BBID's other causes of action
 15 can be read as challenging the Board's curtailment notices, those causes of action similarly should
 16 be dismissed.⁸

17 ⁷ In addition, BBID's twelfth cause of action for takings also is not ripe because the
 18 Board's pending enforcement action is not a final agency action, and the curtailment notices are
 19 merely general notices which have not yet been applied to BBID. "[A] claim that the application
 20 of government regulations effects a taking of a property interest is not ripe until the government
 21 entity charged with implementing the regulations has reached a final decision regarding the
 22 application of the regulations to the property at issue." (*People v. Murrison* (2002) 101
 23 Cal.App.4th 349, 363, quoting *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 10 [holding that
 24 water rights takings claim was not ripe because the challenged regulation had not yet been applied
 25 to the water rights in question]; see also *County of Alameda v. Superior Court* (2005) 133
 26 Cal.App.4th 558, 567 ["under both federal and California law, before a plaintiff may establish a
 27 regulatory taking, it must first demonstrate that it has received a final decision from the land use
 28 authority regarding application of the challenged land use regulation to its property"].)

⁸ In the alternative, BBID's challenges to the curtailment notices are now moot. (*City of*
 24 *Los Angeles v. County of Los Angeles* (1983) 147 Cal.App.3d 952, 958.) In *National Assn. of*
 25 *Wine Bottlers v. Paul* (1969) 268 Cal.App.2d 741, 746-747, the First Appellate District remanded
 26 a challenge to a bulk grape marketing order to the trial court for dismissal as moot where the
 27 Department of Agriculture subsequently repealed the order. In facts similar to the present case,
 28 the Department's Director had adopted a bulk grape marketing order over the protest of the wine
 industry. The industry then obtained a trial court injunction against the Director's
 implementation of the order. Because of "the failure of a majority of the processors to assent to
 the continuation of the marketing order, the Director issued a directive terminating it." (*Id.* at p.
 745.) On these facts, the Court of Appeal found the litigation to be moot and that the public

(continued...)

1 **III. BBID’S DECLARATORY RELIEF CLAIMS CONTAINED IN CAUSES OF ACTION ONE**
2 **THROUGH ELEVEN AND THIRTEEN, FIFTEEN, AND SIXTEEN ARE IMPROPER**
3 **CHALLENGES TO THE BOARD’S ADMINISTRATIVE ACTIONS**

4 BBID’s Causes of Action One through Eleven, Thirteen, Fifteen, and Sixteen ask this
5 Court to enter declaratory judgment against the Board. BBID seeks declaratory relief as both as
6 to the pending Board enforcement proceedings directed against BBID and the Board’s
7 curtailment notices.⁹ Such relief is improper when challenging an agency’s administrative
8 activity.

9 “The law is well established that an action for declaratory relief is not appropriate to
10 review an administrative decision.” (*Walter Leimert Co. v. Calif. Coastal Comn.* (1993) 149
11 Cal.App.3d 222, 230, citing *State of California v. Superior Court (Veta)* (1974) 12 Cal.3d 237,
12 249; see also *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 127; *Scott v.*
13 *City of Indian Wells* (1972) 6 Cal.3d 541, 546.) In the *Veta* case, the petitioners applied for a
14 permit from the California Coastal Zone Conservation Commission (the predecessor to the
15 California Coastal Commission) to develop property within the coastal zone, and the Commission
16 denied the permit. The petitioners challenged the denial, filing a petition for writ of mandate and
17 complaint for other relief, including a cause of action seeking a judicial declaration that
18 petitioners were entitled to construct their development without a permit, or in the alternative that
19 they were entitled to a permit, from the Commission. The Commission demurred to this and
20 other causes of action in the petition and complaint, which the trial court overruled in its entirety.
21 The Commission sought review of the trial court’s rulings by prerogative writ in the California
22 Supreme Court. The Supreme Court reversed, reasoning that “an action for declaratory relief is

23 (...continued)

24 interest did not justify addressing the merits of the case because it was “highly speculative
25 whether the issue will come up again.” (*Id.* at p. 747.) As noted above, the Board has cured any
26 alleged deficiencies in the June notice through the revised notice. BBID’s claims regarding the
27 curtailment notices are therefore moot.

28 ⁹ BBID’s declaratory relief claims are set forth in the following paragraphs of the
amended complaint: First Cause of Action (¶ 97); Second Cause of Action (¶ 106); Third Cause
of Action (¶ 124); Fourth Cause of Action (¶ 134); Fifth Cause of Action (¶ 141); Sixth Cause of
Action (¶ 154); Seventh Cause of Action (¶ 166); Eighth Cause of Action (¶ 179); Ninth Cause of
Action (¶ 186); Tenth Cause of Action (¶ 199); Eleventh Cause of Action (¶ 206); Thirteenth
Cause of Action (¶ 220); Fifteenth Cause of Action (¶ 231); and Sixteenth Cause of Action (¶
241).

1 not appropriate to review an administrative decision.” (*Veta*, 12 Cal.3d at p. 249.)

2 In addition, the *Veta* case held that, while declaratory relief is available to challenge the
3 constitutionality of a statute, regulation or ordinance on its face (i.e. as applied in every situation),
4 this procedure cannot be used to challenge the application of such statute, regulation or ordinance
5 to a particular case and thereby “essentially seek[] to review the validity of an administrative
6 action.” (*Veta*, 12 Cal.3d at p. 251.) Instead, “such review is properly brought under the
7 provisions of section 1094.5 of the Code of Civil Procedure rather than by means of declaratory
8 relief.” (*Ibid.*; accord *Walter Leimert Co.*, *supra*, 149 Cal.App.3d at pp. 230-231; *City of Santee*
9 *v. Superior Court* (1991) 228 Cal.App.3d 713, 718; *Taylor v. Swanson* (1982) 137 Cal.App.3d
10 416, 418; *Mobil Oil Corp. v. Superior Court* (1976) 59 Cal.App.3d 293, 307.) Administrative
11 mandamus is “the proper and sole remedy” for challenging the constitutionality of the application
12 of a statute to a particular case. (*Agins v. City of Tiburon* (1979) 24 Cal.3d 266, 272-273.)

13 Accordingly, the California Supreme Court in *Veta* reversed the trial court’s decision overruling
14 the Commission’s demurrer to a cause of action seeking a declaration that the California Coastal
15 Act was unconstitutional as applied to *Veta*. (*Veta*, 12 Cal.3d at p. 251.)

16 More recently, in *Tejon Real Estate, LLC. v. City of Los Angeles* (2014) 223 Cal.App.4th
17 149, 154-155, a property owner obtained informal opinions from city and fire department staff
18 concerning the cost of a water extension and the need to install a fire hydrant. Believing that
19 these opinions contravened city regulations, the property owner filed a declaratory relief action
20 under section 1060 of the Code of Civil Procedure. Citing *Veta* and *Selby Realty*, the Second
21 Appellate District sustained the city’s demurrer on the grounds that declaratory relief was an
22 improper means “to review a purported administrative decision.” (*Tejon, supra*, 223 Cal.App.3d
23 at p. 155.)

24 In the present case, BBID similarly seeks declaratory relief against the Board as to the
25 pending enforcement action, the June notice and the revised notice. BBID does not bring any
26 facial constitutional challenges to a Board statute or regulation. Thus, under the foregoing cases,
27 this Court should sustain the Board’s demurrer as to all of BBID’s claims for declaratory relief.
28

1 **IV. BBID’S FOURTEENTH CAUSE OF ACTION SHOULD BE DISMISSED BECAUSE**
2 **INJUNCTIVE RELIEF IS A REMEDY, NOT AN INDEPENDENT CAUSE OF ACTION**

3 BBID’s Fourteenth Cause of Action seeks injunctive relief against the Board. The Court
4 should dismiss this cause of action because injunctive relief is a remedy, not a stand-alone cause
5 of action.

6 It is settled that a “permanent injunction is merely a remedy for a proven cause of action.
7 It may not be issued if the underlying cause of action is not established.” (*City of South Pasadena*
8 *v. Department of Transportation* (1994) 29 Cal.App.4th 1280, 1293; *Camp v. Board of*
9 *Supervisors* (1981) 123 Cal.App.3d 334, 356 [“Injunctive relief is a remedy and not, in itself, a
10 cause of action, and a cause of action must exist before injunctive relief may be granted.”].) In
11 *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 65, the Third Appellate District recently
12 sustained a demurrer to a cause of action seeking “an order enjoining the enforcement of a [city]
13 ordinance” on the grounds that “[i]njunctive relief is a remedy, not a cause of action” and that
14 “[a] cause of action must exist before a court may grant a request for injunctive relief.” (*Ibid.*; see
15 also *Livingston Rock & Gravel Co. v. County of Los Angeles* (1954) 43 Cal.2d 121, 128-129.)
16 Based upon these authorities, the Court likewise should dismiss BBID’s Fourteenth Cause of
17 Action for injunctive relief.

18 **CONCLUSION**

19 BBID’s lengthy petition, with its sixteen causes of action, seeks to challenge: 1) the
20 Board’s curtailment notices which, as revised, have no concrete impact on BBID; and 2) the
21 Board’s pending enforcement proceeding directed against BBID that has only just commenced, a
22 proceeding where BBID can raise all of its objections regarding Board administrative policies
23 before a neutral hearing officer and can seek judicial review if it is dissatisfied with the end result
24 of the administrative process. Settled doctrines of exhaustion of administrative remedies and
25 ripeness bar BBID from bypassing the Board’s administrative process and requesting judicial
26 intervention by this Court. Furthermore, BBID’s reliance on declaratory and injunctive relief
27 claims as separate causes of action contravenes long-standing rules of administrative law. For the
28 above reasons, the Board respectfully requests that this Court grant the Board’s demurrer without

1 leave to amend.

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Respectfully Submitted,

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