

1 JEANNE M. ZOLEZZI, SBN: 121282  
2 KARNA E. HARRIGFELD, SBN:  
3 JANELLE KRATTIGER, SBN:  
4 HERUM\CRABTREE\SUNTAG  
5 A California Professional Corporation  
6 5757 Pacific Ave., Suite 222  
7 Stockton, CA 95207  
8 Telephone: (209) 472-7700

9 Attorneys for THE WEST SIDE IRRIGATION DISTRICT

10 **BEFORE THE STATE WATER RESOURCES CONTROL BOARD**

11 ENFORCEMENT ACTION ENFO1949 )  
12 DRAFT CEASE AND DESIST ORDER ) MOTION FOR SUMMARY JUDGMENT, OR  
13 REGARDING UNAUTHORIZED ) IN THE ALTERNATIVE, SUMMARY  
14 DIVERSIONS OR THREATENED ) ADJUDICATION  
15 UNAUTHORIZED DIVERSIONS OF )  
16 WATER FROM OLD RIVER IN SAN ) Hearing Date: March 21, 2015  
17 JOAQUIN COUNTY )  
18 Hearing Officer: Frances Spivy-Weber

19 The West Side Irrigation District (“**WSID**”) hereby moves for summary judgment or,  
20 alternatively, for summary adjudication of the Enforcement Action ENF01949 (“**Enforcement**  
21 **Action**”) against it because (1) there was sufficient water in 2014 and 2015 to support diversions  
22 under WSID’s License 1381, (2) WSID may legally divert wastewater from the City of Tracy  
23 (“**City**”) under Contract without a water right permit or a petition for change under Water Code  
24 §1211, and (3) WSID may legally divert its drain water from its Intake Channel without a water  
25 right permit after it is commingled with water from Old River.

26 **I. FACTUAL BACKGROUND**

27 **A. WSID WATER RIGHTS**

28 WSID holds water right License 1381 (“**License**”), with a priority date of April 17, 1916,  
for direct diversion of 82.5 cubic-feet per section (“**cfs**”) from Old River from about April 1 to  
October 31 of each year. UMF ¶¶1, 2. The WSID diversion point is located on Old River in the  
tidally influenced Delta. UMF ¶6. There is always water in the channels of the Delta because  
they are below sea level. UMF ¶7. At any given time, the Delta holds approximately 1.2 million  
acre-feet of water. UMF ¶8. Water flows into the Delta with the tide from the West as well as

1 from east side tributary streams. UMF ¶9. Inflow from the tributary streams, once having entered  
2 the Delta, will reside in the Delta for up to several months during dry periods. UMF ¶10.

3 WSID diverts water through a dredged intake channel off of Old River, which is  
4 approximately 1.5 miles long. (“**Intake Canal**”). UMF ¶5. The water diverted by WSID from  
5 Old River is “largely return flow from diversions farther upstream and water reaching the San  
6 Joaquin delta from Sacramento River through Georgiana Slough and other inter-delta channels”.  
7 UMF ¶3. Water moves slowly in the flat gradient Intake Canal, which is affected by tides of  
8 about 4 feet, and the depth in the Intake Canal varies from 4 feet to 8 feet deep depending on  
9 tides. UMF ¶11.

10 WSID’s License was issued in 1933 based upon the water placed to beneficial use in  
11 1930, 1931 and 1932. UMF ¶4. In 1931 the majority of the water at the WSID point of diversion  
12 during the irrigation season was from the Sacramento River and had entered the Delta in the  
13 prior three months. UMF ¶12. Similarly, in 2015, the majority of the water at the WSID point of  
14 diversion during the irrigation season was from the Sacramento River and had entered the Delta  
15 in the prior three months. UMF ¶13.

16 The State Water Project and Central Valley Project, constructed after 1931, have altered  
17 flow patterns in the Delta. UMF ¶14. By storing water in the winter and spring and releasing it  
18 through the Delta in the summer, the Projects reduce the percentage of Sacramento River water  
19 that reaches the Delta in the winter and spring months and increase the percentage of Sacramento  
20 River water that reaches the Delta in the summer and fall months. UMF ¶15. Under either  
21 circumstance, however, water is always available to WSID’s during the irrigation season because  
22 of the nature of residence time and tidal influence in the Delta. UMF ¶16.

23 **B. CITY OF TRACY TREATED WASTEWATER**

24 The City of Tracy operates a wastewater treatment plant and discharges approximately 9  
25 million gallons per day (“**mgd**”) of treated wastewater effluent, equivalent to 14 cfs, on a  
26 substantially continuous basis into Old River, just upstream from the District’s point of diversion  
27 under License 1381. UMF ¶¶27, 28. The City obtains water supplies from three sources: (1)  
28 South San Joaquin Irrigation District water from the Stanislaus River; (2) United States Bureau

1 of Reclamation water delivered from the Delta-Mendota Canal; and (3) local groundwater wells,  
2 as such the City's treated wastewater discharges are foreign in source and/or foreign in time to  
3 the Old River flow. UMF ¶¶29, 30. The City and WSID entered into agreements in both 2014 and  
4 2015 for WSID to divert the City's wastewater. UMF ¶¶31, 32, 33, 34. WSID diverted some of  
5 the City's wastewater in 2014 and none of the City's wastewater in 2015. UMF ¶¶26, 40.

6 **C. WSID TAILWATER DISCHARGE**

7 WSID owns and controls the Bethany Drain, which runs through its jurisdictional area.  
8 UMF ¶21. The Bethany Drain collects drainage water from various sources, including, but not  
9 limited to: (1) irrigation return flows from Old River License diversions, (2) shallow  
10 groundwater from tile drains from lands within the district, and (3) by contract, municipal  
11 drainage from lands within the City of Tracy ("**Drainage Water**"). UMF ¶¶17, 18, 19, 20.  
12 WSID controls the Drainage Water in the Bethany Drain, which is foreign in both source and  
13 time to the Old River flow, and discharges directly into WSID's intake channel immediately  
14 upstream of WSID's diversion pumps. UMF ¶¶17, 21. WSID does not intend to abandon water  
15 discharge from the Bethany Drain into the intake channel; rather the intention of the discharge is  
16 to enable WSID to pump the water at its diversion pumps. UMF ¶22.

17 Because the District's intake channel is open to Old River, drain water from the Bethany  
18 Drain may commingle with Old River water in the intake channel. UMF ¶23. Discharges of  
19 water from the Bethany Drain into the intake channel are measured. UMF ¶24. In 2015 WSID  
20 operated its diversion pump to pump out of the Intake Canal the same amount of water that was  
21 discharged into the Intake Canal from the Bethany Drain, and at no time after May 21, 2015 did  
22 WSID's diversions from the intake channel exceed the inflow into the intake channel from the  
23 Bethany Drain. UMF ¶25.

24 **D. SWRCB WATER AVAILABILITY DETERMINATIONS IN 2015**

25 On May 1, 2015 the SWRCB determined there was no water available for diversion  
26 under the License, UMF ¶¶35, 36, 37, a determination based on a spreadsheet methodology that  
27 compared supply and demand on a watershed wide basis. UMF ¶38. This methodology did not  
28 consider water available to WSID at its point of diversion, the tidal effect in the Delta, or the fact

1 that tributary flow from prior months was still present in the Delta and available for WSID to  
2 divert due to Delta hydrodynamics and residence time. UMF ¶39.

3 **II. LEGAL STANDARD**

4 A motion for summary judgment shall be granted if (1) there is no triable issue as to any  
5 material fact, and (2) the moving party is entitled to judgment as a matter of law. CCP §437c(c).  
6 An issue of fact becomes one of law and loses its “triable” character if the undisputed facts leave  
7 no room for a reasonable difference of opinion. *Ostayan v. Serrano Reconveyance Company, et*  
8 *al.* (2000) 77 Cal.App.4th 1411, 1418. Summary judgment is appropriate where there is no merit  
9 to the action. CCP §437c(a).

10 Additionally, a party may move for summary adjudication as to one or more causes of  
11 action in the alternative to summary judgment if it contends there is no merit to that cause of  
12 action. CCP §437c(f). A defendant has met his burden of showing that there is no merit to a  
13 cause of action if that party has proved that one or more elements of the cause of action cannot  
14 be established, or that there is a complete defense to that cause of action. CCP §437c(p)(2). Once  
15 the defendant has met that burden, the burden shifts to the plaintiff to show that a triable issue of  
16 one or more material facts exists as to that cause of action or a defense thereto. *Id.* The plaintiff  
17 may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of  
18 material fact exists but, instead, shall set forth the specific facts showing that a triable issue of  
19 material facts exists as to that cause of action or a defense thereto. *Id.*

20 **III. ARGUMENT**

21 **A. WSID IS ENTITLED TO JUDGMENT AS A MATTER OF LAW REGARDING**  
22 **WATER AVAILABILITY**

23 The primary source of water available to WSID to divert at its point of diversion on Old  
24 River in the summer of 2015 was Sacramento River water that had entered the Delta in prior  
25 months. UMF ¶13. Sacramento River water has historically been a source of supply available to  
26 WSID under its License. UMF ¶3. The SWRCB completely ignored this primary source in its  
27 analysis of water availability. UMF ¶39. No reasonable person could find that the SWRCB’s  
28 water availability analysis credible given this omission. The Prosecution Team cannot meet its

1 burden to establish that no water was available to divert for WSID after May 1, 2015.

2 **B. WSID’S DIVERSION OF WASTEWATER UNDER CONTRACT WITH THE**  
3 **CITY OF TRACY IS PROPER AS A MATTER OF LAW**

4 The City holds title to its treated wastewater (Water Code §1210). The City may use a  
5 natural watercourse to convey the treated wastewater (Water Code §7075). The City can also  
6 agree to allow WSID to divert the water by contract, without SWRCB application, because the  
7 diversion does not cause any measurable decrease in flow in the watercourse. (Water Code  
8 §1211(b)). Further, because the treated wastewater is not abandoned by the City, it is not subject  
9 to appropriation, and no water right permit is required for its diversion.

10 1. **The City holds title to its treated wastewater.** The City holds exclusive title to  
11 its treated wastewater. See Water Code §1210:

12 The owner of a waste water treatment plant operated for the purpose of treating wastes  
13 from a sanitary sewer system shall hold the exclusive right to the treated waste water as  
14 against anyone who has supplied the water discharged into the waste water collection and  
15 treatment system. . .”

16 2. **The City may use Old River to convey its treated wastewater.** Because the  
17 City’s wastewater is not abandoned, and not subject to appropriation in Old River, the City can  
18 convey that water through Old River and WSID can divert it under contract at its point of  
19 diversion downstream as authorized by Water Code §7075, which provides: “Water which has  
20 been appropriated may be turned into the channel of another stream, mingled with its water, and  
21 then reclaimed; but in reclaiming it the water already appropriated by another shall not be  
22 diminished”. *Emphasis added*. By conveying the wastewater in Old River under contract, the  
23 City is not abandoning the water. State Water Board Decision D 1602 at pp. 5 - 6, citing *Burnett*  
24 *v. Whitesides* (1860) 15 Cal. 35.

25 3. **No SWRCB permit is required because WSID’s diversion of the water does**  
26 **not decrease the flow in the watercourse.** Water Code Section 1211 provides:

27 (a) Prior to making any change in the point of discharge, place of use, or purpose of use  
28 of treated wastewater, the owner of any wastewater treatment plant shall obtain approval  
of the board for that change. . .

1 (b) Subdivision (a) does not apply to changes in the discharge or use of treated  
2 wastewater that do not result in decreasing the flow in any portion of a watercourse.

3 Section (b) of Water Code Section 1211 was added to State Water Code in 2001 at the request of  
4 the State Water Board, which asserted: “Where there is no threat to instream flows or third party  
5 water-right holders, requiring [State Water Board] review is an unnecessary burden on  
6 wastewater reclamation.” UMF ¶44.

7 The Prosecution Team has not put forth any credible evidence that diversion of the City’s  
8 wastewater by WSID decreases the flow of a watercourse. The Prosecution Team did not take  
9 any measurements of flow at the WSID point of diversion, or downstream in either direction.  
10 UMF ¶41. Instead the Prosecution Team simply assumed that a diversion of 14 cfs by WSID  
11 resulted in a corresponding reduction in flow. UMF ¶42. By contrast, WSID’s operator did not  
12 observe any change in flow in Old River at any time in 2014 when diversions of City of Tracy  
13 wastewater were being made under contract, and WSID’s expert conducted a scientific study  
14 using scientifically accepted Delta modeling tools to determine that no measurable decrease in  
15 flow or water levels results from WSID’s diversion of 8 to 14 cfs. UMF ¶¶26, 43.

16 **4. A separate water right is not required to divert the City’s wastewater from**  
17 **Old River because the City has not abandoned the wastewater such that it would be subject**  
18 **to appropriation.** As a matter of law, WSID can divert the City’s wastewater pursuant to  
19 contract without classifying the diversion of that water as a diversion under WSID’s license or  
20 being required to obtain a new appropriative permit because the water remains appropriated and  
21 is not abandoned. Only water flowing in a natural channel not being applied to beneficial use or  
22 not otherwise appropriated, is available for appropriation. Wat. Code Sec. 1201. “Although  
23 appropriative rights can attach to any unappropriated water flowing in a stream, previously  
24 appropriated water only becomes unappropriated if it is abandoned”. State Water Resources  
25 Control Board Order No. WR 97-05 at pp. 27-28. “Unappropriated water does not include water  
26 being used by others under paramount rights”. State Water Board Decision D1635 at p. 26.

27 The City’s treated wastewater was previously appropriated, has remained under the  
28 City’s control, and is being conveyed to WSID under contract; thus the water is being applied to

1 beneficial use and remains appropriated. At no time has it reverted to unappropriated water or  
2 stopped being applied for a beneficial use. It is also irrelevant that the City previously abandoned  
3 the water into the river. “. . . [A]n appropriator . . . that has abandoned water in the past, causing  
4 an artificial flow of water, may cease to abandon water as it increases its use of water.” State  
5 Water Board Order WR 97-05 at p. 28, citing *Stevens v. Oakdale Irrigation District* (1939) 13  
6 Cal.2d 343. An importer of foreign water (the City) is under no legal obligation to continue to  
7 import and abandon water for the use of another. See State Water Board Decision D1602 at p. 4;  
8 State Water Board Order WR 95-9 at pp. 18-19; *Haun v. De Vours* (1950) 97 Cal.App.2d 841,  
9 218 P.2d 996.)

10 Here, the Prosecution Team admits the City obtains water supplies from three sources:  
11 (1) South San Joaquin Irrigation District water delivered from the Stanislaus River (typically the  
12 majority of the City’s supply); (2) United States Bureau of Reclamation water delivered from the  
13 Delta-Mendota Canal; and (3) local groundwater wells (typically the smallest portion of the  
14 City’s supply), and that the City’s treated wastewater discharges are foreign in source and/or  
15 foreign in time to the Old River flow. UMF ¶29.

16 The City ceased to abandon the return water and instead chose to dispose of the water  
17 through formal written contract, a practice approved by the State Water Board (*See* Order WR  
18 95-9 *supra*, citing *Haun v. DeVours* (1950) 97 Cal.App.2d 841). “The intention not to abandon  
19 the water turns the stream channel into a mere means of conveyance”. State Water Board  
20 Decision D 334, at p. 18, citing Weil, *Water Rights in the Western States*, 3<sup>rd</sup> Edition, Vol. 1, pp.  
21 37 and 38. “The intent to recapture is essential, and without it, the water is abandoned; and as  
22 previously set forth, cannot be reclaimed again claimants on the stream, existing at the time the  
23 recapture is attempted”. State Water Board Decision D 334, *supra*, citing Weil. By entering into  
24 this contract to sell its treated wastewater to WSID, the City established its intention to cease  
25 abandoning its wastewater and allow WSID to recapture it.

26 Water Code §§1485 and 1486 provide that specified producers of wastewater “*may*  
27 file an application for a permit to appropriate” that water. *Emphasis added*. This language is  
28 permissive and not mandatory, and does not impose a requirement upon any diverter to obtain a

1 permit. State Water Board Decision D 851 succinctly states at page 11: “While under his control  
2 the applicant’s drainage water is his to use and a permit to appropriate same would avail him  
3 nothing,” while Water Right Order 2004-0004 adds: “Water that is appropriated and is flowing  
4 in a channel under the control of its appropriator is not subject to appropriation by others”, at p.  
5 5, citing *Stevens, supra* at p. 352.

6 **C. WSID’S DIVERSION OF DRAINAGE WATER FROM ITS INTAKE CANAL IS**  
7 **AUTHORIZED BY CALIFORNIA CASE LAW AND WATER CODE SECTION**  
8 **7075.**

9 1. **California Law Expressly Allows WSID to Commingle its Drainage Water**  
10 **with Water in Old River and to Recapture That Water.** There is no dispute that drainage  
11 water from WSID’s Bethany Drain enters the WSID Intake Canal, briefly commingles with  
12 water from Old River present in the Intake Canal, and then is pumped out of the Intake Canal at  
13 WSID’s point of diversion. The Water Board provides no evidence that the quality of the water  
14 being discharged from the Bethany Drain is any different from the quality of water in the Intake  
15 Canal that WSID pumps - but even if there were, it would not matter. Under these facts, the law  
16 is clear that WSID can pump a quantity of water equal to its Bethany Drain discharges without a  
17 separate water right permit because it is simply maintaining control of and conveying its own  
18 drainage water.

19 The State Water Board has expressly recognized this right for DWR and USBR: “By  
20 their export pumping, DWR and the USBR are turning water into the channels of the San  
21 Joaquin River, *commingling it, and then reclaiming it*, as [Section 7075] authorizes”. State  
22 Water Board Order WR 89-8 at p. 25. *Emphasis added.* Water Code §7075 codifies a long line of  
23 California cases clarifying a party’s right to convey water through a natural watercourse,  
24 commingle it, and recapture it downstream. The seminal case on recapture, decided before the  
25 Civil War, is *Butte Canal and Ditch Co. v. Vaughn* (1858) 11 Cal. 143, in which the Supreme  
26 Court first upheld the right of a prior appropriator to convey, commingle and recapture water  
27 using a natural watercourse. The *Butte* court was not persuaded by an allegation, remarkably  
28 similar to the assertion advanced by this Prosecution Team, that an appropriator could be injured  
by such commingling by injuring the quality of the water in the natural stream *Id.* at p. 148.

1           **2. The Fact that WSID’s Drainage Water Derives from Several Sources Has No**  
2 **Bearing on WSID’s Right to Recapture.** After the May 1, 2015 curtailment, WSID’s Drainage  
3 Water derived from two sources: (1) shallow groundwater from tile drains from landowners  
4 within WSID, and (2) by contract, municipal drainage from lands within the City of Tracy. UMF  
5 ¶¶17, 18, 19. WSID takes title to these flows when they enter the Bethany Drain, which is owned  
6 and controlled by WSID. UMF ¶21. The majority of the flow in the Bethany Drain is derived  
7 from tile drain discharges installed widely in the district in the late 1950’s to drain lands of  
8 shallow groundwater standing less than 4 feet from the surface, to allow irrigation. UMF ¶18.

9           “One who brings water into a watershed may retain a prior right to the same after  
10 permitting others to use the water for irrigation.” Hutchings, *California Law of Water Rights*  
11 (1956) at p. 399, discussing *Los Angeles v. Glendale, supra*. The only water within the Bethany  
12 Drain not deriving from directly from WSID landowners is municipal runoff under contract with  
13 the City of Tracy and other municipal landowners. The City retains the prior right to use of its  
14 drain water even after use by its municipal customers, and may then transfer that right of use to  
15 WSID. Hutchings continues:

16           It is competent for the producer of return flow from foreign water to dispose of the same  
17 by contract prior to abandonment of the flow. Appropriative rights that have attached to  
18 waters abandoned of the flow. *Haun v. De Vours* (1950) 97 Cal.App.2d 841, 844.  
19 Appropriative rights that have attached to waters abandoned in the past are not infringed  
20 by such acts, for such rights are always subject to the right of the importer to sell or  
21 otherwise dispose of the surplus water before abandoning it. If after the termination of the  
22 agreement the water is again abandoned, it comes thereupon under the appropriative  
23 rights theretofore established.

24           WSID is entitled to recapture all Drainage Water within the Bethany Drain because it is foreign  
25 water comprised of shallow groundwater from WSID landowners or contractually obtained  
26 municipal drainage<sup>1</sup>.

27           **3. The Fact that the Bethany Drain Travels Outside the WSID Boundaries Has**  
28 **no Bearing on WSID’s right to Recapture.** The Drainage Water within the Bethany Drain

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<sup>1</sup> Ms. Mrowka testified in her deposition that water in the Bethany Drain came from “districts outside the districts boundary” (Testimony of Kathy Mrowka at p. 75 lines 11 – 12). While historically WSID accepted drainage from other districts, currently no drainage from other districts flow into the Bethany Drain. UFM ¶20.

1 remains under WSID's control at all times while it is in the drain, regardless of whether the  
2 Bethany Drain is inside or outside of the WSID boundaries. The location of travel or recapture of  
3 the Drainage Water is not a relevant factor in determining WSID's right to recapture that water.  
4 *City of Los Angeles v. City of Glendale, supra* at pp. 76 – 78 and *City of Los Angeles v. City of*  
5 *San Fernando, supra* at pp. 264- 264 each confirms that so long as WSID retains the physical  
6 ability to recapture the imported water after it is commingled with native water, it is not  
7 obligated to recapture the water before the water physically leaves the boundaries of the entity.  
8 *See Slater, 1-7 California Water Law and Policy* (2015) §7.07.

9 This exact issue was conclusively decided in *Stevens v. Oakdale Irrig. Dist. supra*:

10 There are cases where even after a foreign flow has left the land and control of its  
11 producer, he has been permitted to recapture it from the second stream, when it has been  
12 shown that such recapture was a part of his original project, and the water was discharged  
13 into the stream, not simply to be rid of it, but for the express purpose of retaking at a  
14 lower point. Where the recapture occurs before the foreign flow passes from the lands  
15 and control of the producer there can be no doubt of his right to make temporary use of a  
16 channel traversing his property, so long as normal conditions on the stream are not  
17 injuriously affected thereby. In such case the stream bed merely serves the purpose of the  
18 drainage ditch which might be constructed were no natural channel available. (See  
19 *Hoffman v. Stone*, 7 Cal. 46; *Butte Canal & Ditch Co. v. Vaughn*, 11 Cal. 143 [70 Am.  
20 Dec. 769]; *E. C. Horst Co. v. New Blue Point Min. Co.*, supra, at p. 636; 26 Cal. Jur., p.  
21 143 et seq.; *Kinney on Irrigation and Water Rights*, 2d ed., vol. 2, p. 1457 et seq.; *Wiel*  
22 *on Mingling of Waters, supra*.)

23 at pp. 352 – 353.

## 24 V. CONCLUSION

25 WSID respectfully requests that the Hearing Officer grant Summary Judgment in favor of WSID  
26 and against the Prosecution Team, as the Prosecution Team cannot establish that WSID's  
27 diversions were or threaten to be unauthorized.

28 Date: January 25, 2015

HERUM\CRABTREE\SUNTAG  
A California Professional Corporation

By: 

JEANNE M. ZOLEZZI  
Attorneys for  
The West Side Irrigation District

1 JEANNE M. ZOLEZZI, SBN: 121282  
 2 KARNA E. HARRIGFELD, SBN:  
 3 JANELLE KRATTIGER, SBN:  
 4 HERUM\CRABTREE\SUNTAG  
 5 *A California Professional Corporation*  
 6 5757 Pacific Ave., Suite 222  
 7 Stockton, CA 95207  
 8 Telephone: (209) 472-7700

9 Attorneys for  
 10 THE WEST SIDE IRRIGATION DISTRICT

11 **BEFORE THE STATE WATER RESOURCES CONTROL BOARD**

12 ENFORCEMENT ACTION ENFO1949 )  
 13 DRAFT CEASE AND DESIST ORDER ) **WSID’S SEPARATE STATEMENT OF**  
 14 REGARDING UNAUTHORIZED ) **UNDISPUTED MATERIAL FACTS IN**  
 15 DIVERSIONS RO THREATENED ) **SUPPORT OF ITS MOTION FOR**  
 16 UNAUTHORIZED DIVERSIONS OF ) **SUMMARY JUDGMENT**  
 17 WATER FROM OLD RIVER IN SAN )  
 18 JOAQUIN COUNTY ) Filed concurrently with WSID’s Motion for  
 19 ) Summary Judgment, or Alternatively, for  
 20 ) Summary Adjudication.  
 21 )  
 22 ) Hearing Date: March 21, 2015  
 23 ) Hearing Officer: Frances Spivy-Weber

24 The West Side Irrigation District (“**WSID**”) respectfully submits this separate Statement  
 25 of Undisputed Material Facts, together with references to supporting evidence, in support of its  
 26 Motion for Summary Judgment, or Alternatively for Summary Adjudication (“**Motion**”).

<b>UNDISPUTED MATERIAL FACT</b>	<b>SUPPORTING EVIDENCE</b>
1. The District holds water right License 1381 (“ <b>License</b> ”), originally issued on September 29, 1933 and amended on August 19, 2010.	EXHIBIT WSID0099, Declaration of Karna Harrigfeld at ¶3.
2. License 1381 has a priority date of April 17, 1916, and authorizes the direct diversion of 82.5 cubic-feet per section (“ <b>cfs</b> ”) from Old River in San Joaquin County from (1) about April 1 to October 31 of each year for irrigation and (2) from April 1 to October 31 of each year for municipal, domestic and industrial uses.	EXHIBIT WSID0005, License 1381, as amended. EXHIBIT WSID0060, Declaration of Rick Martinez at ¶4. EXHIBIT WSID0099, Declaration of Karna Harrigfeld at ¶4.

1	3. In 1929 the Department of Public Works confirmed that the water diverted by	EXHIBIT WSID0099, Declaration of Karna
2	WSID pursuant to its license is “largely	Harrigfeld at ¶5.
3	return flow from diversions farther	EXHIBIT WSID 0006, Department of Public
4	upstream and water reaching the San	Works Bulletin No. 21-B at p. 157.
5	Joaquin Delta from Sacramento River	
6	through Georgiana Slough and other inter-	
7	delta channels.	
8	4. The License was issued in 1933	EXHIBIT WSID0099, Declaration of Karna
9	documenting the maximum amount of	Harrigfeld at ¶6.
10	water found to have been put to beneficial	EXHIBIT WSI0007, October 9, 1933 letter
11	use in the years 1930, 1931 and 1932, as	from State of California Department of
12	documented in the Sacramento San	Public Works.
13	Joaquin Water Surveyor’s records.	EXHIBIT WSID0008, 1931 Sacramento-San
14		Joaquin Water Supervisor’s Report. Table
15		39.
16	5. Water is diverted by WSID through an	EXHIBIT WSID0060, Declaration of Rick
17	intake canal about 1.5 miles long, as	Martinez at ¶5.
18	depicted on the map attached as	
19	<b>EXHIBIT A.</b>	
20	6. WSID’s point of diversion under its	EXHIBIT WSID0010, DWR Delta ATLAS
21	License is located on Old River, within	at p. 10.
22	the legal delta.	EXHIBIT BBID384 at pp. 18, 20.
23	7. There is always water in the channels of	EXHIBIT BBID384 at p. 23.
24	the Delta because they are below sea	
25	level.	
26	8. At any given time, the Delta holds	EXHIBIT BBID384 at pp. 5, 38.
27	approximately 1.2 million acre feet of	
28	water.	
	9. Water flows into the Delta with the tide	EXHIBIT BBID384 at pp. 3-5, 20, 22.
	from the West as well as from the east	
	side tributary streams.	
	10. Inflow from the tributary streams, once	EXHIBIT BBID384 at pp. 5, 38-40.
	having entered the Delta, will reside in the	
	Delta for up to several months during dry	
	periods.	
	11. Water moves slowly in WSID’s flat	EXHIBIT WSID0060, Declaration of Rick
	gradient channel which is affected by	Martinez at ¶6.
	tides of about 4 feet; the channel is from 4	EXHIBIT WSID0099, Declaration of Karna
	feet to 8 feet deep depending on tides; and	Harrigfeld at ¶8.
	the quality of Old River water diverted by	EXHIBIT WSID0009, July 18, 1985
	WSID in the intake channel is poor,	Inspection Report
	running from 800 to 1000 total dissolved	
	solids.	
	12. In 1931 the majority of the water at the	EXHIBIT BBID384 at pp. 11-13, 83-87, 91-
	WSID point of diversion during the	95.

1	irrigation season was from the Sacramento River and had entered the Delta in the	
2	prior three months.	
3	13. In 2015, the majority of the water at the	EXHIBIT BBID384 at pp. 15-16, 47-49.
4	WSID point of diversion during the	
5	irrigation season was from the Sacramento	
6	River and had entered the Delta in the	
7	prior three months.	
8	14. The State Water Project and Central	EXHIBIT BBID384 at pp. 9, 24-26.
9	Valley Project, constructed after 1931,	
10	have altered flow patterns in the Delta.	
11	15. By storing water in the winter and spring	EXHIBIT BBID384 at pp. 14, 24-26.
12	and releasing it through the Delta in the	
13	summer, the Projects reduce the	
14	percentage of Sacramento River water that	
15	reaches the Delta in the winter and spring	
16	months and increase the percentage of	
17	Sacramento River water that reaches the	
18	Delta in the summer and fall months.	
19	16. Water is always available at WSID's	EXHIBIT BBID384 at p. 4.
20	diversion point during the irrigation	
21	season because of the nature of residence	
22	time and tidal influence in the Delta.	
23	17. The Bethany Drain collects irrigation	EXHIBIT WSID0060, Declaration of Rick
24	return water through tile drains from	Martinez at ¶12.
25	landowners within WSID, shallow	
26	groundwater from tile drains from	
27	landowners within WSID, and municipal	
28	drainage from lands within the City of	
	Tracy and discharges that return water	
	directly into WSID's intake channel.	
	18. The majority of the flow in the Bethany	EXHIBIT WSID0099, Declaration of Karna
	Drain is derived from tile drain discharges	E. Harrigfeld at pp. 3-4.
	installed widely in the district in the late	
	1950's to drain lands of shallow	
	groundwater standing less than 4 feet	
	from the surface, to allow irrigation.	
	19. Municipal discharges into the Bethany	EXHIBIT WSID0060, Declaration of Rick
	Drain are made by various contracts with	Martinez at ¶13.
	the City of Tracy and other landowners	
	within the City.	
	20. There are no sources of water into the	EXHIBIT WSID0060, Declaration of Rick
	Bethany Drain from outside of the WSID.	Martinez at ¶14.
	21. The Bethany Drain is owned by WSID,	EXHIBIT WSID0060, Declaration of Rick
	and WSID maintains control over the	Martinez at ¶15.
	Bethany Drain from its origination within	

1	the district boundaries along its entire	
2	course until it discharges into the intake	
3	canal.	
4	22. WSID does not intend to abandon water	EXHIBIT WSID0060, Declaration of Rick
5	discharge from the Bethany Drain into the	Martinez at ¶16.
6	intake channel; rather the intention of the	
7	discharge is to enable WSID to pump the	
8	water at its diversion pumps.	
9	23. Because the District's intake channel is	EXHIBIT WSID0060, Declaration of Rick
10	open to Old River, drain water from the	Martinez at ¶17.
11	Bethany Drain may commingle with Old	
12	River water in the intake channel.	
13	24. Discharges of water from the Bethany	EXHIBIT WSID0060, Declaration of Rick
14	Drain into the intake channel are	Martinez at ¶18.
15	measured by a weir which is four feet in	
16	height concrete wall installed	
17	approximately 340 feet upstream of the	
18	Bethany Drain outfall into the intake	
19	channel.	
20	25. At no time after May 1, 2015 did WSID's	EXHIBIT WSID0060, Declaration of Rick
21	diversions from the intake channel exceed	Martinez at ¶19.
22	the inflow into the intake channel from the	
23	Bethany Drain.	
24	26. WSID staff did not observe any change in	EXHIBIT WSID0060, Declaration of Rick
25	flow in Old River at any time in 2014	Martinez at ¶19.
26	when diversions of City of Tracy	
27	wastewater were being made under	
28	contract.	
29	27. The City of Tracy ("City") operates a	EXHIBIT WSID0060, Declaration of Rick
30	wastewater treatment plant and discharges	Martinez at ¶23.
31	treated wastewater effluent to Old River, a	EXHIBIT WSID0019, Order R5-2012-0115
32	water of the United States, pursuant to	(NPDES Permit CA0079154) issued by the
33	Order R5-2012-0115 (NPDES Permit	Central Valley Regional Water Quality
34	CA0079154) issued by the Central Valley	Control Board.
35	Regional Water Quality Control Board.	EXHIBIT WR-1, Draft Cease and Desist
36		Order at ¶2.
37	28. The City discharges approximately 9	EXHIBIT WSID0060, Declaration of Rick
38	million gallons per day ("mgd"), which is	Martinez at ¶24.
39	equivalent to 14 cfs, on a substantially	EXHIBIT WR-1, Draft Cease and Desist
40	continuous basis into Old River upstream	Order at ¶2.
41	from the District's point of diversion	
42	under License 1381.	
43	29. The City obtains water supplies from	EXHIBIT WSID0060, Declaration of Rick
44	three sources: (1) South San Joaquin	Martinez at ¶25.
45	Irrigation District water delivered from	EXHIBIT WR-1, Draft Cease and Desist

1	the Stanislaus River (typically the majority of the City's supply); (2) United States Bureau of Reclamation water delivered from the Delta-Mendota Canal; and (3) local groundwater wells (typically the smallest portion of the City's supply).	Order at ¶3.
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5	30. The City's treated wastewater discharges are foreign in source and/or foreign in time to the Old River flow.	EXHIBIT WSID0060, Declaration of Rick Martinez at ¶25. EXHIBIT WSID0099, Declaration of Karna E. Harrigfeld at ¶22. EXHIBIT WR-1, Draft Cease and Desist Order at ¶3.
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8	31. On May 6, 2014, the City Council adopted Resolution 2014-165, authorizing the City to enter into a Wastewater Revocable License Agreement with the District ("2014 Agreement") for the sale of treated wastewater from the City's wastewater treatment plant.	EXHIBIT WSID0060, Declaration of Rick Martinez at ¶27. EXHIBIT WR-1, Draft Cease and Desist Order at ¶8. EXHIBIT WSID 0022, Resolution 2015-165
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13	32. The 2014 Agreement provides that the District may divert all of the City's wastewater discharges from April 1, 2014 through October 31, 2014, estimated to be approximately 14 cfs, equivalent to 27.8 acre-feet per day, on a continuous basis.	EXHIBIT WSID0060, Declaration of Rick Martinez at ¶27. EXHIBIT WR-1, Draft Cease and Desist Order at ¶8. EXHIBIT WSID0023, 2014 Agreement
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16	33. On March 3, 2015, the Tracy City Council adopted Resolution 2015-033, authorizing the City to enter into a Wastewater Revocable License Agreement with the District ("2015 Agreement") for the sale of treated wastewater from the City's wastewater treatment plant.	EXHIBIT WSID0060, Declaration of Rick Martinez at ¶28. EXHIBIT WR-1, Draft Cease and Desist Order at ¶14. EXHIBIT WSID0025, 2015 Agreement
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21	34. The 2015 Agreement provides that the District may divert all of the City's wastewater discharges from April 1, 2015 through October 31, 2015, estimated to be approximately 14 cfs, equivalent to 27.8 acre-feet per day, on a continuous basis.	EXHIBIT WSID0060, Declaration of Rick Martinez at ¶28. EXHIBIT WR-1, Draft Cease and Desist Order at ¶14. EXHIBIT WSID0025, 2015 Agreement
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23		
24	35. On May 1, 2015, the State Water Board issued a "Notice of Unavailability of Water an Immediate Curtailment for Those Diverting Water in the Sacramento River Watershed and Sacramento-San Joaquin Delta with a Post-1914 Appropriative Right" ("May 21 Unavailability Notice").	EXHIBIT WR-1, Draft Cease and Desist Order at ¶17. EXHIBIT WR-34, May 1, 2015 Unavailability Notice
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1	36. The May 1 Unavailability Notice notified all holders of post-1914 appropriative water rights within the Sacramento River and Sacramento-San Joaquin Delta watershed of the lack of availability of water to serve their post-1914 water rights, with some minor exceptions for non-consumptive diversions.	EXHIBIT WR-1, Draft Cease and Desist Order at ¶17. EXHIBIT WR-34, May 1, 2015 Unavailability Notice
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6	37. The May 1 Unavailability Notice was intended to apply to License 1381.	EXHIBIT WR-1, Draft Cease and Desist Order at ¶17. EXHIBIT WR-34, 35, May 1, 2015 Unavailability Notice
7		
8	38. The May 1 Unavailability Notice was based upon a spreadsheet methodology that compared supply and demand on a watershed wide basis.	EXHIBIT WSID0152 at p. 33 ¶¶2-4, p. 45, ¶¶1-8.
9		
10		
11	39. This spreadsheet methodology did not consider water available to WSID at its point of diversion, the tidal effect in the Delta, or the fact that tributary flow from prior months was still present in the Delta and available for WSID to divert due to Delta hydrodynamics and residence time.	EXHIBIT WSID0152 at p. 32 ¶¶23-25, p. 33 ¶¶1-25, p. 34 ¶¶1-3, p. 46 ¶¶10-24, p. 91 ¶¶6-16.
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15	40. The District did not provide the City with a written Commencement Notice or purchase wastewater from the City under the 2015 Agreement.	EXHIBIT WSID0060, Declaration of Rick Martinez at ¶29.
16		
17	41. The Prosecution Team did not take any measurements of flow at the WSID point of diversion, or downstream in either direction.	EXHIBIT WSID0152 at p. 92 ¶¶1-22, p. 93 ¶¶15-20.
18		
19		
20	42. Instead the Prosecution Team simply assumed that a diversion of 14 cfs by WSID resulted in a corresponding reduction in flow.	EXHIBIT WSID0152 at p. 92 ¶¶1-22, p. 93 ¶¶15-20.
21		
22	43. By contrast, WSID's expert conducted a scientific study using scientifically accepted Delta modeling tools to determine that no measurable decrease in flow or water levels results from WSID's diversion of 8 to 14 cfs.	EXHIBIT WSID0123 at ¶12. EXHIBIT WSID0125 at p. 2.
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26	44. Section (b) of Water Code Section 1211 was added to State Water Code in 2001 at the request of the State Water Board, which asserted: "Where there is no threat to instream flows or third party water-	EXHIBIT WSID 0027, September 6, 2001 Enrolled Bill Report at p. 557.
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right holders, requiring [State Water Board] review is an unnecessary burden on wastewater reclamation.”	
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Date: January 25, 2015

HERUM\CRABTREE\SUNTAG  
A California Professional Corporation



By: \_\_\_\_\_  
JEANNE M. ZOLEZZI  
Attorneys for  
The West Side Irrigation District

1 JEANNE M. ZOLEZZI, SBN: 121282  
KARNA E. HARRIGFELD, SBN: 162824  
2 JANELLE KRATTIGER, SBN: 299076  
HERUM\CRABTREE\SUNTAG  
3 *A California Professional Corporation*  
5757 Pacific Ave., Suite 222  
4 Stockton, CA 95207  
Telephone: (209) 472-7700  
5

6 Attorneys for  
THE WEST SIDE IRRIGATION DISTRICT  
7

8 **BEFORE THE STATE WATER RESOURCES CONTROL BOARD**

9  
10 ENFORCEMENT ACTION ENFO1949 )  
DRAFT CEASE AND DESIST ORDER ) MOTION TO DISMISS BASED UPON  
11 REGARDING UNAUTHORIZED ) VIOLATION OF DUE PROCESS  
DIVERSIONS OR THREATENED )  
12 UNAUTHORIZED DIVERSIONS OF ) Hearing Date: March 21, 2015  
WATER FROM OLD RIVER IN SAN )  
13 JOAQUIN COUNTY )  
Hearing Officer: Frances Spivy-Weber  
14 )  
\_\_\_\_\_ )

15 West Side Irrigation District (“**WSID**”) hereby moves to dismiss Enforcement Action  
16 ENF01949 (“**Enforcement Action**”) against it because WSID’s due process rights will be  
17 violated if Hearing Officer Frances Spivy-Weber (“**Hearing Officer**”) is allowed to serve, as  
18 multiple members of the Prosecution Team have served as advisors to the State Water Resources  
19 Control Board (“**Water Board**”) for over two years, of which the Hearing Officer is a member,  
20 both prior to and during the pendency of the Enforcement Action.

21 Due Process rights are violated when the Water Board fails to maintain a separation of  
22 functions between its Prosecution Team and its Hearing Team and Water Board members. The  
23 Prosecution Team members in the Enforcement Action, and a Prosecution Team supervisor, have  
24 been the “go-to” staff members to explain to the Water Board and other Executive Office  
25 members how curtailments were imposed in 2014 and 2015, and how the determination of water  
26 availability supporting those curtailments was made. Those same staff members are now  
27 prosecuting WSID based upon that same water determination methodology, which WSID will be  
28 challenging. What chance does WSID have of convincing the Hearing Team and the Hearing

1 Officer that the methodology being argued by Kathy Mrowka and Michael George is flawed,  
2 when Kathy Mrowka, Michael George, and Ms. Mrowka’s supervisor, John O’Hagan, have been  
3 convincing the Water Board for over two years that the same methodology is accurate and  
4 legally supportable? The answer is very little chance, and that fact violates WSID’s Due Process  
5 rights.

6 **I. FACTUAL BACKGROUND**

7 **A. PROSECUTION TEAM**

8 The designated Prosecution Team in the Enforcement Action includes Kathy Mrowka  
9 and Michael George, who have both submitted testimony in support of the Prosecution Team.  
10 EXHIBITS WR-7, WR-21, September 1, 2015 *Notice of Public Hearing and Pre-Hearing*  
11 *Conference*. John O’Hagan directly supervises Ms. Mrowka at her position at the Water Board.  
12 EXHIBIT WR-7 at p. 23, lines 3-5, p. 25, lines 11-12, p. 162, lines 12-13.

13 Prior to initiating the Draft Cease and Desist Order that is the basis for the Enforcement  
14 Action (“**CDO**”), Ms. Mrowka’s boss, Mr. O’Hagan, submitted a lengthy declaration to a  
15 Superior Court supporting the State Board’s opposition to a temporary restraining order sought  
16 by WSID. In this declaration Mr. O’Hagan testified that WSID was violating its water permit  
17 and insufficient water was available for WSID to exercise its water right permit. His opinion is  
18 based on essentially the same arguments, methodology and evidence that Ms. Mrowka now  
19 relies on in this Enforcement Action to reach the same conclusion as her boss.

20 **B. SEPARATION OF FUNCTIONS**

21 The September 1, 2015 *Notice of Public Hearing and Pre-Hearing Conference* issued by  
22 the Water Board discussed the separation of functions being imposed in the Enforcement  
23 Proceeding:

24 The prosecution team is separated from the hearing team and is prohibited from having ex  
25 parte communications with any members of the State Water Board and any members of the  
26 hearing team regarding substantive issues and controversial procedural issues within the  
27 scope of this proceeding. This separation of functions also applies to the supervisors of each  
28 team. (Gov. Code, §§ 11430.10-11430.80.)

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1 **C. ENFORCEMENT ACTION AND KEY ISSUES**

2 While the CDO is dated July 16, 2015, the Prosecution Team has acknowledged that  
3 Enforcement Action against WSID began on March 22, 2015. EXHIBITS WR-7 at p. 4 and WR-  
4 21 at p. 1. The key issue in Phase I of the Enforcement Action is water availability. December  
5 16, 2015 *Procedural Ruling: Request to Consolidate The West Side Irrigation District and*  
6 *Byron-Bethany Irrigation District hearings and Motion for Continuance of the West Side*  
7 *Irrigation District hearing.*

8 **D. ADVISORY ROLE**

9 Ms. Mrowka, her supervisor John O’Hagan, and Mr. George, have played a continuing  
10 and extensive advisory role to the Water Board regarding water availability methodology and  
11 enforcement since the beginning of 2014, and continuing without interruption through at least  
12 August of 2015. In 2015 alone this advisory role included, but was not limited to, the following  
13 twelve events:

- 14 1. Mr. O’Hagan advised the Water Board on water availability on January 6, 2015.  
15 EXHIBIT BBID305, 306.
- 16 2. Mr. O’Hagan advised the Water Board on water availability on January 20, 2015.  
17 EXHIBIT BBID307, 308.
- 18 3. Mr. O’Hagan advised the Water Board on water availability on February 3, 2015.  
19 EXHIBIT BBID309, 310.
- 20 4. Ms. Mrowka advised the Water Board on water availability on February 17, 2015.  
21 EXHIBIT BBID311, 312.
- 22 5. Mr. O’Hagan advised the Water Board on water availability on April 21, 2015.  
23 EXHIBIT BBID315, 316.
- 24 6. Mr. O’Hagan advised the Water Board on water availability on May 5, 2015.  
25 EXHIBIT BBID317, 318.
- 26 7. Ms. Mrowka advised the Water Board on water availability on May 19, 2015.  
27 EXHIBIT BBID319, 320.
- 28 8. Mr. George advised the Water Board on water availability on June 2, 2015.

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EXHIBIT BBID325, 326.

9. Ms. Mrowka advised the Water Board on water availability on June 16, 2015, including an update on curtailment specifically against WSID. EXHIBIT BBID305, 306.

10. Ms. Mrowka advised the Water Board on water availability on July 7, 2015. EXHIBIT BBID329, 330.

11. Ms. Mrowka advised the Water Board on water availability on July 21, 2015. EXHIBIT BBID331, 332.

12. Mr. O’Hagan, Mr. George and Ms. Mrowka advised the Water Board on water availability and enforcement on August 4, 2015. EXHIBIT BBID333, 334.

These advisory actions occurred at meetings and workshops of the Water Board, and involved not only presentations to, but extensive discussion with Water Board Members, explaining exactly how water availability is determined, how curtailments are imposed, how enforcement is conducted. The discussion includes questions by Water Board Members, and response and explanations by Ms. Mrowka, Mr. George and Mr. O’Hagan. Through these interactions human nature and common sense inform us that the Water Board built trust in the methodology utilized by the Prosecution Team and their supervisors to determine water availability.

This interaction between Prosecution Team staff and their supervisors is not limited to Water Board meetings. There have been additional *ex parte* communications through electronic messages before and after the Enforcement Action was initiated. For example:

1. An April 2, 2015 email from John O’Hagan to Water Board Member Dorene D’Adamo and Tom Howard responding to questions regarding water available and explaining the Prosecution Team’s calculations of and methodology for water availability determinations.

2. A May 19, 2015 email from Kathy Mrowka to Water Board Executive Staff and Water Board Member Dorene D’Adamo providing an update on modeling runs regarding water availability.

3. A June 17, 2015 email from Kathy Mrowka to Water Board Executive Staff and Water Board Member Felicia Marcus providing detailed information on water availability and

1 curtailments.

2 4. A June 25, 2015 email from Caren Trgovich of Water Board Executive Staff,  
3 asking John O’Hagan to response to Water Board Member Dorene D’Adamo requesting Mr.  
4 O’Hagan to explain to Board Member D’Adamo how enforcement actions are taken.

5 5. A May 1, 2015 email from John O’Hagan to Water Board Executive Staff  
6 explaining the Prosecution Team’s rationale for curtailment.

7 **II. LEGAL STANDARD**

8 The Government Code mandates very specific procedures when agencies conduct  
9 adjudicative proceedings. Specifically, the Code requires “[t]he adjudicative function...be  
10 separated from the investigative, prosecutorial, and advocacy functions within the agency...”  
11 [the] “presiding officer is subject to disqualification for bias, prejudice, or interest...” [and,  
12 lastly,] “[e]x parte communications shall be restricted...” Cal. Gov. Code § 11425.10(a)(4)-(5),  
13 and (8). The California Supreme Court recently opined on the potential for Due Process  
14 violations in Enforcement Proceedings. *Morongo Band of Mission Indians v. State Water*  
15 *Resources Control Board* (2009) 45 Cal.4th 731. Generally, the court summarized:

16 [i]n construing the constitutional due process right to an impartial tribunal, we take a  
17 more practical and less pessimistic view of human nature... In the absence of financial or  
18 other personal interest, and when rules mandating an agency's internal separation of  
19 functions [in a given adjudicative proceeding] and prohibiting ex parte communications  
are observed, the presumption of impartiality can be overcome only by specific evidence  
demonstrating actual bias or a particular combination of circumstances creating an  
unacceptable risk of bias.” (Id. at p. 741.)

20 The rule articulated by the Supreme Court is clear and straightforward: if an agency  
21 scrupulously follows rules compelling an internal separation of prosecutorial and hearing teams  
22 then the agency enjoys a meaningful presumption of impartiality. However, when the “rules  
23 mandating an agency’s internal separation of functions” is not scrupulously followed, then no  
24 presumption of impartiality is present, and under the *Morongo* court’s rationale, allowing an  
25 attorney to act as both an advisor and prosecutor is the type of “specific evidence demonstrating  
26 actual bias” or “a combination of circumstances creating an unacceptable risk of bias” and  
27 produces a Due Process violation.

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1 administrative agencies have some discretion in structuring adjudicative proceedings,

2 [T]hey may not disregard certain basic precepts. One fairness principle directs that in  
3 adjudicative matters, one adversary should not be permitted to bend the ear of the  
4 ultimate decision maker or the decision maker's advisers in private. Another directs that  
the functions of prosecution and adjudication be kept separate, carried out by distinct  
individuals.

5 *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40  
6 Cal.4th 1, 5.

7 To comply with these requirements and satisfy Constitutional protections, the Water  
8 Board's policy and practice, as identified in its Hearing Notice, is intended to "wall off" and  
9 separate prosecutorial and advisory staff functions, assigning some employees to an enforcement  
10 team and others to a hearing team:

11 The prosecution team is separated from the hearing team and is prohibited from having  
12 ex parte communications with any members of the State Water Board and any members  
13 of the hearing team regarding substantive issues and controversial procedural issues  
within the scope of this proceeding. This separation of functions also applies to the  
supervisors of each team.

14 Hearing Notice at p. 3. In this instance the Water Board staff did not follow its own policy and  
15 procedure.

16 *Morongo* does not constitute controlling legal precedent over this dispute for two reasons.  
17 First, it involved the issue of whether, in a Water Board administrative proceeding, constitutional  
18 due process is violated when Water Board prosecution staff simultaneously serves as an advisor  
19 to the Water Board in an unrelated matter. Here, members of the Prosecution Team, and their  
20 supervisor, have and continue to serve as advisors to Water Board members and Hearing Team  
21 members and supervisors **in the same matter**, and on the very key issues involved in that matter.

22 The *Morongo* court concluded that because an agency attorney's concurrent advisory role  
23 was in an *unrelated matter*, there was no threat of actual bias on the part of the decision maker;  
24 thus the circumstances did not reach a constitutionally intolerable situation. The *Morongo* court  
25 emphasized the fact that there was no evidence that the staff attorney had ever acted in both  
26 advisory and prosecutorial capacities in that case or any other single adjudicative proceeding.  
27 Thus *Morongo* teaches us that Board staff would be found to have improper undue influence  
28 over the Water Board or a Hearing Officer if: (1) they acted in both advisory and prosecutorial

1 capacities in the same case, or in a single adjudicative proceeding; and/or (2) the Board  
2 regarded the staff member as a sole or primary advisor.

3 This fully describes the situation here. In this Enforcement Action we have precisely this  
4 Constitutional infirmity, members of the Prosecution Team Michael George and Kathy Mrowka,  
5 and Ms. Mrowka's supervisor John O'Hagan, have acted in both advisory and prosecutorial  
6 capacities in the same Enforcement Action, in a single adjudicative proceeding both prior to  
7 March of 2015 through the present day. Under the rule and factors identified in *Morongo*, the  
8 Water Board staff conduct produces an impermissible risk of bias resulting in violation of  
9 WSID's Due Process rights. *Morongo* adopted a presumption of non-bias in favor of agencies  
10 that scrupulously segregate prosecutorial and hearing personnel and functions. That did not  
11 happen here making the presumption unavailable to the State Board.

12 **B. WATER BOARD PROSECUTION TEAM STAFF AND THEIR**  
13 **SUPERVISORS HAVE ACTED AS ADVISORS TO THE WATER BOARD**  
14 **EXTENSIVELY AND REPEATEDLY DURING THE PENDENCY OF THE**  
15 **INVESTIGATION AND ENFORCEMENT AGAINST WSID.**

16 The Water Board concedes that the duty to impose internal separation of functions to  
17 insure Due Process was not followed when preparing and issuing the WSID CDO. Rather:

18 You indicated that the dividing line would be when the decision is made to issue a  
19 complaint or issue a draft cease and desist order. And I think you're well aware of it -- so  
20 there are no implications drawn by folks outside of the room -- that is when you indicated  
21 that the teams separated. In fact, that separation occurs before then. Nobody who has  
22 been involved in the investigation can serve in an advisory capacity to the Board. And  
23 that is not just the Board members, obviously. That is the staff advising the Board.

24 Exhibit BBID334 at p. 16, lines 6-16. Statement of Water Board Chief Counsel Michael Lauffer,  
25 August 4, 2015 Water Board Meeting.

26 According to Michael George, Water Board staff began investigating WSID in March of  
27 2015 with a "field visit" to the WSID service area. EXHIBIT WR-21 at p. 2. The investigation  
28 continued uninterrupted, intending to target WSID as a "test case" for Water Board enforcement.  
EXHIBIT WR-21 at pp. 2-3. Additional site investigations occurred in May, 2015, and targeted  
correspondence from the Water Board was sent to WSID through May and June of 2015.  
EXHIBIT WR-21 at pp. 3-4. As Ms. Mrowka stated in her testimony: "the Division began

1 investigating WSID’s potential threatened unauthorized [diversions] following a citizen  
2 complaint received in March, 2015.” EXHIBIT WR-7 at p. 4.

3 At the August 4, 2015 Water Board meeting, John O’Hagan stated:

4 **[A]s an item comes up, there is an ethical wall that is built, that there is no**  
5 **communication between the advisory team and the prosecution team in any cases**  
6 **because of the rules of law. And we want to make sure that integrity is maintained.**  
7 **So we know very well who is on each side of the wall and we ensure the**  
8 **communication is not met in between those when a case comes before hearing.**

9 EXHIBIT BBID334 at p. 14 lines 3-10 (bolding added). However, Mr. O’Hagan’s subsequent  
10 actions, combined with Ms. Mrowka’s actions, severely undercut and impeach his statements, as  
11 evidenced by the email communications between him and members of the Water Board  
12 Executive Office, and between Ms. Mrowka and members of the Water Board Executive Office.  
13 In this Enforcement Action, the required impenetrable “ethical wall” was neither built nor  
14 observed.

15 As a consequence of failing to separate the prosecution and adjudicative functions, after  
16 applying the statutory factors, it is inescapable that the staff action disables the agency from  
17 conducting an enforcement hearing consistent with Due Process principles and accordingly the  
18 risk of bias in the absence of Due Process safeguards is too high. The Hearing Officer, as part of  
19 the Water Board, has listened to and been advised by members of the Prosecution Team and their  
20 supervisor about how the Division of Water Rights determined water availability in 2015,  
21 listened to the members of the Prosecution Team explain its methodology, and how that  
22 methodology was changed and “improved.” There is no question that human nature responds to  
23 such continued and extensive contact with a bias in favor of the prosecution team, bolsters the  
24 team’s credibility over contested issues and fact and law, and enhances an inherent trust that  
25 these actions are genuine, valid, and legal. A post-hoc cure for collapsing these competing  
26 functions is not available or effective. The staff action infected the process in a manner that  
27 cannot be fixed in this context. The damage to WSID’s ability to obtain a fair hearing from the  
28 Water Board with this Prosecution Team is irreparable, and the protections flowing from the Due  
29 Process Clause are cut off.

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**V. CONCLUSION**

WSID respectfully requests that the Hearing Officer grant its motion to dismiss in light of the violations of WSID's due process.

Date: January 25, 2016

HERUM\CRABTREE\SUNTAG  
A California Professional Corporation



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

JEANNE M. ZOLEZZI  
Attorneys for  
The West Side Irrigation District

1 JEANNE M. ZOLEZZI, SBN: 121282  
KARNA E. HARRIGFELD, SBN: 162824  
2 JANELLE KRATTIGER, SBN: 299076  
HERUM\CRABTREE\SUNTAG  
3 *A California Professional Corporation*  
5757 Pacific Ave., Suite 222  
4 Stockton, CA 95207  
Telephone: (209) 472-7700  
5

6 Attorneys for THE WEST SIDE IRRIGATION DISTRICT  
7

8 **BEFORE THE STATE WATER RESOURCES CONTROL BOARD**

9  
10 ENFORCEMENT ACTION ENFO1949 )  
DRAFT CEASE AND DESIST ORDER )  
11 REGARDING UNAUTHORIZED )  
DIVERSIONS OR THREATENED )  
12 UNAUTHORIZED DIVERSIONS OF )  
WATER FROM OLD RIVER IN SAN )  
13 JOAQUIN COUNTY )

**MOTION TO DISMISS –  
METHOD OF DETERMINING WATER  
AVAILABILITY IS AN UNLAWFUL  
UNDERGROUND REGULATION**

Hearing Date: March 21, 2015

Hearing Officer: Frances Spivy-Weber  
14

15 **INTRODUCTION**

16 The West Side Irrigation District (“**WSID**”) hereby moves to dismiss Enforcement  
17 Action ENF01949 (“**Enforcement Action**”) against it because the State Water Resources  
18 Control Board’s (“**Water Board**”) method for determining water availability constitutes an  
19 unlawful underground regulation in violation of the Administrative Procedures Act (“**APA**”).  
20 The basis for the Enforcement Action is the Water Board’s assertion that there was insufficient  
21 water available to support diversion under WSID’s License 1381. In prosecuting the  
22 Enforcement Action, the Water Board’s Prosecution Team relies on the water availability  
23 analysis set forth in the Draft Cease and Desist Order. (WR-1, ¶35.) The methodology used by  
24 the Water Board to determining water availability was not adopted in accordance with the  
25 procedures required by the APA. Therefore, the Water Board’s actions violate the APA,  
26 constitute an unlawful underground regulation and, cannot be used as a basis for the  
27 Enforcement Action.  
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**ARGUMENT**

WSID hereby incorporates the legal arguments and assertions set forth in the Motion to Dismiss filed concurrently by Byron-Bethany Irrigation District in this proceeding regarding ENFORCEMENT ACTION ENF01951 – ADMINISTRATIVE CIVIL LIABILITY COMPLAINT REGARDING UNAUTHORIZED DIVERSION OF WATER FROM THE INTAKE CHANNEL TO THE BANKS PUMPING PLANT (FORMERLY ITALIAN SLOUGH) IN CONTRA COSTA COUNTY MOTION TO DISMISS ADMINISTRATIVE CIVIL LIABILITY PROCEEDING – STATE WATER RESOURCES CONTROL BOARD’S METHOD OF DETERMINING WATER AVAILABILITY IS AN UNLAWFUL UNDERGROUND REGULATION

**V. CONCLUSION**

WSID respectfully requests that the Hearing Officer grant its motion to dismiss in light of the invalidity of the Water Board’s methodology for determining water availability, which provides the sole basis for the Enforcement Action.

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