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11
12 **BEFORE THE STATE OF CALIFORNIA**
13 **STATE WATER RESOURCES CONTROL BOARD**
14

15 In the Matter of Draft Cease and Desist) **MEMORANDUM OF POINTS AND**
Order No. 2009-00XX DWR Enforcement) **AUTHORITIES IN SUPPORT OF**
16 Action No. 74, Draft Cease and Desist) **PETITION FOR RECONSIDERATION OF**
Order Gallo Vineyards, Inc.) **ORDER WR 2010-0026-EXEC**
17

18 The San Luis & Delta-Mendota Water Authority (Water Authority) and State Water
19 Contractors (SWC), acting for and on behalf of their member agencies, respectfully request the
20 State Water Resources Control Board (State Water Board) reconsider Order WR 2010-0026-EXEC,
21 dated July 2, 2010 (Order Approving Settlement), which approves a settlement between Gallo
22 Vineyards, Inc. and the State Water Board's Division of Water Rights Prosecution Team
23 (Settlement). The State Water Board must reconsider the Order Approving Settlement and find that
24 it and the Settlement are improperly void of necessary findings, conclusions, and citations to
25 substantial evidence in support thereof.

26 **I. LEGAL STANDARD FOR THE PETITION**

27 No later than thirty (30) days after adoption by the board of a decision or order, any person
28 interested in any application, permit or license affected by the decision or order may petition the

1 board for reconsideration of the matter upon any of the following causes:

2 (a) Irregularity in the proceedings, or any ruling, or abuse of
3 discretion, by which the person was prevented from having a fair
4 hearing;

5 (b) The decision or order is not supported by substantial evidence;

6 (c) There is relevant evidence which, in the exercise of reasonable
7 diligence, could not have been produced;

8 (d) Error in law.

9 (Cal. Code Regs. tit. 23, § 768.)

10 **II. BACKGROUND**

11 The State Water Board, on or about December 14, 2009, issued a draft Cease and Desist
12 Order (Draft CDO) against Gallo, through which the State Water Board asserted Gallo was
13 diverting water from Old River and using it on County Assessor Parcels 191-050-05, 191-060-02,
14 191-060-03, 191-060-05 and 191-060-06, without a valid water right. In the Draft CDO, the State
15 Water Board explained:

16 The San Joaquin County Assessor's Parcel maps and aerial photographs both show
17 that parcels 191-050-05, 191-060-02 and 191-060-03 have no continuity to a surface
18 stream. This lack of continuity indicates that a riparian basis of right typically does
19 not exist. Gallo's parcels 191-060-05 and 191-060-06 do have continuity with Old
20 River, so a riparian claim is likely appropriate when natural flow is available.

21 (Draft CDO, p. 2.) The State Water Board concluded:

22 The Division reviewed the submitted information and accepts the claim of riparian
23 rights for parcels 191-060-05 and 191-060-06. However, the Division finds that the
24 information provided for parcels 191-050-05, 191-060-02 and 191-060-03, even after
25 consideration of Mr. Lester Claussen's declaration of his knowledge of the historic
26 use of water on the property, is insufficient to support any retention of riparian rights
27 after severance of or the initiation and then continued beneficial use of water under a
28 pre-1914 claim of right.

(Draft CDO, p. 2.) Gallo disputed the assertions, and filed a request for hearing. The Water
Authority, SWC, and Modesto Irrigation District (MID) intervened in the matter. However, before
the State Water Board held a hearing, the State Water Board and Gallo settled their dispute.

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1 On March 10, 2010, MID, on its own behalf and on behalf of the Water Authority and SWC,
2 requested information from State Water Board regarding the basis for settlement, but received
3 nothing. To date, no information that the State Water Board developed or obtained in the course of
4 its investigations has been made available to MID, the Water Authority, or SWC.¹ Although Senior
5 Staff Counsel for the State Water Board, Ms. Dana Heinrich, responded to the request, her response
6 simply indicated that another Senior Staff Counsel was handling the matter. And, that other Senior
7 Staff Counsel did not provide any documentation.²

8 The State Water Board's executive director approved the settlement on July 2, 2010.
9 Neither the Settlement nor the Order Approving Settlement explains why the State Water Board no
10 longer contests the riparian rights associated with parcels 191-060-02 and 191-060-03. And, there
11 is nothing in the Settlement or Order Approving Settlement to suggest substantial evidence supports
12 either document.

13 **III. THE SETTLEMENT AND ORDER APPROVING SETTLEMENT DO NOT CITE**
14 **EVIDENCE TO SUPPORT RIPARIAN WATER RIGHTS.**

15 The Settlement and Order Approving Settlement are not supported by substantial evidence,
16 and therefore are subject to reconsideration pursuant to California Code of Regulations, title 23,
17 section 768 (b).³ The State Water Board's executive director approved the Settlement, which states
18 that the State Water Board no longer contests Gallo's assertion that parcels 191-060-02 and 191-
19 060-03 maintain riparian water rights. However, neither the Settlement nor the Order Approving
20 Settlement explains why the State Water Board maintains that position or cites evidence to support
21 that position. The Settlement Agreement merely states in conclusory fashion: "Gallo has submitted
22 written evidence to the Division regarding Gallo's claim of a riparian basis of water right to serve
23

24 ¹ See www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/docs/maydeltacdo_midletter31010.pdf.

25 ² On July 30, 2010, a representative of the Water Authority met with a representative of Gallo to discuss the evidentiary
26 basis for the Settlement Agreement. While Gallo allowed the Water Authority to review some documents, time was not
27 sufficient to allow the Water Authority and the SWC to fully consider the information. Also, the information provided
28 by Gallo might not reflect the full extent of information before the State Water Board at the time it entered into the
Settlement Agreement and issued the Order Approving Settlement.

³ For similar reasons, the Order Approving Settlement also violates California Code of Regulations, title 23, section 768
(a) and (d). The lack of reasoning and support reflects the fact that the Order Approving Settlement resulted from an
irregular proceeding, or from errors in law.

1 San Joaquin County Assessor Parcel Nos. 191-060-02 and 191-060-03...” (See Settlement
2 Agreement, p. 2.)⁴ It also summarily provides: “Gallo appears to be exercising valid riparian rights
3 with regard to the riparian parcels or portions of parcels, and therefore the Division Prosecution
4 Team does not contest Gallo’s use of Old River water on these riparian parcels or portions of
5 parcels.” See *Id.* The Order Approving Settlement provided no additional information regarding
6 the evidence upon which the riparian rights belonging to parcels 191-060-02 and 191-060-03 were
7 based.

8 Gallo concedes that parcels 191-060-02 and 191-060-03 are not contiguous to a water
9 course. And, as the State Water Board is well aware, non-contiguous parcels, such as 191-060-02
10 and 191-060-03, can maintain riparian rights only if the landowner(s) can demonstrate the non-
11 contiguous parcels were once part of a larger, contiguous parcel, and at the time the non-contiguous
12 parcels were severed from the water course, the grantor intended to maintain riparian rights in the
13 non-contiguous parcels. (See *Hudson v. Dailey* (1909), 156 Cal.617, 624-25 (holding conveyance
14 of a portion of a riparian tract which was not contiguous to the water course did not carry riparian
15 rights “unless it was so provided in the conveyance, or unless the circumstances were such as to
16 show that the parties so intended, or were such as to raise an estoppel”); *Murphy Slough Association*
17 *v. Avila* (1972), 27 Cal.App.3d 649, 657 (holding that the over-riding principle in determining the
18 consequence of a conveyance of land insofar as riparian rights are concerned is the intention of the
19 parties.) In this case, neither the Settlement nor the Order Approving Settlement present findings
20 or cite evidence that demonstrates Gallo met its burden of demonstrating that an intent existed at the
21 time parcels 191-060-02 and 191-060-02 were severed from the watercourse to maintain riparian
22 rights.

23 **IV. CONCLUSION**

24 For the above stated reasons, the Water Authority and SWC respectfully request that the
25 State Water Board disapprove the Order Approving Settlement and remand this matter to the

26 _____
27 ⁴ A copy of the Settlement Agreement is posted on the State Water Board’s website relating to the Cease and Desist
28 Order Hearing: http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/gallo_vineyards/. Records
on the State Water Board’s website relating to this matter may be received into evidence pursuant to Cal. Code Regs.,
tit. 23, § 648.3.

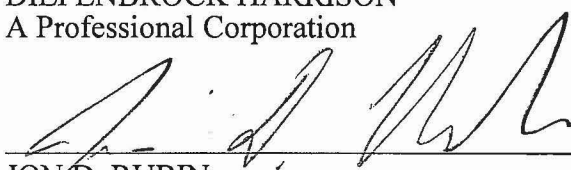
1 executive director. The State Water Board should order the executive director to re-consider the
2 Settlement and include in any order findings of fact and conclusions that are supported by citations
3 to evidence.

4 Dated: August 2, 2010

Respectfully submitted,

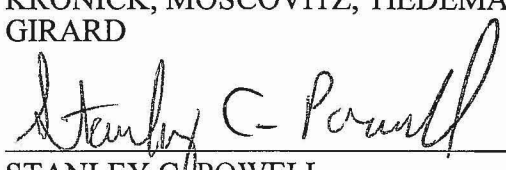
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1 **PROOF OF SERVICE**

2 I, Tracy Gomez, declare as follows:

3 I am over 18 years of age and not a party to the within action; my business address is 400
4 Capitol Mall, Suite 1800, Sacramento, California, I am employed in Sacramento County, California.

5 On August 2, 2010, I served a copy of the foregoing document entitled:

6 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION**
7 **FOR RECONSIDERATION OF ORDER WR 2010-0026-EXEC**

8 on the following interested parties in the above-referenced case number to the following:

9 See attached Service List

10 **BY MAIL**

11 By following ordinary business practice, placing a true copy thereof enclosed in a sealed envelope,
12 for collection and mailing with the United States Postal Service where it would be deposited for
13 first class delivery, postage fully prepaid, in the United States Postal Service that same day in the
14 ordinary course of business as indicated above.

15 **ELECTRONIC MAIL**

16 I caused a true and correct scanned image (.PDF file) copy to be transmitted via the electronic mail
17 transfer system in place at Diepenbrock Harrison, originating from the undersigned at 400 Capitol
18 Mall, Suite 1800, Sacramento, California, to the e-mail address(es) indicated above.”

19 **BY FACSIMILE** at _____ a.m./p.m. to the fax number(s) listed above.

20 The facsimile machine I used complied with California Rules of Court, rule 2003 and no error was
21 reported by the machine. Pursuant to California Rules of Court, rule 2006(d), I caused the
22 machine to print a transmission record of the transmission, a copy of which is attached to this
23 declaration.

24 A true and correct copy was also forwarded by regular U.S. Mail by following ordinary business
25 practice, placing a true copy thereof enclosed in a sealed envelope, for collection and mailing with the United
26 States Postal Service where it would be deposited for first-class delivery, postage fully prepaid, in the United
27 States Postal Service that same day in the ordinary course of business.

28 **BY OVERNIGHT DELIVERY**

Federal Express Golden State Overnight

Depositing copies of the above documents in a box or other facility regularly maintained by
Federal Express, or Golden State Overnight, in an envelope or package designated by Federal
Express or Golden State Overnight with delivery fees paid or provided for.

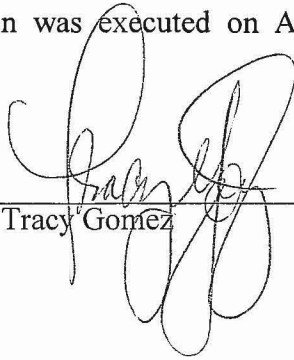
PERSONAL SERVICE

via process server

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I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on August 2, 2010 at Sacramento, California.



Tracy Gomez

**SERVICE LIST
(VIA ELECTRONIC MAIL)**

<p>1</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p>	<p>GALLO VINEYARDS INC. c/o Robert E. Donlan Ellison, Schneider & Harris 2015 H Street, Suite 400 Sacramento, CA 95816 red@eslawfirm.com</p>	<p>DIVISION OF WATER RIGHTS PROSECUTION TEAM c/o David Rose State Water Resources Control Board 1001 I Street Sacramento, CA 95814 DRose@waterboards.ca.gov</p>
<p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p>	<p>MARK AND VALLA DUNKEL c/o John Herrick, Esq. 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 jherrlaw@aol.com</p> <p>c/o Dean Ruiz, Esq. Harris, Perisho & Ruiz 3439 Brookside Road, Suite 210 Stockton, CA 95219 dean@hpllp.com</p>	<p>YONG PAK AND SUN YOUNG c/o John Herrick, Esq. 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 jherrlaw@aol.com</p> <p>c/o Dean Ruiz, Esq. Harris, Perisho & Ruiz 3439 Brookside Road, Suite 210 Stockton, CA 95219 dean@hpllp.com</p>
<p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p>	<p>RUDY MUSSI, TONI MUSSI AND LORY C. MUSSI INVESTMENT LP c/o John Herrick, Esq. 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 jherrlaw@aol.com</p> <p>c/o Dean Ruiz, Esq. Harris, Perisho & Ruiz 3439 Brookside Road, Suite 210 Stockton, CA 95219 dean@hpllp.com</p>	<p>SOUTH DELTA WATER AGENCY c/o John Herrick Attorney at Law 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 jherrlaw@aol.com</p> <p>c/o Dean Ruiz, Esq. Harris, Perisho & Ruiz 3439 Brookside Road, Suite 210 Stockton, CA 95219 dean@hpllp.com</p>
<p>18</p> <p>19</p> <p>20</p>	<p>CENTRAL DELTA WATER AGENCY c/o Dean Ruiz, Esq. Harris, Perisho & Ruiz 3439 Brookside Road, Suite 210 Stockton, CA 95219 dean@hpllp.com</p>	<p>STATE WATER CONTRACTORS c/o Stanley C. Powell Kronick, Moskovitz, Tiedemann & Girard 400 Capitol Mall, 27th Floor Sacramento, CA 95814 spowell@kmtg.com</p>
<p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>SAN JOAQUIN COUNTY AND THE SAN JOAQUIN COUNTY FLOOD CONTROL & WATER CONSERVATION DISTRICT c/o DeeAnne M. Gillick Neumiller & Beardslee P.O. Box 20 Stockton, CA 95201-3020 dgillick@neumiller.com tshepard@neumiller.com</p>	<p>MODESTO IRRIGATION DISTRICT c/o Tim O'Laughlin Ken Petruzzelli O'Laughlin & Paris LLP 117 Meyers Street, Suite 110 P.O. Box 9259 Chico, CA 95927-9259 towater@olaughlinparis.com kpetruzzelli@olaughlinparis.com</p>

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<p>CALIFORNIA DEPARTMENT OF WATER RESOURCES c/o Erick Soderlund 1416 Ninth Street, Room 1118 Sacramento, CA 95814 <u>esoderlu@water.ca.gov</u></p>	<p>SAN JOAQUIN FARM BUREAU c/o Bruce Blodgett 3290 North Ad Art Road Stockton, CA 95215-2296 <u>director@sifb.org</u></p>
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