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6 San Joaquin County Flood Control and Water
Conservation District
7

8 BEFORE THE CALIFORNIA
9 STATE WATER RESOURCES CONTROL BOARD

10 Public Hearings to Determine Whether to Adopt)
11 Cease and Desist Orders against:)
12 Yong Pak and Sun Young (Pak/Young), Duck)
Slough in San Joaquin County;)
13 Rudy Mussi, Toni Mussi and Lori C. Mussi)
14 Investment LP (Mussi et al.), Middle River in)
San Joaquin County)
15

**CLOSING BRIEF OF COUNTY OF SAN
JOAQUIN AND SAN JOAQUIN COUNTY
FLOOD CONTROL AND WATER
CONSERVATION DISTRICT**

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1 The County of San Joaquin and the San Joaquin County Flood Control and Water
2 Conservation District (hereinafter collectively “County”) hereby submit the Closing Brief in the
3 above referenced matters before the State Water Resources Control Board (“State Water Board” or
4 “Board”).

5 **I. INTRODUCTION**

6 The pending cease and desist hearing by the State Water Board are entirely improper to
7 determine the nature, extent and validity of the pre-1914 or riparian water right held by Mussi et al.
8 (“Mussi”) and Pak/Young. The State Board lacks the authority to issue a cease and desist orders
9 regarding riparian or pre-1914 water rights or to determine the nature, extent or validity of those
10 rights. Furthermore, Mussi and Pak/Young presented substantial evidence to support the existence
11 of riparian and pre-1914 water rights to serve their properties which are located along historic Duck
12 Slough.

13 The draft cease and desist orders (“CDOs”) issued on December 14, 2009 to Mussi and
14 Pak/Young allege that the “[Board] is authorized under California *Water Code* section 1831 to issue
15 a Cease and Desist Order requiring [the specified diverter] to cease and desist its unauthorized
16 diversion, collection and use of water in violation of section 1052 of the *Water Code*.” (See Exhibit
17 PT-7 at p. 1 for Pak/Young and Exhibit PT-7 at page 1 for Mussi.)

18 Mussi and Pak/Young claim riparian water rights. (See Mussi Exhibit 7 and Pak/Young
19 Exhibit 7.) The Board does not have the authority to determine the validity, nature or extent of
20 riparian water rights and a cease and desist order proceeding is not proper regarding riparian or pre-
21 1914 water rights.

22 The Board’s inquiry into and any determination regarding the parties riparian water rights is
23 improper and in excess of the Board’s authority. The validity, nature and extent of pre-1914 and
24 riparian water rights are clearly and widely recognized as outside of the jurisdiction of the Board.
25 Any determination regarding these water rights in this proceeding by the Board would be improper.
26 Determinations regarding the nature and extent of pre-1914 and riparian water rights are properly
27 determined by a court of law, not the Board. Any dispute regarding the use of water based on a pre-
28

1 1914 or riparian water right must be properly determined in a court of law pursuant to a quiet title or
2 adjudication proceeding.

3 The CDO is issued pursuant to *Water Code* sections 1831 and 1052¹. These sections do not
4 grant the Board the authority to issue a cease and desist order against claimed pre-1914 water rights
5 and riparian water rights. The Board's authority to issue cease and desist orders is limited to that
6 authority given to the Board by statute. The power of the Board to issue cease and desist orders does
7 not include the authority for the Board to make determinations regarding the validity of the parties
8 riparian or pre-1914 water rights. It's jurisdictional. The Board simply does not have any
9 jurisdiction or authority to determine pre-1914 and riparian water rights. Specifically, the Board's
10 power pursuant to cease and desist orders authorized by *Water Code* 1831 and 1052 simply does not
11 extend to pre-1914 or riparian water rights—the Board's jurisdiction is limited to statutory, post-
12 1914, appropriations. If the Board can determine whether or not these parties' riparian or pre-1914
13 water rights exist in this cease and desist proceeding, then the Board is determining the validity and
14 nature of these riparian and pre-1914 water rights, which is outside of the Board's statutory authority
15 and jurisdiction.

16 While the Board does have some measure of enforcement authority over riparian and pre-
17 1914 water rights, that authority is limited to actions involving waste, unreasonable use or diversion,
18 lack of a beneficial use, or protection of public trust resources (§§ 275, 1831(d)(3)) and such
19 enforcement authority is not necessarily exercised in the form of a CDO. Additionally, the Board
20 may act upon a petition for a “statutory adjudication” of any stream system or act as a referee or
21 investigate matters referred to it by a court of competent jurisdiction (§§ 2000, 2075, 2500), which
22 may involve examination of riparian and pre-1914 rights as part of the process. However, the
23 Board's permitting authority is limited and “does not involve adjudication of such rights” and even in
24 a statutory adjudication or court referral, its determinations are tentative in nature and must be filed
25 with a court for final determination. (*United States v. State Water Resources Control Board* (1986)

26
27 ¹ Unless otherwise specified, all future code section references will be to the California
28 Water Code.

1 182 Cal.App.3d 82, 104.) This proceeding is not pursuant to a statutory adjudication or pending
2 matter in a court of competent jurisdiction, such as a quiet title action. Thus, the Board has no
3 authority to issue a CDO against Mussi and Pak/Young regarding their claimed riparian and pre-
4 1914 water rights.

5 II. ARGUMENT

6 A. THE BOARD DISCLAIMS AUTHORITY TO DETERMINE THE VALIDITY OF 7 RIPARIAN AND PRE-1914 WATER RIGHTS.

8 The Board has varying degrees of administrative authority over California's three different
9 types of surface water rights. The authority of the Board with respect to these matters is derived
10 from specific statutory authority--that is, the Board may only exercise those powers vested in it by
11 statute. It is well recognized and undisputed that the Board has full authority to authorize, regulate
12 and determine the validity of post-1914 appropriative rights pursuant to the Water Commission Act
13 and subsequent legislation now codified in the California Water Code. However, the Board's permit
14 authority extends only to post-1914 appropriative water rights, and not to riparian and pre-1914
15 water rights: "The Board has jurisdiction over water flowing in a known and definite channel,
16 whether surface or subterranean, *to the extent it has not been previously appropriated or is not being*
17 *used upon riparian lands (Water Code §§ 1200 and 1201).*" (SWRCB Decision 1595, p. 8, emphasis
18 added) The Board's authority over riparian and pre-1914 water rights is far more limited, and
19 *specifically* does not extend to determining the validity of those rights.

20 The County recognizes that the Board has some limited regulatory authority over riparian
21 and pre-1914 water rights in those certain circumstances where the Board has been given specific
22 statutory authority, such as where the exercise of these water rights results in waste, unreasonable
23 diversion or use, unreasonable method of diversion, or impacts to the public trust pursuant to *Water*
24 *Code* section 275. In the present matter, however, the Board lacks authority to issue cease and desist
25 orders against a claimed riparian or pre-1914 water right holder, because to do so would necessarily
26 require the Board to make a factual determination regarding the validity of the parties riparian and/or
27 pre-1914 water rights. Such action exceeds the Board's authority.

1 The Board's own literature states that the Board "does not have the authority to determine the
2 validity of vested rights other than appropriative rights initiated December 19, 1914 or later." Exhibit
3 A to County's Motion for Official Notice at p.7-8. The Board's literature also indicates that it will
4 not investigate complaints involving pre-1914 or riparian surface water rights due to its lack of
5 authority over those rights:

6
7 Because we do not have permitting authority over groundwater or pre-1914
8 and riparian surface water rights or authority to determine the relative priority of
9 these classes of use, we will not investigate complaints that involve diversions by
10 these water users unless the complaint involves waste or unreasonable diversion or
11 use or unreasonable method of diversion or impacts to the public trust. Disputes
12 between these water users must be resolved by a court. The court may refer the
13 matter to the State Water Board for findings of fact or of law.

14 (*SWRCB, Frequently Asked Questions: Will the Division of Water Rights accept complaints*
15 *involving matters other than illegal diversions of water or permit or license condition violations?*
16 Exhibit B to County's Motion for Official Notice at p. 8.

17 Federal Judge Oliver Wanger acknowledged the Board's own denial of authority over pre-
18 1914 and riparian water rights in the recent decision *Natural Res. Def. Council v. Kempthorne*
19 (2009) 621 F. Supp.2d 954, stating: "The SWRCB disclaims authority to directly adjudicate or
20 otherwise resolve disputes over the validity, nature, or extent of pre-1914 water rights. *See* SWRCB,
21 *Information Pertaining to Water Rights in California-1990* at p. 8." (*Id.*, p. 963, fn. omitted.)

22 Numerous Board water rights decisions and orders indicate that the Board has no power to
23 adjudicate riparian and pre-1914 water rights and that the Board has no jurisdiction to validate
24 riparian rights or pre-1914 appropriative rights-such determinations are within the sole purview of a
25 court of law. (See e.g., SWRCB Decision 1379, at p. 8 ["The Board does not have jurisdiction to
26 adjudicate or determine the validity of individual vested water rights-this is a judicial function"];
27 Also see, SWRCB Decisions D-934, at p. 3; D-1282, at p. 7; D-1290, at p. 32; and D-1324 at p. 3.)

28 Despite its own repeated admissions, and despite judicial acknowledgment of those
admissions, the Board now attempts to vest itself with this authority by pursuing the issuance of a
CDO against Mussi and Pak/Young regarding their riparian and pre-1914 water rights. This it

1 cannot do. Such determinations regarding the parties riparian and pre-1914 water rights are in
2 excess of the Board's limited jurisdiction over such rights.

3 **B. THE BOARD DOES NOT HAVE AUTHORITY TO ISSUE CEASE AND DESIST**
4 **ORDERS AGAINST CLAIMED PRE-1914 AND RIPARIAN WATER**

5 **1. The Board's Authority to Issue Cease and Desist Orders Is Limited to Specific**
6 **Statutory Situations Not Present in the Current Proceeding.**

7 The Board does not have blanket authority to issue a cease and desist order for merely any
8 matter in which the Board may otherwise have jurisdiction or be involved. The Board's authority to
9 issue cease and desist orders is limited to the specific situations authorized and enumerated in *Water*
10 *Code* section 1831.² The authority of the Board is limited to the specific situations enumerated in
11 statute and the cease and desist authority is specifically limited by statute to apply to only the
12 substantive legal issues in which the Board otherwise has authority. This does not include
13 determining the validity or extent of riparian or pre-1914 water rights.

14 Subsection (e) of *Water Code* section 1831 specifically provides that “This article shall not
15 authorize the board to regulate in any manner, the diversion or use of water not otherwise subject to
16 regulation of the board under this part.”³ This “part” referenced in subsection (e) refers to Part 2 of

17 ² Section 1831 reads in full as follows:

- 18 (a) When the board determines that any person is violating, or threatening to violate, any
19 requirement described in subdivision (d), the board may issue an order to that person
20 to cease and desist from that violation.
- 21 (b) The cease and desist order shall require that person to comply forthwith or in
22 accordance with a time schedule set by the board.
- 23 (c) The board may issue a cease and desist order only after notice and an opportunity for
24 hearing pursuant to Section 1834.
- 25 (d) The board may issue a cease and desist order in response to a violation or threatened
26 violation of any of the following:
- 27 (1) The prohibition set forth in Section 1052 against the unauthorized diversion or
28 use of water subject to this division.
 - (2) Any term or condition of a permit, license, certification, or registration issued
under this division.
 - (3) Any decision or order of the board issued under this part, Section 275, or
Article 7 (commencing with Section 13550) of Chapter 7 of Division 7, in
which decision or order the person to whom the cease and desist order will be
issued, or a predecessor in interest to that person, was named as a party
directly affected by the decision or order.
- (e) This article shall not authorize the board to regulate in any manner, the diversion or
use of water not otherwise subject to regulation of the board under this part.

³ For purposes of understanding the references within the Water Code the Water Code is
developed based on the following hierarchy: Division, Part, Chapter, Article, Section.

1 Division 2 of the Water Code regarding "Appropriation of Water," which includes sections 1200
2 through 1851 and this "article" is Article 2 of Chapter 12 of Part 2 of Division 2 of the Water Code,
3 regarding cease and desist orders, which includes sections 1831, 1832, 1834, 1835 and 1836.
4 Pursuant to subsection (e) of section 1831 enforcement by the Board in the form of cease and desist
5 orders is specifically restricted to the diversion and use of water regulated as specified in Part 2 of
6 Division 2 of the Water Code which relates to the appropriation of water --- permits and licenses
7 issued by the State Board pursuant to post-1914 statutory appropriations. A complete review of
8 every section in Part 2 of Division 2 does not reference any authority by the Board to regulate
9 claimed riparian or pre-1914 water rights. Therefore, because there is no statutory authority vested
10 in the Board to issue cease and desist orders with respect to riparian or pre-1914 water pursuant to
11 Part 2 of Division 2, the Board lacks the authority to do so as a matter of law, and issuance of the
12 draft CDOs exceeds the Board's jurisdiction.

13 In response to the writ of prohibition filed by these parties, the Attorney General argued on
14 behalf of the Board that in 2002 the authority of the Board was expanded thus any prior Board
15 Decisions "disclaiming" authority over riparian and pre-1914 water rights are not relevant. See p.
16 13, Fn. 7. of SWRCB Opposition to Petition for Writ of Prohibition. However, the 2002 legislation,
17 AB 2261 (2001-2002 Reg. Sess.) clearly indicates that those 2002 legislative changes did not expand
18 the powers of the Board. The purpose of subsection (e) of section 1831 was to make that clear.
19 Subsection (e) added on the Senate Floor on August 12, 2002 and that was the only amendment
20 made to the bill on that date. See Exhibit C to County's Motion for Official Notice also located at
21 http://leginfo.ca.gov/pub/01-02/bill/asm/ab_2251-2300/ab_2267_bill_20020812_amended_sen.html.
22 The Senate Rules Committee Bill Analyses dated August 19, 2002, clearly states that the 2002
23 amendments to the cease and desist order procedures do not expand the powers of the Board stating:

24 Senate Floor Amendments of 8/12/02 clarify that by streamlining the
25 administrative process for issuing cease and desist orders the bill does not also
26 expand the powers of the SWRCB.

27 Exhibit D to County's Motion for Official Notice located at http://leginfo.ca.gov/pub/01-02/bill/asm/ab_2251-2300/ab_2267_cfa_20020820_153745_sen_floor.html.

1 The Board's powers prior to 2002 did not include the ability to determine riparian or pre-
2 1914 water rights and the Board did not then gain such powers over such riparian and pre-1914
3 water rights. In the pending proceeding the Board alleges its authority to issue a cease and desist
4 order is based upon a violation of section 1052. Section 1052 was not amended by AB 2261 in
5 2002. See Exhibit E to County's Motion for Official Notice also located at
6 http://leginfo.ca.gov/pub/01-02/bill/asm/ab_2251-2300/ab_2267_bill_20020918_chaptered.html. In
7 2002, the Board's authority to regulate was specifically not expanded. As will be discussed below,
8 in cease and desist proceedings the Board continues to lack authority over riparian and pre-1914
9 water rights, except in limited situations not at issue in the pending proceeding. Making any
10 determinations regarding the existence or validity of pre-1914 and riparian water rights in these
11 cease and desist proceedings is beyond the Board's authority and not proper.

12
13 **2. Riparian and Pre-1914 Water Rights Are Not Subject to Division 2 of the Water**
14 **Code Referenced in Section 1052 for Issuance of a Cease and Desist Order**
15 **Pursuant to Section 1831.**

16 The CDOs specify that the cease and desist orders are issued pursuant to section 1831 due to
17 a prohibition set forth in section 1052. (Exhibit PT-7 at p. 1 for Pak/Young and Exhibit PT-7 at page
18 1 for Mussi.) Subsection (d)(1) of section 1831 provides that the Board may issue a cease and desist
19 order for a violation or threatened violation of "[t]he prohibition set forth in Section 1052 against the
20 unauthorized diversion or use of water subject to this division." Subsection (a) of Section 1052
21 provides that "The diversion or use of water subject to this division other than as authorized in this
22 division is a *trespass*." (Emphasis added.) The "division" referenced in this subsection (a) of
23 Section 1052 is Division 2 of the *Water Code* which includes sections 1000 through section 5976.
24 Therefore, a "trespass" for purposes of section 1052 is limited to situations that fail to comply with
25 the requirements of sections 1000 through 5976. Riparian and pre-1914 rights are not regulated by
26 the Board by any provision in sections 1000 through 5976. Therefore, there can be no "trespass" by
27 riparian and pre-1914 water right holders and thus no grounds for the Board to issue the pending
28 CDOs against the parties claimed riparian and pre-1914 water rights.

1 In order for the Board to have authority to issue a cease and desist order, there must be a
2 violation of something that is subject to regulation by the Board, as authorized by sections 1000
3 through 5976. The diversion of water by Mussi and Pak/Young claiming a diversion of riparian and
4 pre-1914 water rights is not subject to regulation by Division 2 of the Water Code. Therefore, the
5 use and diversion of water under a claim of riparian and/or pre-1914 water rights cannot be the
6 subject of a cease and desist order issued pursuant to section 1831 due to an alleged violation of
7 section 1052. Such action by the Board is in excess of its authority and jurisdiction.

8
9 **a. The Board Itself States Riparian and Pre-1914 Water Rights Are Not
Subject to Division 2's Statutory Appropriation Procedures.**

10 The Board itself has stated that riparian and appropriative rights perfected prior to December
11 19, 1914 do not have to comply with the statutory appropriation procedures set forth in Division 2 of
12 the Water Code. For example, SWRCB Water Rights Order, WR 2001-22, states, at page 14: "With
13 the exception of riparian rights or appropriative rights perfected prior to December 19, 1914, all
14 water use is conditioned upon compliance with the statutory appropriation procedures set forth in
15 division 2 of the *Water Code* commencing with section 1000. (Wat. Code., §§ 1225, 1201.)"

16
17 **b. *Shirokow* Confirms That Division 2's Statutory Appropriation
Procedures Do Not Apply to Riparian and Pre-1914 Water Rights.**

18 In *People v. Shirokow* (1980) 26 Cal.3d 301, the California Supreme Court provided an
19 extensive review of California water law including the ability of the Board to regulate certain water
20 rights. This case specifically addressed the circumstances under which the Board could obtain an
21 injunction pursuant to *Water Code* section 1052. In so doing, *Shirokow* evaluated the language of
22 section 1052 and what types of water diversions or use are subject to regulation by section 1052 as
23 specified in Division 2. *Shirokow* then evaluated Division 2 of the Water Code itself, and
24 specifically section 1201. Section 1201 provides that the authority of the Board over appropriation
25 of water subject to the Water Code provisions is as follows:

26 All water flowing in any natural channel, excepting so far as it has been or is
27 being applied to useful and beneficial purposes upon, or in so far as it is or may be
28 reasonably needed for useful and beneficial purposes upon lands riparian thereto, or

1 otherwise appropriated, is hereby declared to be public water of the State and subject
2 to appropriation in accordance with the provisions of this code.

3 In determining the application of section 1201 of the *Water Code*, *Shirokow* interpreted
4 section 1201 to apply as broadly as possible “in accordance with the code to the fullest extent
5 consistent with its terms.” (*People v. Shirokow, supra*, 26 Cal.3d 301, 309.) The Court concluded
6 that the application of Division 2 of the Water Code is as follows:

7 *The rights not subject to the statutory appropriation procedures* are narrowly
8 circumscribed by the exception clause of the statute and *include only riparian rights*
9 *and those which have been otherwise appropriated prior to December 19, 1914*, the
10 effective date of the statute. [Fn. omitted.] Any use other than those excepted is, in
11 our view, conditioned upon compliance with the appropriation procedures of division
12 2.

13 (*Ibid.*, emphasis added; see also *Modesto Properties Co. v. State Water Rights Bd.* (1960) 179
14 Cal.App.2d 856, 860 [appropriation includes any taking of water for other than riparian or overlying
15 uses]; *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 925 [term “appropriation” means
16 any taking of water for other than riparian or overlying uses].)

17 *Shirokow* clearly indicates that riparian and pre-1914 water rights are not subject to
18 compliance with the statutory appropriation procedures in Division 2 of the Water Code. As
19 discussed above, in order to constitute a “trespass” pursuant to section 1052, which provides
20 authority for the Board to issue a cease and desist order, there must be a violation of one or more
21 requirements in Division 2. Contrary to the Board’s suggestion in the instant draft CDO, both the
22 Board and *Shirokow* acknowledge that riparian and pre-1914 water right holders cannot be found to
23 have violated any of Division 2’s statutory appropriation procedures because those procedures
24 simply do not apply to the exercise of such rights.

25 *Shirokow* acknowledges, however, that the Board may indeed have authority over riparian
26 water rights pursuant to other provisions in Division 2 of the Water Code; however, none of those
27 provisions are applicable to the instant CDO proceedings. At footnote 11 in *Shirokow*, the Court
28 discusses the authority of the Board over riparian rights including “prospective” riparian rights,
stating:

1 Section 1201 by its terms exempts from water subject to appropriation
2 riparian rights which are being applied to, or *may be* reasonably needed for, useful
3 and beneficial purposes. The status of prospective riparian rights is discussed in our
4 recent opinion in *In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d
5 339 []. The opinion holds the board possesses broad authority in statutory
6 adjudications pursuant to section 2500 et seq. to make determinations as to the scope,
7 nature, and priority of future riparian rights, in order to foster the most reasonable and
8 beneficial use of the scarce water resources of the state.

9
10 (*People v. Shirokow, supra*, 26 Cal.3d 301, 309, fn. 11.) As pointed out in this footnote, the Board
11 does have some jurisdiction over riparian water rights but the jurisdiction referenced by the Court is
12 limited to “statutory adjudications” which is provided for in Division 2 of the Water Code at section
13 2500 et seq. However, that authority is expressly limited to a statutory adjudication proceeding, and
14 the Board's role in such proceedings is limited to the facts and circumstances of that proceeding. A
15 statutory adjudication is not in any manner implicated in the instant CDO proceedings.

16 (Incidentally, the reference in *Shirokow* to the Board's authority to limit riparian water rights in the
17 event of a statutory adjudication pertained to then-unexercised riparian water rights, not existing
18 riparian rights then in use, and where the Board's authority to limit those future riparian rights was
19 necessary in order to foster “reasonable and beneficial use” of water within the state.)

20 *Shirokow* also discussed section 1050 in its analysis of the Board’s authority over various
21 water rights pursuant to Division 2 of the Water Code. Section 1050 states that “[Division 2 of the
22 Water Code] is to be in furtherance of the policy contained in Section 2 of Article X of the
23 California Constitution” As a result, Division 2 of the Water Code may be deemed to be in
24 furtherance of the policy contained in Section 2 of Article X of the California Constitution which
25 applies to all water rights including riparian and pre-1914 water rights and which prohibits the
26 “waste or unreasonable use or unreasonable method of use of water.” *Shirokow* reviewed the
27 policies expressed in the Water Code as consistent with the expression in the 1928 amendment
28 including sections 100, 102, 104 and 105, which are within Division 1 of the Code. The Court stated
that “[t]hese declarations of policy together with the comprehensive regulatory scheme set forth in
section 1200 et seq. demonstrate a legislative intent to vest in the board expansive powers to
safeguard the scarce resources of the state.” (*People v. Shirokow, supra*, 26 Cal.3d 301, 309.)

1 However, despite the Court's finding of legislative intent to vest the Board with “expansive powers,”
2 the Court still concluded that riparian and pre-1914 water rights are not water rights which are
3 conditioned upon compliance with the statutory appropriation procedures of Division 2. (*Ibid.*)
4 *Shirokow* clearly determined that the scope of Division 2 of the Water Code, and particularly any
5 enforcement pursuant to section 1052 of the *Water Code*, is limited to water rights that are subject to
6 Division 2’s statutory appropriations, which do not include riparian and pre-1914 water rights.

7 **c. The Parties Claim Riparian and Pre-1914 Water Rights Which Are Not Subject**
8 **to Division 2 of the Water Code and Which Are Not Subject to the Board’s**
9 **Authority to Issue Cease and Desist Orders.**

10 Mussi and Pak/Young claim riparian water rights. (See Mussi Exhibit 7 and Pak/Young
11 Exhibit 7.) The Prosecution Team was presented with evidence prior to the hearing in which the
12 parties asserted these riparian water rights. (See Mussi PT-1 at p. 2, and Pak/Young PT-1 at p. 3.)
13 The parties submitted evidence at the hearings of their claimed riparian and pre-1914 water rights.
14 The Board lacks the authority to make a factual determination of the existence or non-existence of
15 these rights as a matter of law. Such determinations are outside of the authority of section 1052 and
16 are thus not proper bases for cease and desist orders issued pursuant to section 1831. Such a
17 determination of the extent, nature and validity of claimed riparian and pre-1914 water rights must
18 be determined by a court of law. As the Board's own literature posted on its website states, riparian,
19 prescriptive or pre-1914 water rights “can only be confirmed by the courts.” Exhibit B to County’s
20 Motion for Official Notice at p. 4.

21 The Board is exceeding its authority by pursuing the pending cease and desist orders against
22 Mussi and Pak/Young who claim and have provided evidence of riparian and/or pre-1914 water
23 rights. This pursuit of the pending cease and desist orders against Mussi and Pak/Young, and others
24 similarly situated, exceeds the Board's authority as it has no jurisdiction to engage in these
25 enforcement proceedings which determine the validity, nature and extent of claimed riparian and/or
26 pre-1914 water rights.

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1 **C. THE BOARD DOES HAVE SOME AUTHORITY WITHIN DIVISION 2 TO**
2 **DETERMINE RIPARIAN AND PRE-1914 WATER RIGHTS WHICH IS LIMITED**
3 **TO SPECIFIC CIRCUMSTANCES AND REMEDIES NOT INVOLVING CEASE**
4 **AND DESIST ORDERS.**

5
6 **1. In Determining Whether Surplus Water Is Available for Appropriation and in**
7 **Issuing Appropriative Permits, the Board Does Not Affect Riparian or Pre-1914**
8 **Water Rights.**

9 In 1986, First District Court of Appeal evaluated a decision of the Board regarding the Delta.
10 (*United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82 [*"Racanelli"*].)
11 *Racanelli* indicates that in carrying out its authority, the Board does indeed make some
12 determinations related to riparian and pre-1914 water rights. However, these determinations are
13 limited to particular administrative processes and do not affect riparian and pre-1914 water right
14 holders actual rights to water. The Board plays only a "limited role" in "enforcing rights of water
15 rights holders, a task mainly left to the courts." (*Id.*, p. 102.) *Racanelli* discusses the Board's role in
16 issuing appropriative permits and the Board's authority over riparian and senior appropriators under
17 the statutory appropriation procedure. *Racanelli* recognizes in "its role of issuing appropriation
18 permits, the Board has two primary duties: 1) to determine if surplus water is available and 2) to
19 protect the public interest." (*Ibid.*)

20 *Racanelli* explains the Board's role in determining the surplus water supply available for
21 appropriation, and the limitations on the Board's authority over riparian and senior appropriators as
22 follows:

23 Section 1375 declares the basic principle that: "As a prerequisite to the
24 issuance of a permit to appropriate water ... [t]here must be unappropriated water
25 available to supply the applicant." (Subd. (d).) Accordingly, in reviewing the
26 permit application, the Board must first determine whether surplus water is
27 available, a decision requiring an examination of prior riparian and appropriative
28 rights. (*Temescal Water Co. v. Dept. Public Works* (1955) 44 Cal.2d 90.) In
exercising its permit power, the Board's first concern is recognition and protection
of prior rights to beneficial use of the water stream. (*Meridian, Ltd. v. San
Francisco* [1939] 13 Cal.2d 424, 450.) Yet, the Board's estimate of available
surplus water is in no way an adjudication of the rights of other water right
holders (*Temescal [supra]*, at p. 103); the ***rights of the riparians and senior
appropriators remain unaffected by the issuance of an appropriation permit.***
(*Duckworth v. Watsonville Water etc. Co.* (1915) 170 Cal. 425, 431.)

1 (*Id.*, p. 102-103, emphasis added.) In the above excerpt, the Court recognizes that the Board may
2 consider riparian and senior appropriative rights in making a determination of available,
3 unappropriated water, but that such a determination does not in any way alter these pre-existing
4 rights.

5 The above excerpt from *Racanelli* indicates that in a Board proceeding regarding the issuance
6 of an appropriative permit “the rights of riparians and senior appropriators remain unaffected.”
7 Although the Board may evaluate the existence and relationship of riparians and pre-1914 water
8 rights in an appropriative permit proceeding, such evaluation does not determine or validate the
9 riparian and pre-1914 water rights. In 2001 in WR 2001-22 on the reconsideration of D 1635
10 which among other things approved a petition for partial assignment of a state filed application by El
11 Dorado County Water Agency and El Dorado Irrigation District for water from the south fork of the
12 American River which approved a new statutory water right, Pacific Gas & Electric Company
13 (PG&E) argued that the Board did not have the authority to determine PG&E’s pre-1914 water
14 rights. The Board rejected PG&E’s argument stating “PG&E’s assertion that a prima facie showing
15 of a pre-1914 water right ends the SWRCB’s jurisdiction lacks legal support and is inconsistent with
16 the SWRCB’s statutory authority mandate to ensure that unauthorized diversions do not take place.”
17 WR 2001-22 at p. 14. The Board’s conclusion may have been correct, but its stated justification is
18 suspect. The Board does have some authority to evaluate pre-1914 water rights when it is making a
19 determination regarding a statutory appropriation; however, as *Racanelli* explains during a water
20 right permit process “the Board’s role in examining existing water rights to estimate the amount of
21 surplus water available for appropriation does *not* involve adjudication of such rights” and the
22 “rights of riparian’s and senior appropriators remain unaffected by the issuance of an appropriative
23 permit.” *United States v. State Water Res. Control Bd.*, (1986) 182 Cal.App. 3d 82, 102-103, 104.
24 Thus, in WR 2001-22, regarding a water right permit, the Board might have necessarily made
25 conclusions regarding pre-1914 water rights, but in no way was such an “adjudication” or
26 “determination” of those water rights nor was such a determination for purposes of enforcement
27 subject to a cease and desist order. The Board’s statement in WR 2001-22 that it has a mandate to
28

1 “ensure that unauthorized diversions do not take place” does not support the conclusion that the
2 Board may issue a cease and desist order against claimed riparian or pre-1914 water rights nor can
3 the Board use such proceedings to “adjudicate” or determine the validity of such claimed riparian or
4 pre-1914 water rights.

5 *Racanelli* indicates that the Board has only a limited role with respect to disputes and the
6 enforcement of water rights, and that such matters are properly resolved by *judicial* action:

7
8 Yet notwithstanding its power to protect the public interest, **the Board plays**
9 **a limited role in resolving disputes and enforcing rights of water rights holders, a**
10 **task mainly left to the courts.** Because water rights possess indicia of property
11 rights, water rights holders are entitled to judicial protection against infringement,
12 e.g., actions for quiet title, nuisance, wrongful diversion or inverse condemnation.
13 [Citations.] **It bears reemphasis that the Board's role in examining existing water**
14 **rights to estimate the amount of surplus water available for appropriation does**
15 **not involve adjudication of such rights.** [Citations.]

16 (*Id.*, p. 104, bold emphasis added, italics in original.) *Racanelli* unequivocally recognizes that it is
17 the courts, not the Board, which has the authority to resolve water rights disputes and enforce the
18 rights of water right holders regarding riparian and/or pre-1914 water rights. He recognizes that
19 riparian and pre-1914 water rights possess “indicia of property rights” that must be afforded judicial
20 protection. This differs from a statutory appropriation of water, which is based on a permit, which is
21 granted, administered and reviewed by the State Water Board. No such authority of the Board exists
22 for riparian and pre-1914 water rights, which are not based on a permit from the Board.

23 The Board's past decisions regarding water rights reflect its understanding and
24 acknowledgment of the Board's limitation against determining the existence of riparian water rights.
25 In 1967, in SWRCB Decision 1282, the Board discussed the issuance of a new appropriative water
26 right, where the applicant claimed to already possess a riparian or pre-1914 water right which served
27 the same place of use as the pending appropriative right. In so doing, the Board placed a restriction
28 on the application for a new appropriative water right permit:

Persons with apparent but unadjudicated riparian rights sometimes have
reason to file with the Board applications to appropriate unappropriated water for use
on such lands. To prevent situations such as that which would result from approval of
this petition, the Board now uses where appropriate a permit clause which reads:

1 ‘Upon a judicial determination that the place of use under this
2 permit or a portion thereof is entitled to the use of water by riparian
3 right, the right so determined and the right acquired under this permit
shall not result in a combined right to use of water in excess of that
which could be claimed under the larger of the two rights.’

4 (SWRCB Decision 1282, p. 6; see also, SWRCB Water Rights Order, WR 65-25.) In issuing new
5 appropriative rights, Decision 1282 stated quite clearly that the Board's practice was to not
6 adjudicate any existing claimed riparian, or pre-1914, water rights: “The Board has no power to
7 adjudicate this or any other claimed riparian right.” (SWRCB Decision 1282, p. 7.) The Board
8 acknowledged it lacked the authority to determine such rights and properly indicated that such
9 determination is dependent on a “judicial determination.” In the present matter, the Board is now
10 attempting to adjudicate the validity of riparian and pre-1914 water rights. This is a determination
11 that the Board expressly declined to make in Decision 1282 due to its lack of power to do so, even in
12 the context of new appropriative water rights which are squarely within the Board's jurisdiction. Just
13 as the Board lacked the authority to determine or adjudicate riparian or pre-1914 rights in Decision
14 1282, it lacks the authority to do so regarding Mussi and Pak/Young.

15 **2. The Board's Statutory Authority to Make Recommendations to a Court**
16 **Regarding Riparian and Pre-1914 Water Rights Does Not Grant the Board**
17 **Authority to Determine the Existence of Such Rights Nor to Issue Cease and**
18 **Desist Orders.**

19 The superior courts have jurisdiction over water right disputes in California.⁴ Part 3 of
20 Division 2 of the Water Code, entitled “Determination of Water Rights,” provides the manner in
21 which the Board may participate in a water right determination pending before a court. The Board
22 may become involved in an action pending in court for the determination of rights to water as a court
23 may “order a reference to the board, as referee, of any or all issues involved in the suit” (§ 2000) or
24 “refer the suit to the board for investigation of and report upon any or all of the physical facts
25 involved” (§ 2001). Therefore, the ability of the Board to referee or investigate any facts or issues
26 related to water rights is limited to two situations: 1) when ordered to do so by a court of law
27 (§ 2000); or 2) upon a petition filed by a claimant to water (§ 2525).

28 ⁴ See sections 2000 and 2001 stating “In any suit brought in any court of competent
jurisdiction in this State for determination of rights to water”

1 A “statutory adjudication” (§ 2500 et seq.) is a court action to determine the nature, extent
2 and validity of all water rights along a stream system. Section 2501 grants the Board authority to
3 make a recommendation to the courts regarding the determination of rights of water, including
4 riparian and pre-1914 water rights. However, authority to make such a determination is very limited
5 in scope. First, there must be a pending court action. Second, the determination by the Board is
6 only a recommendation which must be approved by the courts. Footnote 3 in *Racanelli*, which
7 follows the statement: “It bears reemphasis that the Board's role in examining existing water rights to
8 estimate the amount of surplus water available for appropriation does *not* involve adjudication of
9 such rights” acknowledges that even in statutory adjudications the Board's role is limited and the
10 Board does not determine or adjudicate water rights. Footnote 3 reads as follows:

11 In two instances the Board performs a limited adjunct function in the
12 process of adjudication of water rights: One, as a special master or referee upon
13 reference from the court (§ 2000 et seq.), a function advisory in nature [citations];
14 another, as a hearing body to conduct a “statutory adjudication,” upon petition of
15 any water rights holder, determining all the water rights in a “stream system”
16 (§ 2500 et seq.; [citation]). The statutory hearing is contingent upon the Board's
17 finding that the public interest will be served by such determination. (§ 2525.) But
18 again, the Board's determination is tentative in nature and must be filed in the
19 superior court for hearing and final adjudication. (§§ 2750, 2768, 2769; [citation];
20 see *In re Waters of Soquel Creek Stream System* (1978) 79 Cal.App.3d 682 [],
21 disapproved on other grounds in *In re Waters of Long Valley Creek Stream
22 System, supra*, 25 Cal.3d 339 [] [trial court properly rejected and remanded
23 Board's determination of water rights]; [citation.]

24 (*United States v. State Water Res. Control Bd., supra*, 182 Cal. App. 3d 82, 152.) If the Board has
25 only limited authority to evaluate riparian and pre-1914 water rights when determining surplus water
26 available for appropriation and if its recommendations in a statutory adjudication are only tentative
27 and subject to a final court determination, then it would be entirely inconsistent for the Board to have
28 the blanket authority to determine such riparian and pre-1914 water rights in a cease and desist
proceeding which is outside the scope of a appropriative water right proceeding which requires a
determination of available unappropriated water and also outside a statutory adjudication
proceeding. Also, as discussed above, the specific authority for a cease and desist order clearly does
not include riparian and pre-1914 water rights. It is inconsistent that the Board would have the
authority to determine something in a cease and desist order proceeding, namely the validity of

1 riparian and pre-1914 water rights, when it doesn't otherwise have such authority based on its
2 statutory powers, as it clearly does not as indicated by *Racanelli*.

3 There are numerous California cases related to the adjudication of water rights which
4 reference the Board's authority over riparian and pre-1914 water rights in the context of a statutory
5 adjudication. This line of cases cannot be interpreted to extend to the Board any authority over
6 riparian and pre-1914 water rights outside of an adjudicatory proceeding. For example, *In re Waters*
7 *of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, holds that the predecessor to the Board
8 possesses broad authority in statutory adjudications pursuant to section 2500 et seq. to make
9 determinations as to the scope, nature, and priority of future riparian rights, in order to foster the
10 most reasonable and beneficial use of the scarce water resources of the state. Again, this referenced
11 authority is limited to statutory adjudications only, and was based upon the Board's authority to
12 foster "the most reasonable and beneficial use of its scarce water resources." Additionally, in *In re*
13 *Water of Hallett Creek Stream System* (1988) 44 Cal.3d 448, the California Supreme Court
14 recognized the ability of the Board to determine riparian and pre-1914 water rights in a statutory
15 adjudication. This authority of the Board to make recommendations determining water rights is
16 similarly limited to statutory adjudication proceedings only.

17 Where the Board lacks the authority to determine or affect riparian water rights and prior
18 appropriative rights, including pre-1914 rights, when the Board is called upon to determine the
19 availability of surplus water for purposes of issuing new appropriative rights, and when in a statutory
20 adjudication the Board's determinations are merely *recommendations* that must be approved by a
21 court, then it is evident that the Board cannot make such water rights determinations generally, such
22 as in the present matter. Therefore, the Board's attempt to do so against Mussi and Pak/Young in the
23 form of a cease and desist order, which is not a court adjudication proceeding, is outside the scope of
24 the Board's authority, and as such, contrary to law.

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D. THE BOARD'S AUTHORITY OVER RIPARIAN AND PRE-1914 WATER RIGHTS IN LIMITED CIRCUMSTANCES ARE NOT AT ISSUE IN THE PENDING CDO PROCEEDINGS

1. The Board Has Power to Investigate, but this Does Not Confer Authority to Issue CDOs.

Section 1051 provides the Board with investigative powers, but this does not authorize the issuance of the pending CDOs. Section 1051 provides in full as follows:

The board for the purpose of this division may:

- (a) Investigate all streams, stream systems, portions of stream systems, lakes, or other bodies of water.
- (b) Take testimony in regard to the rights to water or the use of water thereon or therein.
- (c) Ascertain whether or not water heretofore filed upon or attempted to be appropriated is appropriated under the laws of this State.

An investigation of riparian and pre-1914 appropriative water rights might occur by the Board under the authority of section 1051. Such investigation can include taking testimony, and the Board may “ascertain whether or not” the water is “appropriated under the laws of the State.” However, there is no authority in this section for the Board to issue any enforcement orders, or commence proceedings or actions based on that investigation, including the pending CDOs. Cease and desist orders must be issued pursuant to the circumstances specified by section 1831 only. The Board cannot issue cease and desist orders based solely on its general investigative power.

The Board’s investigatory power was discussed in *Meridian v. City and County of San Francisco* (1939) 13 Cal.2d 424, at page 450:

The State Water Commission (now Department of Public Works, Pol. Code, sec. 363e), has the power under section 10 of the act to investigate all streams of the state for the purpose of ascertaining whether the use of water therein is in conformity with the water appropriation laws of the state. And the power extends to the use of water made under appropriations or attempted appropriations acquired or asserted prior to the passage of the act. By section 15 of the act the commission is given power to allow the appropriation for beneficial purposes of unappropriated water under such terms and conditions as in the judgment of the commission will best develop, conserve and utilize in the public interest the water sought to be appropriated. It should be the first concern of the court in any case pending before it and of the department in the exercise of its powers under the act to recognize and protect the interests of those who have prior and paramount rights to the use of the

1 waters of the stream. The highest use in accordance with the law is for domestic
2 purposes, and the next highest use is for irrigation. When demands on the stream for
3 those and other recognized lawful purposes by riparians and appropriators are fully
met and an excess of water exists, it is for the state to say whether, in the conservation
of this natural resource in the interest of the public, the diversion is excessive.

4 *Meridian* refers to the power of the predecessor to the Board to investigate, including the power to
5 investigate pre-1914 water rights. However, *Meridian* does not extend this power of investigation to
6 the power to issue a cease and desist order. Rather, this reference to an investigation was related to
7 the appropriateness of the predecessor to the Board's issuance of a post-1914 water right and the
8 application of the 1928 Constitutional Amendment requiring reasonable use of all waters of the
9 State.

10 **2. The CDOs Do Not Involve a Violation or Threatened Violation of a Prior Board**
11 **Order Which Might Authorize the Issuance of a Cease and Desist Order**
Pursuant to Section 1831.

12 Subsection (3) of subsection (d) of section 1831 provides that the Board may issue a cease and desist
13 order for a violation or threatened violation of “[a]ny decision or order of the board issued under this
14 part, Section 275, or Article 7 (commencing with Section 13550) of Chapter 7 of Division 7
15 [regarding use of potable water instead of non potable water in certain circumstances], in which
16 decision or order the person to whom the cease and desist order will be issued, or a predecessor in
17 interest to that person, was named as a party directly affected by the decision or order.” Thus, a
18 cease and desist order may be issued for a violation of a previously issued Board order. No former
19 Board order exists against Mussi and Pak/Young, and therefore, subsection (3) of subsection (d) of
20 section 1831 does not apply.

21 The Board has the authority to issue a cease and desist order for any violation or threatened
22 violation of any prior Board decision or order issued pursuant to *Water Code* section 275. Section
23 275 provides in full as follows:

24 The department and board shall take all appropriate proceedings or actions
25 before executive, legislative, or judicial agencies to prevent waste, unreasonable use,
unreasonable method of use, or unreasonable method of diversion of water in this
26 state.

27 This provision confers on the Board the authority to take all appropriate proceedings and actions to
28 “prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion

1 of water.” Many Board decisions have been based on the Board's authority to regulate waste and
2 unreasonable use under section 275, including regulation of such with respect to the exercise of
3 riparian and pre-1914 water rights. (See e.g., *Forni v. State Water Resources Control Board* (1976)
4 54 Cal.App.3d 743 [action brought by the Board against riparian water right based on reasonable use
5 or reasonable method of use of water]; SWRCB Water Rights Order, WR 95-4 [the Board issued an
6 order requiring certain instream flow requirements be met by the pre-1914 water right holders based
7 upon the Board's authority over public trust resources and section 275 of the *Water Code*]; *Imperial*
8 *Irrigation Dist. v. State Wat. Resources Control Bd.* (1990) 225 Cal.App.3d 548 [Board has the
9 power to take steps necessary to prevent unreasonable use of water and board is vested with power
10 to investigate alleged water waste and to take appropriate remedial action].) These cases and
11 decisions involved the Board's broad authority to regulate waste and unreasonable use, even over
12 riparian and pre-1914 rights, pursuant to section 275. However, this authority does not grant the
13 Board the authority to issue CDOs nor determine the existence or validity of riparian or pre-1914
14 water rights. The pending CDOs do not allege that Mussi or Pak/Young have engaged in any
15 “waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of
16 water” that would come under the purview of section 275. Exhibits PT-7. No such allegations
17 occurred during the hearing. Therefore, the CDO against Mussi or Pak/Young cannot be based upon
18 any authority of the Board derived from *Water Code* section 275.

19 A 2005 Law Review Article by Andrew H. Sawyer, who is the Assistant Chief Counsel to
20 the Board, reviewed the implementation of the recommendations of the 1978 Governor's
21 Commission to Review California Water Rights Law. Mr. Sawyer states in Footnote 89 of that
22 article:

23
24 The SWRCB has authority regarding pre-1914 rights under the public trust
25 doctrine and *Water Code* section 275. [Citations.] *This continuing authority does not*
26 *amount to regulatory authority over proprietary right issues to the same extent as for*
27 *permitted and licensed rights.* Rather, the SWRCB may review and make findings on
28 issues concerning claimed pre-1914 rights to the extent reasonably necessary to carry
out the SWRCB's other responsibilities. e.g. Cal. *Water Code* §§ 1051, 1052, 1202.

1 (36 McGeorge Law Review 209, 223, emphasis added.) This footnote indicates that the Board does
2 not have continuing authority to regulate pre-1914 and riparian water rights to the same extent as it
3 regulates permitted and licensed appropriative water rights. Although the Board might make
4 findings regarding riparian and pre-1914 water rights in carrying out its other authority, such as
5 determining surplus water to a stream as discussed in *Racanelli*, its authority does not amount to
6 “regulatory authority over proprietary right issues” and the Board has no authority under *Water Code*
7 section 1831 to issue the pending CDO.

8 III. CONCLUSION

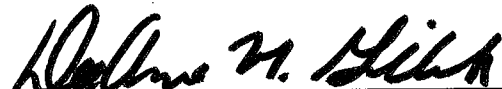
9 Mussi and Pak/Young claim riparian and pre-1914 water rights. This was asserted prior to
10 the hearing, and substantial evidence was presented during the hearing to support the existence of
11 those rights. The Board is precluded from making any determinations regarding the validity, nature
12 or extent of those rights within the instant cease and desist proceedings. The Board has not been
13 granted authority by the Legislature to determine the validity, nature or extent of the alleged riparian
14 and pre-1914 water rights, and therefore, the Board cannot, as a matter of law, make such
15 determinations.

16 The Board itself recognizes this limitation in its authority as indicated in its own publications
17 and issued Water Rights Orders. (See Exhibit A to SJC Motion for Official Notice at p.7-8 [“The
18 SWRCB does not have the authority to determine the validity of vested rights other than
19 appropriative rights initiated December 19, 1914 or later”]; and SWRCB Decision 1379, p. 8 [“The
20 Board does not have jurisdiction to adjudicate or determine the validity of individual vested water
21 rights-this is a judicial function”].) While the Board does have some regulatory authority over
22 public trust resources and water use which is considered unreasonable or wasteful, the pending CDO
23 does not allege public trust impacts or unreasonable or wasteful use. The pending CDO is issued
24 pursuant to *Water Code* section 1831, based on an alleged violation of section 1052, which prohibits
25 a diversion or use of water “subject to this division other than as authorized in this division.”
26 However, diversions and use of water subject to Division 2 of the Water Code does not include
27 water diverted pursuant to riparian and pre-1914 water rights.

1 As indicated by the *Racanelli* decision “Because water rights possess indicia of property
2 rights, water rights holders are entitled to judicial protection against infringement, e.g., actions for
3 quiet title, nuisance, wrongful diversion or inverse condemnation.” (*United States v. State Water
4 Res. Control Bd., supra*, 182 Cal. App. 3d 82, 104.) Any dispute regarding Mussi and Pak/Young’s
5 water rights and the use and enjoyment of these claimed property rights - that is, their riparian and/or
6 pre-1914 water rights - must be determined in a court of law, not by the Board. Any issuance of a
7 cease and desist order to Mussi or Pak/Young by the Board is a violation of the Board’s statutory
8 authority and the due process and property rights of Mussi and Pak/Young. A cease and desist order
9 to Mussi or Pak/Young regarding their claimed riparian and pre-1914 water rights cannot be issued
10 by the Board. In the event the Board evaluates the validity of Mussi and Pak/Young’s riparian and
11 pre-1914 water rights, the County submits that substantial evidence exists to establish their valid
12 water rights and a cease and desist order shall not be issued by the Board.

13
14 Dated: August 30, 2010

NEUMILLER & BEARDSLEE
A PROFESSIONAL CORPORATION

15
16 By: 
17 DEEANNE M. GILLICK
18 Attorneys for
19 County of San Joaquin and
20 San Joaquin County Flood Control and
21 Water Conservation District
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PROOF OF SERVICE
CCP 1013a


I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 509 W. Weber Avenue, Stockton, California 95203. On August 30, 2010, I served the within documents:

**CLOSING BRIEF OF COUNTY OF SAN JOAQUIN AND SAN JOAQUIN COUNTY
FLOOD CONTROL AND WATER CONSERVATION DISTRICT; REQUEST FOR
OFFICIAL NOTICE AND DECLARATION OF DEEANNE M. GILICK IN SUPPORT OF
REQUEST FOR OFFICIAL NOTICE**

- (BY U.S. MAIL)** I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than on day after the date of deposit for mailing in affidavit.
- (BY PERSONAL SERVICE)** I delivered such envelope by hand to the address(es) shown below.
- (BY ELECTRONIC MAIL)** I caused a true and correct scanned image (.PDF file) copy to be transmitted via the electronic mail transfer system in place at Neumiller & Beardslee, originating from the undersigned at 509 W. Weber Avenue, 5th Floor, Stockton, California, to the email address(es) indicated in the attached Service List of Participants.
- (BY OVERNIGHT DELIVERY)** I enclosed the documents in an envelope or package designated by an overnight delivery carrier and addressed to the persons at the addresses stated below. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier, or with a courier or driver authorized by the overnight delivery carrier to receive documents.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed this 30th day of August 2010, at Stockton, California.



ELVIA C. TRUJILLO

**SERVICE LIST
(VIA ELECTRONIC MAIL)**

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