State Water Resources Control Board

January 28, 2022

Dear Interested Parties:

On January 19, 2022, the State Water Resources Control Board adopted Order WR 2022-0086. A copy of this order is enclosed with this letter.

Sincerely,

Administrative Hearings Office
State Water Resources Control Board
AdminHrgOffice@waterboards.ca.gov
P. O. Box 100, Mail Stop 2-C
Sacramento, CA 95812-0100
(916) 341-6940

Encls:
-Service List
-Order WR 2022-0086

SERVICE LIST

Kevin Gonzalves and Jennifer Gonzalves
9888 N. Buhach Rd
Winton, CA 95388
kgonzalves@live.com

Kenneth Petruzzelli, John Prager
Division of Water Rights
Prosecution Team
801 K St., 23rd Floor
Sacramento, CA 95814
Kenneth.petruzzelli@waterboards.ca.gov
John.Prager@Waterboards.ca.gov
Attorneys for Division of Water Rights, Prosecution Team

Thomas Berliner, Jolie-Anne Ansley
Duane Morris LLP
Spear Tower
One Market Plaza, Suite 2200
San Francisco, CA 94105
tmberliner@duanemorris.com
jsansley@duanemorris.com
Attorneys for Merced Irrigation District

(all transmittals by e-mail only)

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2022-0086

In the Matter of the petition of

Merced Irrigation District

for reconsideration of Order WR 2021-0094,
Cease and Desist Order and Administrative Civil Liability Order against
Kevin Gonzalves
for unauthorized diversions of water
within the Canal Creek watershed in Merced County

ORDER AMENDING ORDER WR 2021-0094 AND OTHERWISE DENYING PETITION FOR RECONSIDERATION

BY THE BOARD:

1.0 INTRODUCTION

This matter came to the State Water Resources Control Board (State Water Board or Board) on the petition of the Merced Irrigation District (Merced ID or MID) for reconsideration of the Board's Order WR 2021-0094. Order WR 2021-0094 issued a cease and desist order and an administrative civil liability order to Kevin Gonzalves (Respondent) based on his unauthorized diversions of water within the Canal Creek watershed in Merced County. The Board issued Order WR 2021-0094 following a hearing by the Board's Administrative Hearings Office (AHO). Although Merced ID received notice of the AHO's hearing and submitted some pre-hearing arguments, Merced ID did not participate in the AHO hearing.

Merced ID now challenges the provisions of Order WR 2021-0094 that require Respondent to continue to maintain the pipes in the berm between Canal Creek and the Gonzalves Pond. Order WR 2021-0094 and this order refer to these pipes as the "Canal Creek Berm Pipes." Order WR 2021-0094 requires Respondent to maintain these pipes free from any obstructions that would impede flows of water through the

pipes, as Respondent has done for the past 25 years. Merced ID asks the Board to vacate those provisions and to direct Respondent to work with the district to remove the pipes.[1]

Based on the evidence that is in the administrative record, we conclude that Order WR 2021-0094 properly requires Respondent to continue to take these actions to maintain the Canal Creek Berm Pipes in their present conditions, unless a court, the United States Army Corps of Engineers (Corps of Engineers) or the Central Valley Flood Protection Board directs Respondent to take some other action. We edit Order WR 2021-0094 to make it clear that the Board defers to the courts on the property-law issues raised by Merced ID and to the Corps of Engineers and the Central Valley Flood Protection Board on flood-control issues. After making these edits, we deny Merced ID's petition.

2.0 GROUNDS FOR RECONSIDERATION OF A BOARD ORDER; TIMING

Any interested person may petition the State Water Board for reconsideration of a water rights order within 30 days after the date on which the Board adopted the order. (Wat. Code, § 1122.) The applicable Board regulation (Cal. Code Regs., tit. 23, § 768) provides that a petition for reconsideration may address any of the following causes:

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

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

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

(d) Error in law.

Water Code section 1122 provides that the State Water Board shall order or deny reconsideration on a petition within 90 days from the date on which the Board adopts the decision or order. The Board adopted Order WR 2021-0094 on October 5, 2021.

[1] Figure 2 to Order WR 2021-0094 shows the locations of the Gonzalves Pond, Canal Creek, the Canal Creek Berm Pipes, and the other physical features discussed in that order.

Ninety days after that date was January 3, 2022. Because of the Board's meeting schedule, we were not able to act on Merced ID's petition by that date.

If the State Water Board does not act on a petition for reconsideration within the 90-day period specified in Water Code section 1122, the petitioner may seek judicial review, but the Board is not divested of jurisdiction to act upon the petition. (State Water Board Order WR 2009-0061, p. 2, fn. 1; see *California Correctional Peace Officers Assn v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1147-1148, 1150-1151.) We therefore have authority to issue this order on Merced ID's petition for reconsideration.

3.0 BACKGROUND

3.1 Division of Water Rights, AHO and Board Proceedings

Order WR 2021-0094 discusses the relevant facts (see Order WR 2021-0094, pp. 2-25), and we do not repeat them here. The following paragraphs briefly summarize the actions by the Board's Division of Water Rights (Division) Enforcement Section (Enforcement Section) and the AHO, and our actions.

On November 12, 2019, the Enforcement Section issued a draft cease and desist order (Draft CDO) to Respondent. (Order WR 2021-0094, pp. 22-23.) On May 5, 2020, the Division sent an administrative civil liability complaint (ACL Complaint) to Respondent. (*Id.,* at *p.* 23.) Respondent requested hearings on the Draft CDO and the ACL Complaint. (*Ibid.*)

The AHO held hearings on July 17, 30, 31 and September 9 and 16, 2020. (*Id.,* at *p.* 2.) The AHO held a site visit on August 7, 2020. (*Ibid.*) Respondent and the Board's Prosecution Team, which consisted of members of the Enforcement Section and the Board's Office of Enforcement, participated in the hearings and the site visit. (*Ibid.*)

On November 6, 2020, the Prosecution Team and Respondent filed closing briefs with the AHO. (*Id.,* at *p.* 25.) The AHO circulated its March 8, 2021 draft proposed order to the parties and the AHO's LYRIS e-mail list (which contains e-mail addresses for all people who have signed up to receive AHO notices), and the AHO posted its notice of the draft proposed order on the AHO's webpage (see

https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/docs/2021/2021_03_08_notice_dpo_gonzalves.pdf). The parties filed comments on April 14 and 15, 2021. (*Ibid.*) After considering these comments, the AHO amended its draft proposed order and added Attachment A to address the comments. (*Ibid.*) The AHO transmitted its final proposed order to the Clerk of the Board on July 14, 2021. (2021-07-14 notice of transmittal of proposed order (Gonzalves).)[2]

We considered the AHO's proposed order during our Board meetings on September 21 and October 5, 2021. Following Water Code section 1114, subdivision (c)(2)(A), we adopted the AHO proposed order, which subsequently was numbered Order WR 2021-0094, on October 5, 2021.

Order WR 2021-0094 concluded that Respondent does not have any riparian rights or other water rights that authorize him to divert water from Canal Creek or the Gonzalves Pond for irrigation or other purposes of use at Respondent's orchards, and that the Board should prohibit Respondent from making such diversions. (Order WR 2021-0094, pp. 28-33, 37-38, 60.)

Order WR 2021-0094 concluded that, for water-rights purposes, the Gonzalves Pond should be treated as part of the Canal Creek Channel, and that the Board should prohibit Respondent from blocking flows in either direction in the Canal Creek Berm Pipes and should require Respondent to continue to maintain these pipes to allow such flows. (*Id.*, at pp. 33-36, 37-38, 60-62.)

Order WR 2021-0094 imposed administrative civil liability on Respondent, based on his unauthorized diversions of water from the Gonzalves Pond during 2015 through 2017. (*Id.*, at pp. 40-59, 63-64.)

[2] Citations in this order are in the same format as citations in Order WR 2021-0094. (See Order WR 2021-0094, p. 2, fn. 1.)

3.2 Merced ID's Actions and Comments

Merced ID's attorney was on the service list for the Enforcement Section's November 12, 2019 letter transmitting the Draft CDO. (Order WR 2021-0094, Att. A, pp. 3-4.) He also was on the service list for the AHO's hearing notice for this matter. (2020-03-12 Notice of Hearing, p. 20.) After the parties submitted their exhibits and written proposed testimony to the AHO, Merced ID's attorney filed objections to parts of Respondent's written proposed testimony. (2020-07-13 T. Berliner ltr. to A. Lilly.) But Merced ID did not participate in the AHO hearing or the site visit. (See 2021-11-04 Merced ID Petition for Reconsideration, p. 10:15-16.)

In his July 13, 2020 letter to the AHO hearing officer, Merced ID's attorney stated that "MID agreed it would not advocate during the SWB proceedings with respect to how illegal diversions by Mr. Gonzalves are addressed by the SWB." (2020-07-13 T. Berliner ltr. to A. Lilly, p. 1.) During the two State Water Board meetings on this matter, Merced ID's attorney similarly stated that the district's settlement agreement with Respondent provided that Merced ID would not be a party to the AHO hearing. (2021-09-21 State Water Resources Control Board - Meeting Item 2, Recording 50:27-50:50; 2021-10-5 State Water Resources Control Board - Meeting Item 6, Recording 1:08:50-1:09:19.)

These statements are not consistent with the applicable provision of the settlement agreement. That provision states:

> 5. Obligations of MID.
>
> . . . . . .
>
> b. Notification to State Water Resources Control Board. Upon satisfactory completion of all physical modifications required by Gonzalves in this settlement, and the dismissal of all litigation, MID will notify the State Water Resources Control Board of the settlement and will withdraw the complaint filed with the State Water Resources Control Board. Following notification to the State Water Resources Control Board, MID will not initiate any new complaint or investigation with the Water Board or other regulatory authority regarding the claims at issue in the litigation provided that Gonzalves refrains from action that would give rise to a well-founded complaint. However, MID will respond to requests and inquiries from the State Water Resources

> Control Board or any other governmental agencies regarding issues raised by the MID complaint against Gonzalves filed at the State Water Resources Control Board, now the subject of a Water Board water rights enforcement investigation.

(Gonzalves-37, pp. 4-5, ¶ 5.b.)

The administrative record in this matter does not contain any notification from Merced ID to the State Water Board of the settlement or withdrawal of its complaint against Respondent, as described in the first sentence of this paragraph of the settlement agreement, and our understanding is that the litigation discussed in this paragraph still is pending in Merced County Superior Court. (See 2021-08-13 Merced ID attorney ltr. re proposed order, p. 1.) Moreover, regardless of the status of that litigation or Merced ID's obligations to notify the State Water Board, nothing in this paragraph of the settlement agreement prohibited Merced ID from participating as a party in the AHO hearing, particularly to offer evidence and make arguments supporting implementation of the settlement agreement.

During the September 21, 2021 State Water Board meeting, Merced ID's attorney stated that he was advised by "the Water Board" that only parties to the hearing could submit comments on the AHO's March 8, 2021 draft proposed order, and that, for this reason, Merced ID did not submit any comments to the AHO on that draft. (2021-09-21 State Water Resources Control Board - Meeting Item 2, Recording 50:23-50:28.) However, while the AHO's March 8, 2021 notice stated that it was releasing the draft proposed order "for review and comments by the parties to this proceeding" (2021-03-08 notice of draft proposed order (Gonzalves)), Merced ID's attorney did not submit any evidence to the Board before or during the September 21 meeting about what the "Water Board" advised him regarding the rights of non-parties to comment on the draft proposed order, and he did not identify the Water Board staff member who allegedly made this statement. There is nothing in the record indicating that Merced ID ever asked the AHO for permission to submit comments on the March 8 draft proposed order. If Merced ID had submitted comments on that draft, then the AHO could have addressed them in its final proposed order.

The first time Merced ID submitted comments on the issues it now raises in its petition for reconsideration was on August 13, 2021, when Merced ID submitted comments to the Clerk of the Board. This was after the AHO completed its proposed order and transmitted it to the Clerk of the Board on July 14, 2021.[3]

After the Board adopted Order WR 2021-0094 on October 5, 2021, Merced ID filed its petition for reconsideration on November 4, 2021. (2021-11-04 Merced ID Petition for Reconsideration.) Merced ID's petition asks the Board to reconsider two ordering paragraphs of Order WR 2021-0094. These are: (a) paragraph 1.b. on pages 60 to 61 of the order, which directs Respondent to maintain the Canal Creek Berm Pipes free from any obstructions that would impede flows of water in either direction, unless the Corps of Engineers or the Central Valley Flood Protection Board directs Respondent to take some other action; and (b) paragraph 1.e. on pages 61 to 62 of the order, which provides that, if Respondent may not maintain these pipes because of an order of the Corps of Engineers, the Central Valley Flood Protection Board or a court, then Respondent shall work with the Enforcement Section to develop an alternative plan for maintenance of the pipes. (*Id.*, at pp. 1, 3-4, 15-16.) Merced ID's petition asks the Board to issue a new order directing Respondent to work with the district to remove the pipes, subject to any applicable permitting requirements of other agencies. (*Id.,* at *p.* 16.)

3.3 Respondent's Draft Compliance Plan

On October 26, 2021, Respondent filed the first draft of his compliance plan for Order WR 2021-0094. (2021-10-26 K. Gonzalves Compliance Plan.) On December 1, 2021, Respondent filed the final draft of his compliance plan. (2021-12-01 Gonzalves Draft Compliance Plan.) Later the same day, the Senior Water Resource Control Engineer for the San Joaquin Valley Unit of the Division of Water Rights Enforcement Section

[3] Many other statements in Merced ID's petition for reconsideration, particularly those on pages 4-7 of the petition, are not supported by any citations to the administrative record or any substantial evidence in the record. We do not agree that these statements are correct.

acknowledged receipt of this draft plan and advised Respondent that the Division would review the draft plan and provide comments. (2021-12-01 B. Coats e-mail to K. Gonzalves.)

The part of Respondent's draft compliance plan that concerns maintenance of the Canal Creek Berm Pipes states:

> Once a week, during flood season from November 1st through March 30th, Mr. Gonzalves, or an appointed representative, will visually inspect the Canal Creek Berm Pipes and take any necessary steps to remove debris that may be blocking the pipes to ensure that water may freely pass through the pipes in both directions. Mr. Gonzalves will keep a log of his inspections and actions taken if any action is necessary.
>
> Once a month, during irrigation season from April 1st through October 31st, Mr. Gonzalves[,] or an appointed representative, will visually inspect the Canal Creek Berm Pipes and take any necessary steps to remove debris that may be blocking the pipes to ensure that water may freely pass through the pipes in both directions. Mr. Gonzalves will keep a log of his inspections and actions taken if any action is necessary.

(2021-12-01 Gonzalves Draft Compliance Plan, p. 1.)

4.0 DISCUSSION

4.1 Ownership of Lands on Which Canal Creek Berm Pipes Are Located

Merced ID argues that the State Water Board "acted in excess of its authority" when it ordered Respondent to maintain the Canal Creek Berm Pipes, which Merced ID argues are located on district property. (2021-11-04 Merced ID Petition for Reconsideration, pp. 12:18-20.) For the argument that Merced ID owns the property on which the pipes are located, the district cites various Prosecution Team exhibits, including the testimony of Damon Hess, the Division Water Resource Control Engineer who conducted the Enforcement Section's investigation, and some of the exhibits he discussed in his testimony. (*Id.,* at *p.* 13.) Merced ID also cites some of Respondent's exhibits, including the draft record of survey prepared by Casey Lowrey, a licensed surveyor who testified for Respondent during the AHO hearing. (*Ibid.*)

Paragraph 1.b. of Order WR 2021-0094 requires Respondent to maintain the Canal Creek Berm Pipes, unless the United States Army Corps of Engineers or the Central Valley Flood Protection Board directs Respondent to take some other action. (Order WR 2021-0094, pp. 60-61.) This requirement follows our conclusions that the Gonzalves Pond had become a natural condition that is part of the Canal Creek channel and our concerns that limiting flows through these pipes could lead to different water-surface elevations in the pond and the creek, which would impair the hydrostatic equilibrium at the Canal Creek Berm and could lead to a catastrophic failure of the berm. (*Id.*, pp. 37-39.) We defer to the Corps of Engineers and the Central Valley Protection Board to decide whether to investigate issues concerning the safety and integrity of the Canal Creek Berm and consider follow-up actions. (*Id.,* at *p.* 38.)

In Order WR 2021-0094, in the discussion of Respondent's riparian rights claim, we concluded that we did not need to decide what weight to give Mr. Lowrey's draft records of survey. We concluded that, regardless of the relative locations of the boundary of Respondent's property and Canal Creek, there are not any significant amounts of natural flow in Canal Creek during the irrigation season that could be diverted under riparian rights, and that the riparian rights of Respondent's lands were severed in 1922, when the prior landowner conveyed these lands' water rights. (Order WR 2021-0094, pp. 31-32.)

Contrary to Merced ID's arguments, none of the exhibits it cites in its petition for reconsideration conclusively determines the relative locations of the Canal Creek Berm Pipes and Respondent's property line. For example, one of the exhibits Merced ID cites is the aerial photograph in Appendix G of Mr. Hess's Report of Investigation, which includes a traverse of the center line of the 150-foot-wide strip of land that Merced ID asserts the Crocker-Huffman Land Company conveyed to Merced ID in 1922. (PT-12, p. 101.) The text below this photograph states:

> This depiction does not represent an official survey. By law only a California licensed Professional Land Surveyor or a Civil Engineer licensed prior to 1982 may perform land surveying. Bus. & Prof. Code §§ 6731, 8725. This traverse was recreated based on the legal description on the previous pages. Many factors affect the accuracy of this traverse,

> including the true starting point, monuments used during the survey, ground to grid correction, and legibility of the document.

(*Id.,* underlining in original.)

Another exhibit cited by Merced ID is Mr. Lowrey's draft record of survey. (PT-73; Gonzalves-49.) But, as the Prosecution Team pointed out during the AHO hearing process, this survey is "incomplete," and "conflicts with other unrecorded survey maps, as well as the deed language, and the recorded parcel map." (2020-11-05 Prosecution Team Closing Brief, p. 10:20, p. 11:8-9.) Merced ID also cites the draft survey map prepared by QK. (PT-72, Gonzalves 39, slide 35.) But this map is an unsigned draft, and no one with personal knowledge about it testified during the hearing. Also, the top of this exhibit contains the following heading: "NOT ADMISSIBLE FOR ANY PURPOSE. SETTLEMENT PURPOSES ONLY. DO NOT DISCLOSE. DO NOT CIRCULATE." (*Id.*)

In addition, Respondent disputes Merced ID's argument that the district owns the lands on which the Canal Creek Berm Pipes are located. He argues that the 1922 deed from the Crocker-Huffman Land Company to Merced ID conveyed only a right of way over the relevant lands, not ownership of the lands. (2021-12-08 K. Gonzalves answer to Merced ID pet. for reconsideration, pp. 1-2.)

Considering these significant uncertainties regarding these property-law issues, we do not accept Merced ID's arguments about the ownership of the lands on which the Canal Creek Berm Pipes are located, and we therefore do not change the provision of Order WR 2021-0094 that requires Respondent to continue to maintain the Canal Creek Berm Pipes as he has for the past 25 years. We do recognize that the court in the pending litigation between Respondent and Merced ID, or some other court, may issue an order that reaches conclusions on these property-law issues, and, as a result, may require Respondent to take some action, or may prohibit Respondent from taking some action, that may affect Respondent's ability to continue to maintain the Canal Creek Berm Pipes. The Corps of Engineers or the Central Valley Flood Protection Board also may issue an order that requires Respondent to take some action, or that prohibits Respondent from taking some action, that may affect Respondent's ability to continue to

maintain these pipes. If one or more of these entities issue such an order, then that order should have priority over the requirement in this order that Respondent continue to maintain the Canal Creek Berm Pipes. We therefore amend ordering paragraph 1.b. as follows:

b. Respondent shall maintain the Canal Creek Berm Pipes free from any obstructions that would impede flows of water in either direction in such pipes, unless **a court,** the United States Army Corps of Engineers or the Central Valley Flood Protection Board **issues an order that prohibits** ~~orders~~ Respondent **from conducting such maintenance or that requires Respondent** to take some ~~other~~ action **that is inconsistent with, or that conflicts with, this maintenance requirement**. **If a court, the Corps of Engineers or the Central Valley Flood Protection Board issues such an order, then Respondent's obligations under this paragraph of this order shall terminate.**

Because Respondent's obligations under ordering paragraph 1.b. will terminate if one of these entities issues such an order, we delete ordering paragraph 1.e.

We make related edits to section 3.1.3 of Order WR 2021-0094 so that it recognizes that a court may issue such an order.[4] With these edits, it will be clear that Order WR 2021-0094 does not limit or conflict with the courts' authorities to decide these property-law issues. The courts are the proper forums to resolve these issues.

Merced ID's petition for reconsideration argues that Order WR 2021-0094 "effectively creates a burden on MID to monitor in perpetuity" Respondent's actions regarding the Canal Creek Berm Pipes. (2021-11-04 Merced ID Petition for Reconsideration, p. 2:25-27.) During the October 5, 2021 Board meeting, Merced ID's attorney referred to this alleged burden as "on-going headache." (2021-10-5 State Water Resources Control Board - Meeting Item 6, Recording, 1:16:33-1:16:50.)

We disagree. These arguments ignore the facts that these pipes have been in place and maintained by Respondent for the past 25 years without any reported problems or burdens on Merced ID, and that Merced ID's complaint to the State Water Board did not ask the Board to order Respondent to remove the pipes or to take any action regarding

[4] We also correct a typographical error on page 32 of Order WR 2021-0094.

the Canal Creek Berm or the Gonzalves Pond. (PT-14, p. 7.)[5] Moreover, to the extent that Merced ID believes that it now needs to obtain relief based on its property-law arguments, Order WR 2021-0094, as amended by this order, explicitly defers to the courts to order such relief.

4.2 Risks of Canal Creek Berm Failures

Merced ID argues that the concerns we expressed in Order WR 2021-0094 about the risks of Canal Creek Berm failures (see Order WR 2021-0094, pp. 37-39) are not supported by substantial evidence. (2021-11-04 Merced ID Petition for Reconsideration, p. 16:1-12.) Merced ID asserts that Mr. Hess's "sparse testimony" on this issue was not supported by any engineering analysis and did not discuss engineering measures that could be taken if the Canal Creek Berm Pipes were removed. (*Id., at p.* 16:6-10.) Merced ID states that its settlement agreement with Respondent demonstrates that Merced ID "believes the pipes can be removed." (*Id.,* at *p.* 16:11-12.)

We disagree with Merced ID's characterization of Mr. Hess's testimony. As a registered civil engineer with almost five years' experience in field investigations for the Division's Enforcement Section (PT-10), Mr. Hess was qualified to testify about the risks of berm failures from the hydrostatic pressure differences that would result if the Canal Creek Berm Pipes were plugged or removed. (See Order WR 2021-0094, p. 37.) Because there is no contrary evidence in the record regarding these risks, we concluded that it would not be appropriate for the Board to order Respondent to take any actions to limit flows through these pipes. (*Id.*, at pp. 38-39.) Merced ID's belief that the pipes can be removed, based solely on the district's settlement agreement with Respondent, is not substantial evidence refuting Mr. Hess's testimony about these risks.

---

[5] The request for relief in Merced ID's complaint to the State Water Board states: "Based on the foregoing, MID requests that the Water Board reject the Initial Statement of Diversion and Use filed by Gonzalves and conduct an inquiry to confirm that the water in Canal Creek during the irrigation season is water placed there and owned by MID and that it is not subject to diversion whether from the creek or the pond." (PT-14, p. 7.)

Besides the risks associated the hydrostatic pressure differences, there also would be risks of berm failures from Canal Creek overtopping the berm and causing erosion of the berm, if the Canal Creek Berm Pipes were plugged or removed, and, as a result, the water surface elevations in the Gonzalves Pond were substantially below the top of the berm during such overtopping events. Although Merced ID's attorney stated during the September 21 Board meeting that the Canal Creek Berms are overtopped only in "rare times" (2021-09-21 State Water Resources Control Board - Meeting Item 2, Recording, 46:50-47:08), there is no evidence in the record supporting his statement, and Respondent's statements during the site visit indicated that overtoppings occur regularly during the irrigation season. (2020-08-07 Site Visit Recording, FILE 0008.)

There also is no evidence in the record regarding what work would be necessary to engineer the Canal Creek Berm to address risks associated with hydrostatic pressure differences and overtopping events, or regarding the cost of such work.

Because the record does not contain any evidence on these berm safety and integrity issues besides Mr. Hess's testimony, and because we did not need to address these issues to decide the water-right issues that were before us when we adopted Order WR 2021-0094, we defer to the Corps of Engineers and the Central Valley Protection Board to address these issues.[6]

4.3 Merced ID's Request for Order Directing Respondent to Work with District to Remove Canal Creek Berm Pipes

Merced ID's petition asks the Board to adopt an order directing Respondent to work with the district to remove the Canal Creek Berm Pipes. (2021-11-04 Merced ID Petition for Reconsideration, p. 16:17-21.)

Such an order would be inconsistent with the conclusions in Order WR 2021-0094 that, for water-rights purposes, the Gonzalves Pond should be treated as part of the Canal

[6] Merced ID's petition for reconsideration acknowledges that the Central Valley Flood Protection Board or the Corps of Engineers probably would have to authorize any project to remove the Canal Creek Berm Pipes and work on the Canal Creek Berm. (2021-11-04 Merced ID Petition for Reconsideration, pp. 9:25-10:1.)

Creek Channel, and that the Board therefore should require Respondent to clear and maintain these pipes. (Order WR 2021-0094, pp. 33-36, 37-38, 60-62.)

Merced ID's petition for reconsideration does not challenge these conclusions. Rather, the district's argument that we should order Respondent to work with the district to remove these pipes appears to be based solely on the district's property-law arguments about the ownership of the lands on which the pipes are located.

Merced ID has not submitted any evidence on these property-law issues, and, as discussed in section 4.1 of this order, the evidence in the record on these issues is inconclusive. Moreover, we did not need to decide these issues to resolve the water-law issues raised by the Draft CDO and ACL Complaint and decided in Order WR 2021-0094. For these reasons, we do not decide these property-law issues or issue the order requested by Merced ID.[7]

Merced ID's petition for reconsideration states that the cross-complaint the district filed in Merced County Superior Court against Respondent is for, among other things, "trespass, trespass to land, trespass-interference with easements [and] quiet title." (2021-11-04 Merced ID Petition for Reconsideration, p. 9:6-9.) If this cross-complaint, which is not in the record, actually seeks such relief, then Merced ID already has a pending action in a forum that may resolve the property-law issues and order any appropriate relief.

5.0 CONCLUSIONS

Order WR 2021-0094 resolves the water-right issues raised by Merced ID's complaint to the Board, the Draft CDO and the ACL Complaint. Consistent with the order's

[7] This result is consistent with the Board's regulation, California Code of Regulations, title 23, section 777. The first sentence of this regulation states that "[t]he board will not undertake to determine title to land or the right to occupy or use land or other property." Although this regulation specifically applies only when the Board is considering issues associated with rights of access when acting on applications to appropriate water, the principle is applicable here, where we do not need to decide the property-law issues to resolve the pending water-right issues.

conclusion that Gonzalves Pond has become a natural condition for water-rights purposes, the order directs Respondent to continue to maintain the status quo that has existed for the past 25 years regarding the Canal Creek Berm Pipes.

With the conclusions in Order WR 2021-0094 on Respondent's riparian-right claims, the order did not need to reach any conclusions on property-law issues now raised by Merced ID. For this reason, and because there is not sufficient evidence in the record to resolve these issues, the order defers to the courts to decide these issues. The courts are in a better position than the State Water Board to resolve these issues and to determine any appropriate remedies.

Considering the risks of potential Canal Creek Berm failures that would be associated with removing or plugging the Canal Creek Berm Pipes, the uncertainties regarding the feasibility and costs of engineering the berm to address such risks, and the related Central Valley Flood Protection Board permitting issues, Order WR 2021-0094 defers to the Central Valley Flood Protection Board and the Corps of Engineers to address these issues. These entities can determine what actions regarding the Canal Creek Berm and the Canal Creek Berm Pipes, if any, are appropriate to prevent risks of berm failures and potential impacts on the Castle Dam and Reservoir Project.

For these reasons, we conclude that we should amend Order WR 2021-0094 as discussed in the following ordering paragraphs, and, after making these amendments, deny Merced ID's petition for reconsideration.

ORDER

IT IS HEREBY ORDERED that:

1. The Board makes the following amendments to Order WR 2021-0094:

    a. On page 32, the Board amends the last paragraph as follows:

    > For all of these reasons, we conclude that Respondent's lands do not have any riparian rights that authorize the diversion of water from Canal Creek or the Gonzalves Pond for irrigation or other purposes of **use** on Orchard 1, 2 or 3, the Former Orchard or the Unused Area.

b. On page 38, the Board amends the second full paragraph by deleting the second sentence, as follows:

Because this order concludes that the Gonzalves Pond has become a natural condition that is part of the Canal Creek channel, this order does not require Respondent to render the pond incapable of storing water. ~~We note that it is questionable whether the Corps of Engineers or the Central Valley Flood Control Board would issue a permit for such action, because the action would reduce the flood-control capacity of Castle Reservoir and could have significant environmental impacts. (Gonzalves-38, p. 4; Gonzalves-45, p. 2.)~~

c. On page 38, the Board amends the first sentence of the third full paragraph as follows:

To maintain the hydraulic continuity between Canal Creek and the Gonzalves Pond, this order prohibits Respondent from blocking the flows of water in either direction through the Canal Creek Berm Pipes, unless **a court,** the Corps of Engineers or the Central Valley Flood Protection Board orders Respondent to do so.

d. On page 39, the Board amends the second full paragraph as follows:

This order provides that, if Respondent may not maintain the Canal Creek Berm Pipes free from obstructions because of an order from **a court,** the Corps of Engineers or the Central Valley Flood Protection Board ~~or some action by an entity that claims property rights in the lands on which these pipes are located~~, then Respondent**'s obligations under this order to maintain the pipes shall terminate.** ~~shall advise the Enforcement Section, and work with the Enforcement Section to develop an alternative maintenance plan.~~

e. On pages 60-61, the Board amends ordering paragraph 1.b. as follows:

b. Respondent shall maintain the Canal Creek Berm Pipes free from any obstructions that would impede flows of water in either direction in such pipes, unless **a court,** the United States Army Corps of Engineers or the Central Valley Flood Protection Board **issues an order that prohibits** ~~orders~~ Respondent **from conducting such maintenance or that requires Respondent** to take some ~~other~~ action **that is inconsistent with, or that conflicts with, this maintenance requirement**. **If a court, the Corps of Engineers or the Central Valley Flood Protection Board issues such an order, then Respondent's obligations under this paragraph of this order shall terminate.**

f. On pages 61-62, the Board deletes ordering paragraph 1.e.

2. After making these amendments, the Board denies Merced ID's petition for reconsideration of Order WR 2021-0094.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on January 19, 2022.

AYE:	Chair E. Joaquin Esquivel Vice Chair Dorene D'Adamo Board Member Sean Maguire Board Member Laurel Firestone Board Member Nichole Morgan
NAY:	None
ABSENT:	None
ABSTAIN:	None

Jeanine Townsend
Clerk to the Board