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October 14, 2022

Via Email and U.S. Mail

STATE WATER RESOURCES CONTROL BOARD

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**RE: PETITION FOR RECONSIDERATION OF STANFORD VINA RANCH
IRRIGATION COMPANY, LOS MOLINOS MUTUAL WATER COMPANY,
and PEYTON PACIFIC PROPERTIES, LLC RELATED TO CURTAILMENT
ORDERS WR 2022-0169-DWR and WR 2022-0170-DWR FOR THE
CURTAILMENT OF DIVERSIONS ON MILL AND DEER CREEKS**

Dear Members of the State Water Resources Control Board:

A. Name and Address of Petitioners.

Stanford-Vina Ranch Irrigation Company ("Stanford Vina") and its shareholders
Post Office Box 248
6230 Tehama-Vina Road
Vina, California 96092

Los Molinos Mutual Water Company (“LMMWC”) and its shareholders
Post Office Box 211
25162 Josephine Street
Los Molinos, California 96055

Peyton Pacific Properties, LLC
dba Mill Creek Ranch
105 N 5th Street
Canadian, Texas 79014

B. Specific Board Action of Which Petitioners Request Reconsideration.

On August 16, the State Water Resources Control Board (“SWRCB”) adopted emergency regulations for the Curtailment of Diversion on Mill and Deer Creeks Due to Insufficient Flow for Specific Fisheries, adding sections 876.5, 876.7, and 878.4 and amending sections 878.1 and 879, in title 23, division 3, chapter 2, article 24 of the California Code of Regulations (“Regulations”), and adopted a resolution REVISING AND RE-ADOPTING AN EMERGENCY REGULATION FOR CURTAILMENT OF DIVERSIONS ON MILL AND DEER CREEKS DUE TO INSUFFICIENT FLOW FOR SPECIFIC FISHERIES (“Resolution”). The Resolution and Regulations call for issuance of Curtailment Orders for Mill Creek and Deer Creek. However, the Curtailment Orders were not issued until October 7, 2022. Petitioners filed a Petition for Reconsideration on or about September 1, 2022. Petitioners hereby submit another Petition for Reconsideration herein for Curtailment Order 2022-0170-DWR for Deer Creek and Curtailment Order 2022-0169-DWR for Mill Creek now that those Curtailment Orders have been issued.

Petitioners seek reconsideration of these actions to adopt, approve and issue Curtailment Order 2022-0170-DWR for Deer Creek and Curtailment Order 2022-0169-DWR for Mill Creek.

C. The Date on Which the Order or Decision was Made by the Board.

On or around October 7, 2022 the Curtailment Orders were issued, and the decision to adopt the Regulations and Resolutions which provided for issuance of the Curtailment Orders occurred on or about August 16, 2022.

D. The Reason the Action was Inappropriate or Improper.

Reconsideration is sought on the basis of 23 CCR section 768, subdivisions (a)¹, (b)², (c)³ and (d)⁴. The reasons why the SWRCB’s and SWRCB staff’s actions are inappropriate, unlawful, and improper are set forth in the following materials, including without

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

2 “The decision or order is not supported by substantial evidence;”

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

4 “Error in law.”

limitation, all comments, statements, and materials therein and the exhibits thereto all of which are incorporated herein as if set forth in full:

1. Comment letter dated September 21, 2021 from Minasian Law Firm on behalf of Stanford Vina and Los Molinos Mutual Water Company regarding Emergency Regulations and Curtailment Orders for Mill Creek and Deer Creek and exhibits thereto. A copy of this letter and the exhibits thereto are attached hereto and incorporated herein as if set forth in full.
2. Comment letter dated September 8, 2021 from Minasian Law Firm on behalf of LMMWC regarding Preliminary Draft Drought Emergency Regulation, with Exhibits A through F thereto. A copy of this letter and the exhibits thereto are attached hereto and incorporated herein as if set forth in full.
3. Comment letter dated September 8, 2021 from Minasian Law Firm on behalf of Stanford Vina regarding Preliminary Draft Drought Emergency Regulations, with Exhibits A through H thereto. A copy of this letter and the exhibits thereto are attached hereto and incorporated herein as if set forth in full.
4. Comment letter dated September 17, 2021 to CDFW from Dustin Cooper (Minasian Law Firm) on behalf of Stanford Vina and LMMWC regarding response to CDFW's Letter dated September 14, 2021. A copy of this letter and the exhibits thereto are attached hereto and incorporated herein as if set forth in full.
5. Comment letter dated August 10, 2022 to SWRCB, CDFW and NOAA from Jackson Minasian (Minasian Law Firm) on behalf of Stanford Vina, LMMWC and Peyton Pacific Properties LLC regarding Emergency Regulations and Curtailment Orders for Mill Creek and Deer Creek, and exhibits and attachments thereto. A copy of this letter and the exhibits thereto are attached hereto and incorporated herein as if set forth in full.
6. Petition for Reconsideration dated September 1, 2022 from Jackson Minasian on behalf of Stanford Vina Ranch Irrigation Company, Los Molinos Mutual Water Company, and Peyton Pacific Properties, LLC and exhibits and attachments thereto. A copy of this letter and the exhibits thereto are attached hereto and incorporated herein as if set forth in full.

The Curtailment Orders for Mill Creek and Deer Creek were issued without regard for the actual hydrological or biological factors on Mill and Deer Creek. Specifically, the California Department of Fish and Wildlife through its October 6, 2022 letter gave notice to SWRCB Defendants on October 6, 2022 that six total steelhead were observed in Clear Creek and Battle Creek. (see October 6, 2022 letter) This is not evidence that Steelhead will be present in Deer Creek or Mill Creek or will attempt migration up or down Mill Creek or Deer Creek when the curtailment will take effect on October 15, 2022. As CDFW notes in its October 6, 2022 letter, the criteria of the Emergency Regulations is the *presence* of steelhead in Mill and Deer Creek. That six steelhead were observed on Clear Creek and Battle Creek prior to September 19, 2022 is not evidence that

steelhead are present in Mill or Deer Creeks or will be present on October 15, 2022. DFW even says in its October 6, 2022 letter that it believes “Mill and Deer Creek steelhead are present *in the Sacramento River and other Upper Sacramento River Tributaries*. [Emphasis Added].” (October 6, 2022 Letter, p. 2.) This is not evidence that steelhead are present in Mill or Deer Creeks.

Moreover, there is no hydrological basis for the Curtailment Orders on Mill or Deer Creeks. Impaired flow beneath the SVRIC dam- the flows left in Deer Creek after diversions by water users- is currently fluctuating between 40 and 41 CFS. CDFW is inaccurate and disingenuous by representing that steelhead will encounter “extremely low stream flows” below Ward and SVRIC Dams. (see October 6, 2022 Memorandum of Tina Bartlett, p.1.) This statement, and the Curtailment Orders themselves, are wholly debased from the actual hydrology of Mill or Deer Creek. There is no emergency on Mill or Deer Creeks, and this is not an appropriate way for government agencies and employees to behave.

CDFW’s October 6, 2022 letter, a copy of which is attached hereto, was issued only one day before the Curtailment Orders were issued on October 7, 2022. This confirms that SWRCB Defendants did not scrutinize, weigh, assess, or even consider the representations of DFW or whether there is a factual basis or evidence for moving forward with the curtailment on Mill and Deer Creek on October 15, 2022.

California law requires implementation of a physical solution when physical measures will maximize the beneficial use of water in accordance with California Constitution Article X, section 2. The physical solution in Mill and Deer Creeks is multi-beneficial channel restoration and critical riffle rehabilitation measures that will enhance fishery passage conditions for both juvenile and adult salmonids while reducing instream flows in order to maximize the beneficial use of water for human and instream purposes. The proposed channel restoration and critical riffle rehabilitation measures consist, in the short-term, of hand stacking rocks in a downstream V-shape to channel lower flows at critical locations to increase depth and create improved passage conditions with minimal low flows (flows substantially less than 50 CFS). These channel restoration measures can be immediately implemented by hand and with minimal cost, and they will enhance fishery conditions in the stream while maximizing the beneficial use of water for crops, livestock, and other human uses. Water users on Mill and Deer Creeks have unsuccessfully and repeatedly requested that the SWRCB, DFW, and NMFS address the root problem, as set forth in our prior comment letters. Water users also unsuccessfully requested that such measures be implemented on an emergency basis in light of the prevailing drought year conditions. A physical solution of channel restoration and critical riffle rehabilitation within Mill and Deer Creeks is required by law. (*City of Lodi v East Bay Municipal Utility District* (1936) 7 Cal 2d. 316, 341, 344.) The lack of any such physical solution here and the use of the regulations and orders to confiscate the water from senior water right holders and to reallocate it to for instream fishery purposes on Mill and Deer Creek rather instead violates California water law.

California water rights are real property rights pursuant to 160 years of California and Federal case law. “As such, they cannot be infringed by others or taken by government action without due process and just compensation. [Citations]” (*United States v. SWRCB* (1986) 182 Cal.App.3d 82, 101.) The California and United States Constitutions prohibit government from taking property without due process and compensation. (U.S. Const., 5th, 14th Amendments; Cal. Const., Art. I, § 7, subd. (a), Art. I, §19(A).) At no point in the process are water right holders

afforded an evidentiary hearing to challenge the determination that their use and diversion of water is unreasonable with cross-examination, as required by the United States and California Constitutions. This scheme is incompatible with due process and the real property nature of California water rights. (*U.S. v. Gerlach Live Stock Co.* (1950) 339 U.S. 725, 727-30, 752-56; *United States v. SWRCB* (1986) 182 Cal.App.3d 82, 101.) The SWRCB may not declare unreasonable or impose a new condition on water rights without an opportunity for an evidentiary hearing. (*United States v. SWRCB* (1986) 182 Cal.App.3d 82, 101.)

The reasonableness of the targeted water right holders' use and diversion of water is a question of fact subject to due process hearing requirements. (*Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132, 139 (*Joslin*); *Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 706 (“what is an unreasonable use is a judicial question depending upon the facts in each case.”).) Determining the reasonableness of a diversion and use of water requires an evidentiary hearing with consideration of other water uses and diversions. The SWRCB must provide an opportunity for an evidentiary hearing with cross-examination for water right holders on Mill and Deer Creek to challenge the determination of the SWRCB that their use and diversion of water is unreasonable.

The instream flow requirements are also a compensable physical taking of real property that requires compensation. It is well established that interference with the use and diversion of water pursuant to its water rights constitutes a compensable physical taking of private property. (*Dugan v. Rank*, 372 U.S. at 623-26 (Supreme Court treated Friant Dam's interference with downstream water rights as a physical taking requiring compensation); *U.S. v. Gerlach Live Stock Co.*, *supra*, 399 U.S. at 754 (Supreme Court analyzed Friant Dam interference with downstream San Joaquin River water rights as a physical taking of private property requiring compensation).) The SWRCB is taking the property of water users for a preferred public use and project- instream fishery enhancement in Mill and Deer Creeks. Styling of the taking of property as legislative does not excuse compensation requirements.

The injurious and confiscatory nature of the application of Article X, section 2 here is in severe conflict with California water law. Article X, section 2 is not confiscatory – it only limits the use and diversion of water to what is “reasonably required for the beneficial use to be served...” so that “the water resources of the State be put to beneficial use to the fullest extent of which they are capable...” (Cal. Con. Art. X, sec. 2.) The Amendment authorizes limiting diversions and uses of water when more efficient methods are available, and which can be utilized without injury to the beneficial use of other water users. (Cal. Con. Art. X, sec. 2 (“...nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water ...”); *Gin S. Chow v. City of Santa Barbara* 217 Cal. 673, 700, 706 (1933) (Upholding unreasonableness finding to maximize beneficial use through storage when no injury to water right holder).) The United States Supreme Court has held Article X, section 2's is not “confiscatory” and is the result of a “studied purposes to preserve” property right in water rights. (*Gerlach, supra*, 339 U.S. 725 at 751-755.)

The SWRCB is utilizing a label of “unreasonable” to take the water of a small number of rural Tehama County water right holders for an instream public trust use that its' Board Members preferred. No balancing is occurring - purported instream fishery needs are to be fully satisfied while all conflicting beneficial uses are automatically declared unreasonable and ordered to cease. Mill and Deer Creek water right holders' use and diversion of water is not being declared unreasonable because they exceed what is “reasonably required for the beneficial use” being

served. It is not even being considered if more efficient methods of diversion or use of water are available.

The use of water to provide minimum in-stream flows for fish protection is a public trust use of water. The US Supreme Court unequivocally held in *Summa Corp, supra*, 466 U.S. 198 that California could not apply the public trust to former Mexican Land Grant lands and waters. (*Summa Corp., supra*, at 206-209.) Deer Creek and Mill Creek and the lands of Petitioners are patented Mexican Land Grant lands. The SWRCB is violating the prohibition of *Summa Corp* by confiscating the water and property from former Mexican Land Grant lands and by doing so for public trust interests within former Mexican Land Grants.

The SWRCB is also violating Government Code section 11346.1(b). Government Code Section 11346.1(b)(1) requires that, prior to adopting an emergency regulation, a state agency must make a finding that the adoption of a regulation is “necessary to address an emergency.” The SWRCB cannot satisfy Government Code § 11346.1. As set forth herein and in the material submitted herewith, government has been studying and calling for an instream flow project on Mill and Deer Creek for over thirty years, and it even began but didn’t adequately fund or complete public projects on Deer and Mill Creeks paying private landowners and water right holders to forego their surface water diversions and to pump groundwater to supplement instream fishery flows. Recurring drought is also a known situation in California, particularly to the State Water Board. The SWRCB had nearly five years since the last severe drought (and arguably much longer) to develop and implement a project to enhance fishery conditions in Mill and Deer Creeks through the restoration and rehabilitation of critical riffles within Mill and Deer Creeks. The SWRCB fails to adequately explain its failure to address the situation through non-emergency regulations. (Government Code § 11346.1(b)(2).) Waiting until drought conditions recur to declare the need to issue emergency regulations is merely a matter of expedience and therefore the SWRCB is violating Government Code § 11346.1(b).

There is no emergency on Deer Creek or Mill Creek. The fish return numbers in 2021 and 2022 have been excellent, and the hydrological conditions in 2022 have been favorable on both Mill and Deer Creek. SWRCB Staff, DFW, and NMFS were not accurate in their depiction of the “need” for emergency regulations and they failed to provide the State Water Board with the full picture.

The SWRCB also provided water users insufficient notice and opportunity to comment on the proposed actions. The SWRCB noticed the Draft Emergency Regulations at 11:35 p.m. on Friday, August 5, 2022, leaving affected water users 3.5 business days to prepare and submit comments before the deadline of noon, August 11, 2022. This made it impossible for affected water users to offer comprehensive comments by the August 11, 2022 noon deadline.

DFW has also abandoned operation, maintenance, and repair of its fish ladders and screens on Deer Creek and is refusing to operate, maintain, and repair them. DFW admitted that operation, maintenance, and repair of the ladders and screens, which DFW is refusing to do, is necessary to protect salmon and steelhead. (Tina Bartlett February 8, 2022 Letter [Stating Stanford Vina should agree to an MOU “so CDFW can resume operating and maintaining the fish screens and ladders on SVRIC’s dam to protect fish in Deer Creek.”]) Fish cannot survive migration without properly functioning fish ladders and screens, and the ladders and screens will not function properly if they

are not operated, maintained, and repaired. The SWRCB's base and pulse flows will attract salmon and steelhead to leave the Sacramento River and attempt migration up Deer Creek. Yet the Ladders and Screens are not safe for salmon and steelhead due to DFW's refusal to operation, maintain, and repair them, as DFW has done for approximately seventy years.

The State is also relying on the emergency regulations to breach its voluntary agreement with LMMWC- the "1990 Agreement"- in which the State, acting through DFW and DWR, provides LMMWC groundwater in exchange for LMMWC foregoing diversions in an amount equal to the instantaneous capacity of the State's wells for the purpose of enhancing fishery flows in Mill Creek. DFW has asserted that because the SWRCB's emergency regulations require minimum instream flows on Mill Creek, LMMWC is not entitled to groundwater pumping credits for instream flows under the 1990 Agreement. That is, because the State is utilizing emergency regulations to take LMMWC's water for instream flows, the State is not going to honor its voluntary agreement that provides groundwater to LMMWC in exchange for instream flows. This violates the Governor's Drought Declaration which seeks voluntary agreement between water users and fishery agencies, and statements by the SWRCB in the resolution adopting emergency regulations that it wants "long-term resolution of needed measures to protect fisheries..."

The SWRCB is exercising emergency authority to declare the diversion and use of water as "unreasonable" without any regard for the actual temperature, hydrological, and fishery conditions that actually exist on Mill and Deer Creeks – the facts. LMMWC, SVRIC, and Peyton Pacific renew their objections to the emergency regulations and the curtailment orders for Mill and Deer Creeks, and their demands for a due process evidentiary hearing and compensation for the taking of property.

The State Water Board has also curtailed junior post-1914 water rights. Significantly, senior rights of LMMWC, Stanford Vina, and Peyton Pacific were not curtailed. Unlike most other water right holders in the Delta watershed, water is available for diversion under Stanford Vina's, LMMWC's and Peyton Pacific's super-senior water rights. Mill and Deer Creek water users would only be "curtailed" because the State has envisioned a preferred priority for their water – instream fishery use. To amicably address the state's preference for this instream use of water, Mill and Deer Creek water users in May 2021 offered to transfer water instream for compensation (\$2.1 million). This offer was refused, and the State now seeks to condemn property rights without any compensation under the guise of a "curtailment." This is unlawful.

E. Specific Action Which Petitioner Requests.

Petitioners request that the SWRCB and SWRCB staff vacate its decisions to adopt and issue the Curtailment Orders 2022-0169-DWR and 2022-0170-DWR for Mill and Deer Creeks, and Petitioners request that SWRCB compensate Petitioners for damages and attorney fees incurred as a result of the improper actions undertaken by the State Water Board and its staff, and that the SWRCB hold an evidentiary hearing and agree to payment of compensation prior to adopting further or future Curtailment Orders.

F. A Statement that Copies of the Petition and Accompanying Materials Have Been Sent to All Interested Parties.

Copies of the Petition and accompanying materials have been sent to Deer Creek Irrigation District (DCID), California Department of Fish and Wildlife (CDFW), the National Marine Fisheries Service (NMFS), and SWRCB Division of Water Rights. Petitioners do not believe that this petition is required to be sent to any other parties.

Very truly yours,

MINASIAN, MEITH, SOARES
SEXTON & COOPER, LLP

By: 
JACKSON A. MINASIAN

cc: Dustin Cooper
Aidan P. Wallace
Enclosure(s)

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