

1 DANIEL J. O'HANLON, State Bar No. 122380
REBECCA R. AKROYD, State Bar No. 267305
2 KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
400 Capitol Mall, 27th Floor
3 Sacramento, CA 95814
Telephone: (916) 321-4500
4 Facsimile: (916) 321-4555
Attorneys for San Luis & Delta-Mendota Water Authority

5 JON D. RUBIN, State Bar No. 196944
6 Senior Staff Counsel
SAN LUIS & DELTA-MENDOTA WATER
7 AUTHORITY
400 Capitol Mall, 27th Floor
8 Sacramento, CA 95814
Telephone: (916) 321-4519
9 Facsimile: (209) 826-9698
Attorney for San Luis & Delta-Mendota Water Authority

10 CLIFFORD W. SCHULZ, SBN 39381
11 STANLEY C. POWELL, SBN 254057
KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
12 400 Capitol Mall, 27th Floor
Sacramento, CA 95814
13 Telephone: (916) 321-4500
Facsimile: (916) 321-4555
14 *Attorneys for State Water Contractors*

15 TIM O'LAUGHLIN, SBN 116807
VALERIE C. KINCAID, SBN 231815
16 O'LAUGHLIN & PARIS LLP
117 Meyers Street, P.O. Box 9259
17 Chico, CA 95927-9259
Telephone: (530) 899-9755
18 Facsimile: (530) 899-1367
Attorneys for Modesto Irrigation District

20 BEFORE THE
21 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

22 In the Matter of the Draft Cease and Desist
23 Order Against Unauthorized Diversion of
Water by Mark and Valla Dunkel

**SUPPLEMENTAL MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF PETITION FOR
RECONSIDERATION OF ORDER
DECLINING TO ISSUE CEASE AND
DESIST ORDER (DIVERSION OF WATER
BY MARK AND VALLA DUNKEL)**

1 **I. INTRODUCTION**

2 The San Luis & Delta-Mendota Water Authority (“Water Authority”) and State Water
3 Contractors (“SWC”), acting for and on behalf of their member agencies, and Modesto Irrigation
4 District (“MID”) (collectively, “Petitioners”) submit the following Supplemental Memorandum
5 of Points and Authorities in Support of Petition for Reconsideration of Water Rights Order 2012-
6 0016 (“Order WR 2012-0016” or “Order”) Declining to Issue Cease and Desist Order against
7 Mark and Valley Dunkel (“Dunkels”). On November 15, 2012, the Petitioners filed a
8 Memorandum of Points and Authorities in Support of Petition for Reconsideration of Order 2012-
9 0016. Since that time, the State Water Resources Control Board (“State Water Board”) issued a
10 water rights order, Order WR 2012-0035 (“Gallo Reconsideration Order”), which draws a legal
11 distinction between a State Water Board decision concerning the exercise of its prosecutorial
12 discretion (choosing to not pursue an enforcement action) and determination of alleged water
13 rights. In light of that language in the Gallo Reconsideration Order, the Petitioners submit this
14 Supplemental Memorandum.

15 **II. SUPPLEMENTAL STATEMENT OF FACTS**

16 On December 4, 2012, the State Water Board issued the Gallo Reconsideration Order. In
17 that order, the State Water Board rejected the argument made by the Water Authority and SWC
18 that the Executive Director erred when she approved the settlement without substantial evidence
19 to support the decision of the prosecutorial team not to contest the validity of water rights asserted
20 by Gallo. (*See* Gallo Reconsideration Order, at p. 6.) In doing so, the State Water Board drew a
21 distinction between a determination of claimed water rights and a determination not to prosecute
22 an enforcement action against those claiming such water rights. The State Water Board
23 explained:

24 The settlement does not amount to an adjudication or determination of Gallo’s
25 riparian right claims, nor does it purport to do so. Rather, the Prosecution Team
26 agreed not to contest some of those claims. There has not been a determination
27 that would bind the State Water Board or third parties if issues concerning the
28 riparian right claims the Prosecution Team agreed not to challenge should arise in
connection with a later proceeding before the State Water Board or a court.

(*Id.* at pp. 6-7.) Consistent with the language in the Gallo Reconsideration Order, the State Water

1 Board in Order WR 2011-0005 (regarding the Woods Irrigation Company) wrote:

2 [I]f the validity and extent of a riparian or pre-1914 appropriative right is
3 determined in the context of an enforcement proceeding, the validity of the right is
4 determined for the more limited purpose of deciding whether enforcement action is
5 warranted. For this more limited purpose, it may not be necessary to define all of
6 the parameters of a right. For example, ... the State Water Board's determination
7 in an enforcement proceeding that a claim of right is valid may not be based on the
8 same amount or quality of evidence that would be required to substantiate the right
9 in a statutory stream adjudication or court reference. The Board's decision whether
10 to take enforcement action is discretionary, and the Board may elect not to take
11 enforcement action against a diverter, even if the evidence substantiating the
12 diverter's claim of right is deficient in certain respects.

13 (Order WR 2011-0005 at pp. 15-16 (citations omitted).)¹

14 **III. ALTERNATIVE RELIEF**

15 In their November 15, 2012, Memorandum of Points and Authorities, the Petitioners
16 respectfully requested that the State Water Board rescind Order WR 2012-0016 and defer a
17 decision on whether to issue to the Dunkels a cease and desist order until after it has completed
18 the hearing in the Woods Irrigation Company matter, as directed in Order WR 2012-0012. That
19 relief remains appropriate. However, if the State Water Board is inclined to issue an order
20 denying the Petition for Reconsideration of Water Rights Order 2012-0016, the Petitioners
21 respectfully request that the State Water Board include in any such order language substantially
22 similar to the language contained in the Gallo Reconsideration Order and consistent with Order
23 WR 2011-0005, quoted above. The Petitioners propose such an order state:

24 In Order WR 2012-0016, the State Water Board declined to issue a Cease and
25 Desist Order against the Dunkels. That decision does not amount to an
26 adjudication or determination of the Dunkels' water right claims, nor does it
27 purport to do so. In Order WR 2012-0016, the State Water Board decided not to
28 exercise its prosecutorial discretion. As a result, the State Water Board did not
render a determination that would bind the State Water Board or third parties if
issues concerning the water right claims the State Water Board agreed not to
challenge should arise in connection with a later proceeding before the State Water
Board or a court.

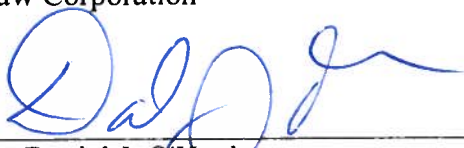
¹ The Petitioners cite the Gallo Reconsideration Order and Order WR 2011-0005 because they reflect a position of the State Water Board. Through this Supplemental Memorandum, the Petitioners ask the State Water Board to reflect that position in any order denying the Petition for Reconsideration of Order WR 2012-0016, if the State Water Board determines that denial is appropriate. The Petitioners make that request notwithstanding and without waiving their argument that the law requires the State Water Board ensure the evidence offered to support a claim of right satisfies well-established legal standards before determining if the claim of right is valid.

1 The Petitioners appreciate the State Water Board's consideration of this Supplemental
2 Memorandum.

3 Dated: March 1, 2013

Kronick, Moskovitz, Tiedemann & Girard
A Law Corporation

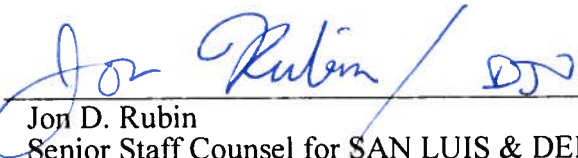
5
6
7
8
9

By: 
Daniel J. O'Hanlon
Rebecca R. Akroyd
Attorneys for SAN LUIS & DELTA-MENDOTA
WATER AUTHORITY

10 Dated: March 1, 2013

San Luis & Delta-Mendota Water Authority

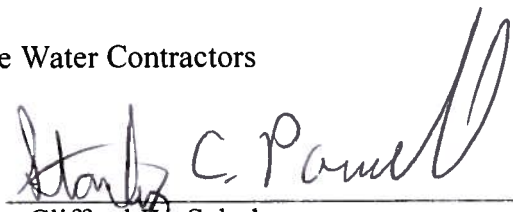
11
12
13
14

By: 
Jon D. Rubin
Senior Staff Counsel for SAN LUIS & DELTA-
MENDOTA WATER AUTHORITY

15 Dated: March 1, 2013

State Water Contractors

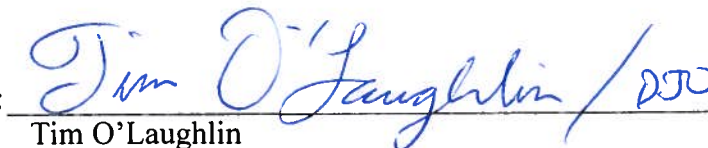
16
17
18
19

By: 
Clifford W. Schulz
Stanley C. Powell
Attorneys for STATE WATER CONTRACTORS

20 Dated: March 1, 2013

Modesto Irrigation District

21
22
23
24
25

By: 
Tim O'Laughlin
Valerie C. Kincaid
Attorneys for MODESTO IRRIGATION DISTRICT

26
27
28

1 **PROOF OF SERVICE**

2 I, Terri Whitman, declare:

3 I am a citizen of the United States and employed in Sacramento County, California. I am
4 over the age of eighteen years and not a party to the within-entitled action. My business address
5 is 400 Capitol Mall, 27th Floor, Sacramento, California 95814. On March 1, 2013, served a copy
6 of the within document(s):

7 **SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN
8 SUPPORT OF PETITION FOR RECONSIDERATION OF ORDER DECLINING
9 TO ISSUE CEASE AND DESIST ORDER (DIVERSION OF WATER BY MARK
10 AND VALLA DUNKEL)**

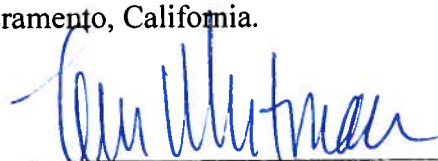
- 11 by transmitting via facsimile the document(s) listed above to the fax number(s) set
12 forth below on this date before 5:00 p.m.
- 13 by placing the document(s) listed above in a sealed envelope with postage thereon
14 fully prepaid, in the United States mail at Sacramento, California addressed as set
15 forth below.
- 16 by placing the document(s) listed above in a sealed Federal Express envelope and
17 affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal
18 Express agent for delivery.
- 19 by personally delivering the document(s) listed above to the person(s) at the
20 address(es) set forth below.
- 21 by transmitting via e-mail or electronic transmission the document(s) listed above
22 to the person(s) at the e-mail address(es) set forth below.

23 *See Attached Service List*

24 I am readily familiar with the firm's practice of collection and processing correspondence
25 for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same
26 day with postage thereon fully prepaid in the ordinary course of business. I am aware that on
27 motion of the party served, service is presumed invalid if postal cancellation date or postage
28 meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this court at whose
direction the service was made.

Executed on March 1, 2013, at Sacramento, California.



Terri Whitman

1 *In The Matter of the Draft Cease and Desist Order Against Unauthorized Diversion of Water by*
2 *Mark and Valla Dunkel*

3 **SERVICE LIST**

4 MARK AND VALLA DUNKEL:
5 c/o John Herrick, Esq.
6 4255 Pacific Avenue, Suite 2
7 Stockton, CA 95207
8 jherrlaw@aol.com

9 c/o Dean Ruiz, Esq.
10 Harris, Perisho & Ruiz
11 3439 Brookside Road, Suite 210
12 Stockton, CA 95219
13 dean@hpllp.com

14 CENTRAL DELTA WATER AGENCY
15 c/o Dean Ruiz, Esq.
16 Harris Perisho & Ruiz
17 3439 Brookside Road, Suite 210
18 Stockton, CA 95219
19 dean@hpllp.com

20 SAN JOAQUIN COUNTY AND THE
21 SAN JOAQUIN COUNTY FLOOD
22 CONTROL AND WATER
23 CONSERVATION DISTRICT
24 c/o DeeAnn M. Gillick, Esq.
25 Neumiller & Beardslee
26 P.O. Box 20
27 Stockton, CA 95201-3020
28 dgillick@neumiller.com
mbrown@neumiller.com

DIVISION OF WATER RIGHTS
PROSECUTION TEAM:
c/o David Rose, Esq.
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814
drose@waterboards.ca.gov

SOUTH DELTA WATER AGENCY
c/o John Herrick, Esq.
4255 Pacific Avenue, Suite 2
Stockton, CA 95207
jherrlaw@aol.com

c/o Dean Ruiz, Esq.
Harris, Perisho & Ruiz
3439 Brookside Road, Suite 210
Stockton, CA 95219
dean@hpllp.com

STATE WATER CONTRACTORS
c/o Stanley C. Powell, Esq.
Kronick, Moskovitz, Tiedemann & Girard
400 Capitol Mall, 27th Floor
Sacramento, CA 95814
spowell@kmtg.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

THE SAN LUIS & DELTA-MENDOTA
WATER AUTHORITY
c/o Jon Rubin, Counsel
P.O. Box 2157
Los Banos, CA 93635
Jon.Rubin@SLDMWA.Org

SAN JOAQUIN FARM BUREAU
c/o Bruce Blodgett
3290 North Ad Art Road
Stockton, CA 95215-2296
director@sjfb.org

MODESTO IRRIGATION DISTRICT
c/o Tim O'Laughlin, Esq.
O'Laughlin & Paris, LLP
P.O. Box 9259
Chico, CA 92927
towater@olaughlinparis.com
kpetruzzelli@olaughlinparis.com
vkincaid@olaughlinparis.com

CALIFORNIA DEPARTMENT OF WATER
RESOURCES
c/o James Mizell, Esq.
1416 Ninth Street, Room 1118
Sacramento, CA 95814
jmizell@water.ca.gov