



1 constant rate through Lots 71 and 72. Third, it's inherently unreasonable for Hidden Lakes to allow  
2 a majority of the water in the Lake to flow through the earthen dam onto Lots 71 and 72.

3 **II. BRIEF SUMMARY OF FACTS**

4 Hidden Lakes is a subdivision located in Granite Bay, California. The subdivision has two lakes  
5 for aesthetic purposes – the Northern and Southern Lakes. The Northern Lake is the lake at issue in  
6 this case and all parties agree that the Northern Lake leaks at a constant rate and flows through the  
7 Affected Lots. According to the Hidden Lakes' own documents, Hidden Lakes has known the  
8 Northern Lake leaks approximately 5,400 gallons of water per day since their testing began in 1990.  
9 (PT-3) The Northern Lake is an artificial lake that was created through the construction of an  
10 embankment on the Northern Shore adjacent to the Allegras' property. (Testimony of Mr. Rich,  
11 48:14-16) As far back as 1990, Hidden Lakes has recognized the need to seal up the lakes to prevent  
12 the "seepage" from continuing. (PT-4) In 1992 the Hidden Lakes minutes contain the following  
13 statement:

14 The lakes have been known to be leaking for many years. This may be the source of  
15 water infiltration in some properties adjoining the lakes. Due to the expense of major  
16 renovation and sealing, maintenance has been postponed. This issue needs to be  
addressed in the future. (PT-5)

17 Hidden Lakes admits the Northern Lake is leaking at a constant rate which increases during heavy  
18 rainfall, but the leaking continues year round and is not dependent on rainfall. (Testimony of Mr.  
19 Wentz, 163:18-164-18) According to Mr. Rich's testimony, the average rate of seepage is 3.75  
20 gallons per minute which equates to 6.05 acre-feet per year. (PT 21) The total estimated volume of  
21 the Northern Lake is approximately 7 acre-feet. (PT 21) Hidden Lakes offered no substantive  
22 evidence to controvert these numbers, and for the most part, they are extrapolated from their own  
23 reports and experts. The bottom line is everybody knows the Northern Lake is leaking.

24 The next issue is that water leaking from the Northern Lake is flowing directly into the  
25 Affected Lots. While Hidden Lake's argued at the hearing that the amount of water leaking from the  
26 Northern Lake is equivalent to a cup of water compared to the amount leaking from Folsom Lake, its  
27 argument failed to consider the reality for the Allegras and Delaneys. The reality is the leaking

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1 Northern Lake sends 86,400 cups of water per day through Lots 71 and 72.<sup>1</sup> The staggering figures  
2 are confirmed by the reports of the Associations expert Mr. Humphrey. (PT 21)

3 There was ample written and oral testimony from the Allegras and Delaneys in describing the  
4 negative effects the leaking Northern Lake has on their properties. The Affected Lots are soggy year  
5 round, so much so that portions of their respective backyards are too wet to use during the summer  
6 months. (Allegra 1, 2, and 15) The Affected Lots are the two “downstream” lots, and thus the entire  
7 amount of water leaking from the Northern Lake flows through the Allegra and Delany lots.

### 8 III. DISCUSSION

#### 9 A. The Factors Set Forth by The Department of Water Resources Favor a 10 Determination of Misuse of Water by Hidden Lakes

11 According to Water Resources Control Board Decision D1600 (“D1600”) there are several  
12 factors that are to be considered in evaluating an unreasonable use of water. As stated in D1600:

13 Thus, in determining the “reasonableness” of water usage within the IID, the law  
14 requires an examination of the ascertainable facts concerning such water usage and an  
15 evaluation of such facts in view of the increasing need for water conservation within  
California.

16 While Cal/EPA will assuredly present its further analysis in its closing briefing, the Allegras offer  
17 this following further analysis of the factors presented in D1600. As stated below, each of the  
18 factors to favor a determination of “unreasonable use” in this case:

- 19 • Other Potential Beneficial Uses for Conserved Water – Cal/EPA provided evidence  
20 of the current water shortages in California mandating conservation efforts. While,  
21 6.02 acre feet of water will not cure the water crisis, the cumulative effect of  
22 preventing wasteful uses is well-established. (PT 21) Certainly, keeping 6.02 acre  
feet of water within the San Juan Water District is of vital interest.
- 23 • Whether the Excess Water Now Serves a Reasonable and Beneficial Purpose – While  
24 Hidden Lakes attempted to frame the “beneficial purposes” of the excess water as a  
25 recreational lake with a fish population, that position is a misrepresentation of  
26 “beneficial purpose.” Certainly, the existing use (without the water waste) can be  
27 considered a beneficial use; however, the analysis is on the water leaking, not the  
water properly allocated to the Northern Lake. Hidden Lakes offered no beneficial  
purpose for the 6.02 acre-feet of water being lost per annum. In fact, the only  
evidence before the Board is that the leaking water causes harm to property owners.

28 <sup>1</sup> Average rate of seepage of 3.75 gallons per minute (PT 21). One cup [U.S.] is equivalent to .0625  
gallons. (www.asknumbers.com).

- 1 • Probable Benefits of Water Savings – The probable benefits of more efficient use are  
2 many, but there are two key considerations. First, the water can and should be used  
3 by the San Juan Water District to service its existing customers, contribute to  
4 preservation of wildlife in the American River Watershed (the leakage ends up in a  
5 different watershed [Dry Creek], and lessen the burden on Folsom Lake.
- 6 • The Amount of Water Reasonably Required for the Current Use – The Northern Lake  
7 is 7.02 acre feet. As per the testimony of Mr. Rich, leakage in the amount of 85% of  
8 the total volume of this purely aesthetic and recreational lake is unreasonable.
- 9 • Amount and Reasonableness of the Cost of Saving Water – Hidden Lakes has the  
10 ability to spread the cost of remediating the leaking Northern Lake amongst all of its  
11 members. There have been a number of alternatives to remedy the water including,  
12 but not limited to sealing the lake with a number of different proven products (which  
13 solves the leak issue), installation of the curtain drain which fails to address the  
14 problems and could cause substantial hardship to the Affected Lot owners, and even  
15 draining the lake and turning it into a green space. (PT 21)
- 16 • Whether the Required Methods of Saving Water are Conventional and Reasonable  
17 Rather than Extraordinary – The Northern Lake was not constructed as per the  
18 specifications, and thus the Northern Lake leaks constantly. The requirement to cure  
19 the leaking Northern Lake is conventional since it should have been done when it was  
20 initially constructed. Further, curing a leaking lake is simply a cost of operation no  
21 different than curing a leak in one’s pool. The only distinguishing factor here is the  
22 scale, but the ability to spread the cost of the remedy is equally scaled by the total  
23 ownership.
- 24 • A Physical Plan or Solution – Many solutions have been proposed, but the best option  
25 would be the seal the lake with a product (i.e. ESS-13). This system would enable  
26 Hidden Lakes to cure the damage conditions on the Affected Lots and recapture the  
27 leaking water and place it back into the Northern Lake. There are a number of other  
28 potential cures including, but not limited to, draining and resealing the lake with a  
geosynthetic liner, adding bentonite, and/or reconstructing the dam with low  
permeability soils. (Allegra 3; PT 21)

**B. In Addition the Unreasonable Use by Hidden Lakes is Further Evidenced by the  
Damage Affecting the Allegras’ and Delaneys’ Lots**

According to the written testimony of Ted Allegra, Cheri Allegra, Tony Wood (former  
owner), and Tara Delaney, as well as the oral testimony from all of the Allegras’ witnesses, the  
Affected Lots have suffered damages, and continue to suffer damages as a direct result of the  
Northern Lakes substantial leakage. The damage is severe in that the Allegras and Delaneys have  
substantial interference with their use and enjoyment of their Lots. The yards are saturated, they are  
forced to use equipment to battle the water flows, their pools and spas are damaged, and their

1 properties have seen significant decrease in their property values (\$82,500 attributed loss to  
2 Allegras, and \$165,000 to Delaneys [formerly Wood]). (Allegra 13) The ongoing damages can be  
3 entirely alleviated upon Hidden Lakes' agreement to remediate the Northern Lake's leak. It's  
4 entirely unreasonable for Hidden Lakes to waste 6.05 acre-feet of water every year in our current  
5 water shortage conditions. However, what truly makes Hidden Lakes' waste unreasonable, in fact,  
6 unconscionable, is that Hidden Lakes is knowingly causing harm to two of its residents.

7 **(1) The Wood/Allegra Settlement Does Not Address The Current Damages**

8 Hidden Lakes has argued the Allegras settled their damage claims against Hidden Lakes  
9 when they settled their past litigation in 2005. However, while the Allegras did settle their past suit  
10 against Hidden Lakes, the express language of the settlement agreement excluded any right of  
11 Hidden Lakes to continue to injure the Affected Properties. The express language of the settlement  
12 reads:

13 In exchange for the unallocated payment of \_\_[redacted pursuant to confidentiality  
14 agreement]\_\_ on behalf of defendant Hidden Lakes Estates Homeowners Association  
15 by Philadelphia Indemnity Insurance Company, Plaintiffs, for and on behalf of  
16 themselves, their heirs, executors, administrators, successors, predecessors, assigns,  
17 insurers, parents, attorneys, parents corporations, subsidiaries, related entities,  
18 trustees, partners, shareholders, officers, directors, agents, employees, and third party  
19 administrators, hereby release and discharge Hidden Lakes Estates Homeowners  
20 Association, Philadelphia Indemnity Insurance Company, their respective heirs,  
21 executors, administrators, successors, predecessors, assigns, insurers, attorneys'  
parent corporations, subsidiaries, related entities, trustees, partners, shareholders,  
officers, directors, agents, employees, and third party administrators, from any and all  
claims, demands causes of action, obligations, damages, and liabilities of any kind  
and nature whatsoever, whether in law or in equity, which either party ever had, now  
has, or may in the future arising from the claims asserted in the operative complaint  
and predecessor complaint in Superior Court of California, County of Placer Case No.  
SCV16896, *except as limited by the provisions of Civil Code §1668*. (HLE 5,  
Emphasis added.)

22 The key language with regard to whether the damages being suffered today by the Allegras and  
23 Delaneys is reasonable (i.e. consensual) is the fact that the settlement agreement is expressly limited  
24 by Civil Code section 1668. Civil Code section 1668 is not a standard term used in settlement  
25 agreements, and in this case, it was expressly required by the Allegras to avoid any preemption of  
26 their rights to seek future relief from future water discharges.

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1 Civil Code section 1668 is a statute that bars parties from entering into contracts which  
2 would result in future unlawful conduct. Civil Code section 1668 states:

3 All contracts which have for their object, directly or indirectly, to exempt one from  
4 responsibility for his own fraud, or willful injury to the person or property of another,  
5 or violation of law, whether willful or negligent, are against the public policy of the  
6 law.

6 Contracts that are in violation of Civil Code section 1668 are illegal contracts, and any such  
7 illegality voids the entire contract. *Mechanical Contractors Assoc. v. Greater Bay Area Assoc.*, 66  
8 Cal.App.4th, 672, 688 (1998). The inclusion of Civil Code section 1668 was intentional, and the  
9 purpose of the inclusion was to prevent Hidden Lakes from claiming it now had a right to cause  
10 willful and/or negligent injury to the Affected Properties through unlawful discharge of water. The  
11 simple fact is any interpretation by Hidden Lakes that it has a right to continue to cause harm to the  
12 Affected Properties, or any property for that matter, is unlawful, unenforceable, and would cause the  
13 entire settlement agreement to be voidable as an illegal contract. Thus, the argument that the use is  
14 reasonable because the Allegras have waived their right to make a claim for damages that are being  
15 incurred today is entirely unenforceable and illegal.

16 **(2) The Continuous Discharge of Water from the Northern Lake is an Ongoing**  
17 **and Continuous Tort Causing New Damages Every Day**

18 Hidden Lakes admittedly continuous discharge of 5,400 gallons of water per day amounts to  
19 a continuous trespass and/or nuisance. The fact that the injury could be entirely abated with remedial  
20 measures at any time, ceasing all further damages, makes the tort continuous versus permanent. Thus,  
21 even assuming the Board interprets the settlement agreement as argued by Hidden Lakes (i.e. that  
22 there was a waiver of all claims in the complaint including future claims arising out of the claims in  
23 the complaint), there are new damages because new tort claims are occurring continuously.

24 In *Baker v. Burbank-Glendale-Pasadena Airport Authority*, *supra*, 39 Cal.3d at pp. 868-870,  
25 the high court drew a distinction between an injury to land that is complete when the offending act is  
26 committed, and injury that is attributable to the defendant's continuing activities, the discontinuance  
27 of which would terminate the injury. In finding a continuing nuisance there, the court emphasized  
28 that the plaintiffs were not complaining of the location of the defendant's structures (an

1 encroachment), but were complaining of the activities of the defendant on neighboring land (a  
2 continuing use). *Beck Development Co. v. Southern Pacific Transportation Co., supra*, 44  
3 Cal.App.4th at p. 1218.

4 In the present case, the simple fact remains that Hidden Lakes asked this Board to simply  
5 disregard the damages occurring on the Affected Lots, disregard the illegality of their interpretation  
6 of the settlement agreement, and thus find that the unpermitted discharge of 1,971,000 gallons of  
7 water (6.02 acre-feet) into the Affected Lots each and every year is not causing damage and is thus  
8 reasonable. Certainly, Hidden Lakes would like to ignore the 20 year history of their disregard for  
9 reasonable water use, but in the current environmental context and the harm to the Allegras and  
10 Delaneys Hidden Lakes conduct clearly constitutes an unreasonable use.

11 **IV. CONCLUSION**

12 For all the reasons introduced in the written testimony, oral testimony at the hearing, and  
13 those summarized and set forth above, the Allegras hereby request the Board find Hidden Lakes'  
14 discharge of 6.02 acre-feet of water through the leaking Northern Lake to be an Unreasonable Use of  
15 Water, and order Hidden Lakes to take immediate steps to eliminate the unreasonable discharge.

16  
17 DATED: March 19, 2010

18 **MILLSTONE PETERSON & WATTS, LLP**  
19 *Attorneys at Law*

20  
21 By: 

22 RICHARD M. WATTS, JR.

23 Attorneys for Ted Allegra & Cheri Allegra  
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**PROOF OF SERVICE**

I am employed in the County of Placer; my business address is 2267 Lava Ridge Court, Suite 210, Roseville, California. I am over the age of 18 years and not a party to the foregoing action.

On March 22, 2010, I served the following documents:

**CLOSING BRIEF OF TED ALLEGRA & CHERI ALLEGRA**

**by overnight delivery** on the following party(ies) in said action, in accordance with Code of Civil Procedure § 1013(c), by placing a true copy thereof enclosed in a sealed envelope, with delivery fees paid or provided for, and delivering that envelope to an overnight express service carrier as defined in Code of Civil Procedure § 1013(c).

**by electronic service** [Code Civ. Proc 1010.6] by electronically mailing a true and correct copy of the documents listed above through electronic mail to the e-mail address(es) set forth below:

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California Environmental Protection  
c/o Linda S. Adams  
Secretary for Environmental Protection  
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Division of Water Rights  
State Water Resource Control Board  
c/o Records Unit  
1001 I Street, 2nd floor  
Sacramento, CA 95814  
Attn: Ernesta Mona  
[wrhearing@waterboards.ca.gov](mailto:wrhearing@waterboards.ca.gov)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 22, 2010, at Roseville, California.

  
\_\_\_\_\_  
KATE MOORE

2 **PROOF OF SERVICE**

3 I am employed in the County of Placer; my business address is 2267 Lava Ridge Court,  
4 Suite 210, Roseville, California. I am over the age of 18 years and not a party to the foregoing  
5 action.

6 On March 22, 2010, I served the following documents:

7 **CLOSING BRIEF OF TED ALLEGRA & CHERI ALLEGRA**

8  **by personally delivering** a true copy thereof, in accordance with Code of Civil  
9 Procedure § 1011, to the person(s) and at the address(es) set forth below.

10 Division of Water Rights  
11 State Water Resource Control Board  
12 c/o Records Unit  
13 1001 I Street, 2nd floor  
14 Sacramento, CA 95814  
15 Attn: Ernesta Mona  
16 [wrhearing@waterboards.ca.gov](mailto:wrhearing@waterboards.ca.gov)

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KATE MOORE