STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2021-0094

In the matter of the Draft Cease and Desist Order and
Administrative Civil Liability Complaint
issued by the Division of Water Rights Enforcement Section against

Kevin Gonzalves

for alleged unauthorized diversions of water
within the Canal Creek watershed in Merced County

CEASE AND DESIST ORDER AND ADMINISTRATIVE CIVIL LIABILITY ORDER

Table of Contents

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2021-0094

In the matter of the Draft Cease and Desist Order and
Administrative Civil Liability Complaint
issued by the Division of Water Rights Enforcement Section against

Kevin Gonzalves

for alleged unauthorized diversions of water
within the Canal Creek watershed in Merced County.

CEASE AND DESIST ORDER AND ADMINISTRATIVE CIVIL LIABILITY ORDER

BY THE BOARD:

1.0 INTRODUCTION

This matter came to the State Water Resources Control Board (State Water Board or Board) as a proposed order prepared by the Presiding Hearing Officer of the Board's Administrative Hearings Office (AHO), pursuant to Water Code section 1114, subdivision (c)(1). Pursuant to Water Code section 1114, subdivision (c)(2)(A), the Board adopts the AHO's proposed order in its entirety.

On November 12, 2019, the Board's Division of Water Rights (Division) Enforcement Section (Enforcement Section) issued a draft cease and desist order (CDO) against Respondent Kevin Gonzalves for unauthorized diversions from Canal Creek in Merced County. The draft CDO alleged that Respondent diverted water "into a reservoir" for, among other uses, irrigation of almond orchards, without a basis of right. Respondent timely submitted a request for hearing on the draft CDO.

On May 5, 2020, the Division issued an Administrative Civil Liability Complaint (ACL Complaint) against Respondent based on the same allegations. The Division asserted

that Respondent's alleged unauthorized diversions were a trespass under Water Code section 1052. The ACL Complaint asked the Board to impose administrative civil liability of $165,000 for alleged unauthorized diversions. Respondent timely submitted a request for hearing on the ACL Complaint.

On July 17, 30, and 31 and September 9 and 16, 2020, the AHO held its public hearing on the draft CDO and the ACL Complaint via Zoom teleconference. The Presiding Hearing Officer and AHO staff held a site visit on August 7, 2020. Respondent and members of the Enforcement Section and the Board's Office of Enforcement (collectively, the "Prosecution Team") participated in the public hearing and site visit.

We conclude that the Board should issue a cease and desist order to Respondent and impose administrative civil liability on Respondent.

2.0 LEGAL AND PROCEDURAL BACKGROUND

2.1 Physical Setting and Facilities

Respondent owns two parcels in northern Merced County, Merced County Assessor's Parcel Numbers (APNs) 052-540-015 and 052-540-065. (PT-12, p. 8; PT-13.)[1] These parcels are depicted as the "Gonzalves Property" in Figure 1.[2] They are located north of the City of Merced near the Town of Winton, south of Fisher Road and north of Canal Creek, in the Canal Creek watershed. (Figs. 1, 2 & 3.)

There are three almond orchards on Respondent's parcels, which are labeled as "Orchards 1, 2 and 3" in Figure 2. Respondent receives water from the Merced

[1] The Prosecution Team's exhibits are labeled "PT-". Respondent's exhibits are labeled "Gonzalves-". Electronic copies of each party's exhibits are in a subfolder for the party in the administrative record for this matter. Because Respondent did not number his exhibits when he filed them, the AHO re-numbered them, and saved them in a sub-folder within the Gonzalves exhibits folder, titled "Files created by AHO." This order refers to the Gonzalves exhibits in that sub-folder. The AHO has posted this administrative record on the AHO-FTP site. Unless otherwise noted, references to page numbers in documents, including parties' exhibits, refer to the page numbers at the top of the screen reading software used to view the pdf files of these documents.

[2] Unless the context indicates otherwise, references to "Fig." or "Figure" are to the figures attached to this order.

Irrigation District (Merced ID) through the district's Escaladian Canal and Escaladian Lateral A and conveys this water through Gonzalves Lateral A to his sprinkler pump and irrigation system manifold, which are located on the north side of Orchard 3. (See Fig. 2.) Respondent uses two systems to irrigate his orchards: (a) a gravity-flow system that conveys water from the irrigation system manifold to the orchards for flood irrigation; and (b) a pressurized system that conveys water from the sprinkler pump to the orchards for irrigation with sprinklers. (2020-08-07 Site Visit Recording, FILE0015,[3] 0:00-1:37; Fig. 2.)

APN 052-540-015 contains Orchard 3 and the unused area south of this orchard (Unused Area). (PT-13; Fig. 2.) APN 052-540-065 contains Orchards 1 and 2, the Gonzalves Pond,[4] the Tailwater Recovery Pond, and an area that previously was an orchard and currently is fallow (Former Orchard).[5] (*Id*.)

A berm with a roadway on top (Roadway Berm) is located between the Gonzalves Pond and Orchard 1. (PT-12, p. 14; Fig. 2.) Another berm (Canal Creek Berm) is located between the Gonzalves Pond and Canal Creek.

When water levels are high enough, water can flow back-and-forth between Canal Creek and the Gonzalves Pond through two pipes (Canal Creek Berm Pipes) in the

---

[3] Files from the August 7, 2020 site visit are in the administrative record in the folder labeled "2020-08-07 Gonzalves site visit." The citations in this order to the five days of AHO Zoom hearings are labeled "Recording," followed by the date and timestamp of the recording. These files are in the Hearing Documents folder in the administrative record, with a separate file for each hearing day. All citations to recordings list the time in each recording in hours (where applicable), minutes and seconds when the relevant discussion begins and the time when the discussion ends.

[4] We use "Gonzalves Pond" as the name of this pond. This is the name of this pond in the petition for writ of mandate and complaint in Respondent's 2017 lawsuit against Merced ID. (PT-15, p. 7, ¶ 25.) The Prosecution Team's exhibits refer to the Gonzalves Pond as "Reservoir A" (see, e.g., PT-12, p. 7) or the "reservoir" (see, e.g., PT-4, p. 3, ¶ 10.) We do not use the term "reservoir" for this pond because it does not appear that this pond was constructed to store water for beneficial uses. (See Recording, 2020-07-17, 2:22:46-2:24:13.)

[5] During the August 7, 2020 site visit, Mr. Gonzalves explained that he stopped growing almond trees on this seven-acre orchard in 2014 or 2015. (2020-08-07 Site Visit Recording, FILE0014, 0:00-0:46.)

Canal Creek Berm. At higher water levels, water can flow back-and-forth over the top of the Canal Creek Berm. (Fig. 2; PT-4, p. 4, ¶ 14; PT-12, p. 16.) Damon Hess, a Water Resource Control Engineer with the Enforcement Section, observed one of these pipes during his January 25, 2018 site inspection. (PT-12, p. 16; see also Fig. 2.) He estimated that this pipe is 12 inches in diameter. (*Id.*) During the August 7, 2020 site visit, Respondent told the hearing officer that there is a second pipe in the Canal Creek Berm. (See 2020-08-07 Site Visit Recording, FILE0006.) This second pipe, depicted in Figure 2, is approximately 40 feet downstream of the pipe Mr. Hess observed. (See PT-12, p. 24, fig. 8, first photograph, which apparently shows the part of this second pipe that extends into the Canal Creek bed. This second pipe is located to the left of the "Pipe" labeled in that photograph.)

Figure 2 lists the approximate elevations of Orchards 1, 2 and 3, the top of the Roadway Berm and the top of the Canal Creek Berm.[6] As shown in this figure, the elevation of the top of the Canal Creek Berm is approximately 195 feet, the elevation of the top of the Roadway Berm is approximately 204 feet, and the elevation of Orchard 1 is approximately 191 to 200 feet. The elevation of the lowest part of the Canal Creek bed near the western Canal Creek Berm Pipe is approximately 188 to 189 feet. (PT-39, p. 6, ¶ 8; PT-53.) The elevation of the bottom of the Gonzalves Pond is approximately 182 feet. (PT-39, p. 5, ¶ 7; PT-51.) Mr. Hess testified that the elevation of the bottom of the Canal Creek Berm Pipe he observed (the eastern pipe) was about 189 feet. (Recording, 2020-07-30, 4:59:15-5:00:39.)

During the site visit, Respondent waded into the Gonzalves Pond to a point where he said he was standing on the eastern Canal Creek Berm Pipe. (2020-08-07 Site Visit Recording, FILE0005, 0:00-4:36.) At this point, he was in water about four feet deep,

[6] Mr. Hess testified that two different elevation datum reference points, NGVD29 and NAVD88, are used for elevations in the vicinity of Respondent's properties. (PT-39, p. 4, ¶ 7.) At and near Respondent's parcels, elevations using NAVD88 are approximately 2.5 feet higher than elevations using NAVD29. (*Id.*; PT-51.) Many of the exhibits and testimony in the administrative record do not state which datum reference point is used for the elevations listed in them. Because of these uncertainties, this order uses these elevations only as approximations to demonstrate the approximate relative elevations of the various features and facilities.

and the pond surface elevation was about two feet below the top of the Canal Creek Berm at that location. If the top of the berm at that location is at elevation 195, then this indicates that the elevation of this pipe is about 189 feet. This approximate elevation is consistent with Mr. Hess's testimony discussed in the preceding paragraph.[7]

This pipe does not extend to the middle of the Canal Creek bed (see PT-12, p. 16), and the elevations discussed in the preceding paragraphs indicate that the lowest point of the creek bed may be about one foot lower than the pipe elevation. Mr. Hess testified that "there is always water in the reservoir, due to the height differential between the bottom of the reservoir and the bed of the creek, and the open pipe connecting the two." (PT-4, p. 5, ¶ 15.) This statement is consistent with the relative elevations discussed in the previous paragraphs. Mr. Gonzalves agreed that the Gonzalves Pond never is empty, and that the water levels in it vary. (PT-4, pp. 5-6, ¶ 20; 2020-08-07 Site Visit Recording, FILE0027, 0:00-2:17.)

2.2 Canal Creek Flows and Castle Dam and Reservoir Operations

Upstream of Respondent's parcels, Canal Creek generally runs east to west. (Fig. 3.) In the vicinity of Respondent's parcel, the general direction of Canal Creek turns to the south. (*Id.*) Canal Creek begins at an elevation of approximately 600 feet. (Gonzalves-52, p. 1.) The Canal Creek watershed upstream of Respondent's parcels has an area of approximately 16,800 acres. (PT-12, p. 29; Recording, 2020-07-30, 5:06:19-5:10:23.) A 1916 topographic map depicts the upper reaches of Canal Creek as an intermittent stream. (Gonzalves-52, pp. 1-2.)

Merced ID diverts water from the Merced River downstream of the district's Lake McClure and New Exchequer Dam into the district's Main Canal. (Figs. 1 & 3; PT-4, p. 8, ¶ 27.) Merced ID releases water from the Main Canal into Canal and Edendale Creeks. (*Id.*; Gonzalves-30, p. 182.) Merced ID makes these releases to convey water

[7] Respondent's written testimony states that one of the Canal Creek Berm Pipes is "set at 192 feet" and the "banks are at 193.5 feet." (Gonzalves-38, p. 3.) This would indicate the pipe elevation was only about one and one-half feet below the top of the Canal Creek Berm. Based on Mr. Gonzalves's statements during the site visit (during which he was under oath) and the hearing officer's observations, it appears more likely that the pipe elevation was in the range discussed in these paragraphs of this order.

through Canal Creek to district customers located downstream of Respondent's parcels. (PT-4, p. 8, ¶ 27, pp. 14-15, ¶¶ 49-51.)

The United States Army Corps of Engineers constructed the Castle Dam and Reservoir Project during 1991 and 1992, and the Central Valley Flood Protection Board[8] now operates the project. (PT-12, pp. 19-20; Gonzalves-30, p. 139.) Castle Dam is located on Canal Creek downstream of Respondent's parcels. (Figs. 1 & 3; PT-12, p. 36; Gonzalves-30, pp. 122, 363.) Castle Dam's 50-year flood pool elevation is 206.5 feet and has a capacity of 4,000 acre-feet (af). (Gonzalves-30, pp. 133, 137.) The Standard Project Flood pool elevation is 210.8 feet, the spillway crest elevation is 211.5 feet, and the Spillway Design Flood pool elevation is 215.5 feet. (*Id.*) The reservoir's capacities at these elevations are 6,400 af, 7,500 af and 11,000 af. (*Id.*) Castle Dam controls natural flows from Canal and Edendale Creeks and the water that flows into the Main Canal north of Edendale Creek and then is released into Canal and Edendale Creeks. (*Id.,* p. 139.) Water normally is released from Castle Dam into Canal Creek below the dam at rates within downstream channel capacities. (*Id.*)

The flood-control season for the Castle Dam and Reservoir Project normally is October 15 to April 15. (Gonzalves-30, p. 182.) The irrigation season can occur from March 1 through October 31 of each year. (*Id.*) If Merced ID starts an irrigation season before April 15, then the district must closely coordinate its operations with the Central Valley Flood Control Board's flood-control operations. (*Id.*) During the irrigation season, Merced ID may divert water from the Merced River into the Main Canal and release water from the Main Canal into Canal Creek or Edendale Creek. (*Id.)*

---

[8] The Reclamation Board was chartered in 1911. (http://cvfpb.ca.gov/about-us/agency/.) Amendments to Water Code sections 8521 and 8550 enacted in 2007 changed the name of the Reclamation Board to the "Central Valley Flood Protection Board" and transferred all previously allocated duties and funding from the Reclamation Board to the Central Valley Flood Protection Board. (Cal. Stats. 2007, ch. 365, §§ 3, 7; ch. 366, §§ 7, 11.)

Many documents in the administrative record pre-date these changes and therefore use the name "Reclamation Board." The discussions in this order of such documents use this prior name.

There are two ways that surface-water elevations in Canal Creek adjacent to Respondent's property can rise and overtop the Canal Creek Berm.

First, surface-water elevations in Castle Reservoir may exceed the elevation of the top of the Canal Creek Berm. Because the 50-year flood pool elevation is 206.5 feet (Gonzalves-30, pp. 133, 137), reservoir levels during 50-year flood events would be over 11 feet higher than the top of the Canal Creek Berm.[9] Even during events with much higher probabilities of occurrence, when surface-water elevations in Castle Reservoir do not reach 206.5 feet but still exceed the elevation of the top of the Canal Creek Berm, the berm will be overtopped.

The Castle Reservoir irrigation pool is limited to approximately elevation 193 feet. (*Id*., p. 269.) While the elevation of the top of most of the Canal Creek Berm appears to be approximately 195 feet, some parts of the top of this berm may be slightly lower. For this reason, and because reservoir operations during the irrigation season may cause reservoir levels to rise above 193 feet, the reservoir may overtop the Canal Creek Berm during the irrigation season.

Second, Mr. Gonzalves testified that Merced ID frequently conveys flows between 400 and 800 cubic feet per second (cfs) through Canal Creek, which he testified cause the creek to overtop the Canal Creek Berm. (Gonzalves-38, p. 8.)

Merced ID's mean daily flow data indicate that, on August 7, 2020, the date of the AHO's site visit, the flow in Canal Creek below the power plant on the Main Canal was 2.2 cfs and the flow at the Edendale Creek Weir below the Main Canal was 289.32 cfs. (2020-09-21 Canal Creek Flow Data, cells 7087D & 7087E.) These flows total 291.52 cfs. Assuming there were no significant diversions or conveyance losses between these two measurement points and Respondent's property, the Canal Creek flow at Respondent's property on that date was close to this total. On that date, the hearing officer observed that the Canal Creek Berm was not overtopped, and the surface-water elevation in the creek was just below the lowest elevation of the top of the berm.

[9] An aerial photo taken on February 6, 1996 shows Castle Reservoir at a water level that inundated all of the Canal Creek Berm, the Gonzalves Pond, the Roadway Berm and Orchard 1. (PT-56, p. 103.)

Respondent pointed out several places where the soil on the top of the berm was wet, and a few places where there were puddles, and Respondent said these conditions were the results of recent overtopping events. (2020-08-07 Site Visit Recording, FILE0008, 0;00-0:25.)

Merced ID's data indicate that, during August 1-4, the totals of Canal Creek and Edendale Creek flows at these measurement points were between approximately 330 and 355 cfs. (2020-09-21 Canal Creek Flow Data, cells 7081D & 7081E through cells 7084D & 7084E.) It is possible that the Canal Creek Berm had overtopped on these dates because of these higher creek flows. It also is possible that these overtopping events occurred because of higher Castle Reservoir surface-water elevations during early August 2020. However, the administrative record does not contain any Castle Reservoir elevation data or a stage-discharge curve for Canal Creek, so we cannot determine the specific causes of these overtopping events.

2.3 Prior Topography and Prior Landowners' Actions

A site topography map in the Corps of Engineers Castle Dam and Reservoir Project Operations and Maintenance Manual, dated July 13, 1989, depicts the area where Orchard 1, the Tailwater Recovery Pond, the Roadway Berm and the Gonzalves Pond now are located. (Gonzalves-30, p. 412; see Fig. 2.) This map indicates that this area was generally flat, with elevations ranging from 193 to 199 feet. (*Id.*) This depiction is consistent with aerial photographs from 1946, 1958, 1976, 1990, 1991, 1992, 1993 and 1994, which show that this area sometimes was under cultivation and do not show any excavated or raised areas. (PT-12, p. 51; PT-56, pp. 6-26, 52-56; PT-57, pp. 7-29.) A 1974 aerial photograph indicates that water may have collected occasionally and temporarily in the southernmost part of this area. (Gonzalves-14, p. 3 [May 3, 1974 photo].)

In 1992, the United States acquired an "occasional flowage easement" for this area from the prior landowners, Gordon and Sandra Fisher. (Gonzalves-3, p. 1.) In 1994, a representative of the Corps of Engineers advised the Fishers that, as a result of ponding during the summer of 1993, the Corps had determined that the United States needed to

obtain a "permanent flowage easement" in this area. (*Id.*) The Fishers executed a deed for this easement in 1994. (Gonzalves-2.) The Corps designated the area of this easement as Tract 108E-1. (*Id.*, p. 2; Gonzalves-3, pp. 3, 5.)

Mr. Hess testified that Tract 108E-1 has an area of more than double the area of Gonzalves Pond. (PT-39, p. 2, ¶ 3.) Figure 4 depicts the area covered by Tract 108E-1 in relation to the Gonzalves Pond.

In March 1994, the Fishers' representative applied to the Reclamation Board for a permit to remove dirt to lower the level of a one-quarter-acre area and to place the dirt on top of an existing levee. (Gonzalves-4, pp. 3-11.) It appears that this area was where the eastern portion of the Gonzalves Pond now is located. (*Id.*, p. 11; see Fig. 2.) It is not clear whether the area where the dirt would be placed now is part of the Roadway Berm or the Canal Creek Berm. In June 1994, the Corps sent the Reclamation Board a letter, which stated that the Corps' District Engineer had no objection to the Reclamation Board's approval of this application. (*Id.*, p. 2.) However, the Reclamation Board never approved this application. (Gonzalves-38, p. 3.)

2.4 Construction of Gonzalves Pond, Roadway Berm and Canal Creek Berm

On April 24, 1995, Mr. Gonzalves and his wife signed a contract with the Fishers for the purchase of the Gonzalves property depicted in Figures 1 and 2. (Gonzalves-10.) The contract provided that the sellers would convey title to the buyers as soon as the buyers were able to obtain governmental approval of a lot split that was necessary for the conveyance. (*Id.*, p. 4, § 4.) The contract provided that the buyers would have the right immediately to enter onto and possess the property. (*Id.*, p. 5, § 8.) Merced County issued the necessary certificate of compliance on March 15, 1996 and the grant deed conveying the property was recorded on April 3, 1996. (PT-12, pp. 19, 71-76.) Mr. Gonzalves testified that his father purchased this property in Mr. Gonzalves's name to ensure that Mr. Gonzalves would inherit the property. (Gonzalves-38, pp. 1-2.)

Mr. Gonzalves testified that Mr. Fisher built the Gonzalves Pond, and that the pond and the Canal Creek Berm were there when Mr. Gonzalves's father bought the land for

Mr. Gonzalves in 1995. (Recording, 2020-07-30, 2:13:59-2:16:25; Gonzalves-38, p. 2; Respondent's Brief, p. 10.) Mr. Gonzalves submitted aerial photos starting in 1969, which he said showed ponding in this area. (Gonzalves-14, pp. 3-6.)

Mr. Gonzalves testified that the previous owners had placed one of the Canal Creek Berm Pipes in the Canal Creek Berm, and it "was most likely intended to drain as much floodwater back into the creek as possible." (Gonzalves-38, p. 8; Recording, 2020-07-30, 52:29-52:53.)[10] He said that this pipe "may also have been placed there when the previous owner requested to add soil to the banks of the creek in order to allow the water onto the easement area." (Gonzalves-38, p. 8; Recording, 2020-07-30, 3:41:56-3:42:59 [Fishers applied to remove one foot of soil to raise Roadway Berm]; & 52:29-52:53.)

In late June and early July 1995, Respondent's father moved dirt from the area that became Orchard 1 to the Roadway Berm to increase the berm's crest elevation. (Gonzalves-38, pp. 2-3, 8; Gonzalves-42; Recording, 2020-07-30, 1:06:23-1:07:43.) While raising the Roadway Berm's crest elevation to 204 feet would not stop all inundations of Orchard 1 from high water elevations in Castle Reservoir, this higher berm would substantially reduce the frequency of such inundations.

During the August 7, 2020 site visit, Mr. Gonzalves showed the hearing officer and the Prosecution Team members where his father had removed dirt from the lands that became Orchard 1 and graded those lands so drainage from the orchard would flow east into the Tailwater Recovery Pond. (2020-08-07 Site Visit Recording, FILE0014 & FILE0015.) Mr. Gonzalves also showed the hearing officer and Prosecution Team members the place where his father's dirt excavations had created an approximately four-foot-high cut in the bank between Orchards 1 and 2. (*Id.*) Mr. Gonzalves explained

[10] As discussed in section 2.1, there is a second pipe in the Canal Creek Berm, although Mr. Gonzalves frequently referred only to one pipe in his written testimony, and Mr. Hess's Report of Investigation identified only one pipe. (PT-12, p. 16.) During the site visit, Mr. Hess stated he was unable to verify that there is a second pipe, but Mr. Gonzalves said there is a second pipe. (2020-08-07 Site Visit Recording, FILE0006.) Figure 2 depicts the approximate locations of both pipes.

that his father installed the Roadway Berm Pipes in the Roadway Berm so water would flow from the Tailwater Recovery Pond into Canal Creek when the elevation of Castle Reservoir dropped to lower than the elevation of water in the Tailwater Recovery Pond. (2020-08-07 Site Visit Recording, FILE0021 & FILE 0015, 0:00-1:31.)

Although Mr. Gonzalves's testimony discusses only his father's actions to move dirt from Orchard 1 to the Roadway Berm, aerial photographs show that Canal Creek Pond became substantially larger in July 1995. For example, while the aerial photographs taken on May 23, 1974, July 7 and 23, 1993, August 11, 1994 and June 27, 1995 show some ponding of water in part of the area that later became the Gonzalves Pond, the aerial photographs taken on July 11, 1995 and June 11, 2005 show a much larger inundated area, which covered the entire Gonzalves Pond in its current configuration. (Gonzalves-14, pp. 3-6.) These photographs indicate that substantial amounts of additional dirt were removed from the area that became the Gonzalves Pond in late June and early July 1995.

In 2002, the Reclamation Board issued a permit authorizing the prior construction of the Roadway Berm. (Gonzalves-29; see Gonzalves-38, p. 10; Recording, 2020-07-30, 3:03:44-3:05:29.)

Mr. Hess disputed Mr. Gonzalves's description of Mr. Fisher's activities. Mr. Hess testified that he believed that Mr. Gonzalves installed the Canal Creek Berm Pipe. However, Mr. Hess conceded that he did not have personal knowledge of this. (Recording, 2020-07-30, 4:30:49-4:32:23.) Mr. Hess testified that Gonzalves Pond "did not exist" when the Castle Dam and Reservoir Project was being constructed, and the pond was not constructed as part of the project. (PT-39, p. 3, ¶ 7; see also Recording, 2020-07-30, 3:57:00-3:58:15 [neither the real estate map included in the O & M Manual nor the map for Easement 108E-1 depict the pond].)

Mr. Hess admitted that no single image of Respondent's property has been "dispositive of anything." (Recording, 2020-07-30, 5:41:15-5:41:50.) He also admitted that aerial photos taken before 1995 showed that surface water in the area that became the Gonzalves Pond appeared to recede and then disappear, but then testified that in

photos taken in 1995 and later years, the pond was “always there” and the pattern of water receding ended. (Recording, 2020-07-30, 5:41:40-5:42:01.) Mr. Hess testified that he believes the Gonzalves Pond was built between June 27, 1995 and July 11, 1995, based on his review of the aerial imagery. (Recording, 2020-07-30, 3:44:55-3:47:12.)

Based on our review of all of the relevant evidence in the record, we conclude that Mr. Fisher probably made some initial excavations in part of the area that became Gonzalves Pond while he owned the property, and that Mr. Gonzalves’s father probably made substantial additional excavations in this area during late June and early July 1995 while he also was removing dirt from the area that became Orchard 1 to construct the Roadway Berm. The relatively steep gradients in the present bed of the Gonzalves Pond (see PT-51) could not have been formed by fluvial geomorphological processes and indicate that some substantial artificial excavation work occurred. The aerial photos from 1993 and 1994 show some ponding in this area. (PT-56, pp. 50-53, 70-71; PT-57, pp. 76-80.) But none of these aerial photos show the larger, more regular ponding that occurred frequently after July 1995. (See PT-56, pp. 90-97; PT-57, pp. 103-109.)

It does not appear that the 1995 excavation of the area that became the Gonzalves Pond was made to create an irrigation water supply. In 1995, Merced ID Lateral 7 supplied water by gravity flow to Orchards 1, 2 and 3, and there is no obvious reason why Mr. Gonzalves’s father would have constructed a different water supply that would require pumping. Also, there is no evidence that this pond ever was used as an irrigation water supply during the next 20 years. It is more likely that dirt was removed from this area to provide a supply of additional dirt to raise the top of the Roadway Berm to an elevation of 204 feet, so the berm would provide more protection of Orchard 1 from inundation by water in Castle Reservoir.

2.5 Water Supplies for Respondent's Almond Orchards

2.5.1 Water Supplies Before August 2015

Before August 2015, Respondent irrigated Orchards 1, 2 and 3 with water he purchased from Merced ID, which the district delivered through the Escaladian Canal and Lateral 7. (See Fig. 2.)[11] Part of Lateral 7 was on the property of a neighboring landowner. (Recording, 2020-07-30, 2:26:16-2:27:20.) Mr. Gonzalves explained that Lateral 7 had been an open canal and that Mr. Fisher, who once owned both the neighboring property and the property Mr. Gonzalves now owns, had replaced the ditch with a concrete pipe. (*Id*.; see PT-15, p. 7, ¶ 23.)

Mr. Gonzalves testified that after he and his father purchased the property in 1995, they had had issues with what he described as the neighbor's breaking the Lateral 7 concrete pipe. (Gonzalves-38, p. 11.) They sued the neighbor in 2007, but the lawsuit ended in May 2015 "with no remedy." (*Id.*) In late June or early July 2015, the neighbor cut the concrete pipe, which terminated Mr. Gonzalves's access to the Merced ID water supply from the Escaladian Canal through Lateral 7. (Gonzalves-38, p. 2; Recording, 2020-07-30, 2:26:16-2:29:16; PT-15, p. 7, ¶ 24; PT-4, p. 2, ¶ 5.)

2.5.2 Respondent's 2015-2017 Pumping of Water from Gonzalves Pond

After losing access to Merced ID water from the Escaladian Canal through Lateral 7, Respondent began pumping water from the Gonzalves Pond around August 1, 2015. (Recording, 2020-07-30, 2:34:44-2:36:10.) The location of the portable pond pump Respondent installed for this pumping is depicted in Figure 2. (PT-4, pp. 5-6, ¶ 20; PT-12, p. 23.) During the August 7, 2020 site inspection, Mr. Gonzalves explained that he installed a pipe to convey water from the portable pond pump into one of his irrigation system pipes, ran water backward through that pipe to the sprinkler pump depicted in

[11] The administrative record only contains evidence of the part of Lateral 7 that is depicted in red in Figure 2 and a now-abandoned continuation of this lateral south of the sprinkler pump. (Gonzalves-10, p. 14; 2020-08-07 Site Visit Recording, FILE0027, 8:20-8:35.) This lateral appears to have been in a historical lateral alignment in the upper left corner of this figure and then ran through the neighbor's property to the part of the lateral depicted in Figure 2.

Figure 2, and then used his irrigation system to use this water to irrigate his orchards. (2020-08-07 Site Visit Recording, FILE0027, 3:05-3:45.)

Respondent did not have any authorization from Merced ID for this pumping until he obtained a temporary pump permit from the district on August 28, 2017. (See Respondent's Closing Brief, p. 17; Recording, 2020-07-30, 2:39:45-2:40:04; 3:10:05-3:11:11.) Respondent did not have any other water source to irrigate Orchards 1, 2 and 3 during this period. (Gonzalves-38, p. 11; Recording, 2020-07-31, 29:24-30:07; 2020-08-07 Site Visit Recording, FILE0018.)

The record contains several substantially different estimates of the amounts of water Respondent pumped from Gonzalves Pond between August 1, 2015 and August 28, 2017.

Mr. Hess, using an estimated annual demand of three-and-one-half acre-feet per acre for almond orchards and an estimated two-and-one-half irrigation seasons during which Respondent pumped water from the Gonzalves Pond without authorization from Merced ID, estimated that Respondent's total pumping during this period to irrigate his 29 acres of almond orchards was 253 af. (PT-4, p. 13, ¶ 45 [3.5 af/acre-season x 2.5 seasons x 29 acres = 253.75 af, which Mr. Hess rounded down to 253 af].) On rebuttal, Brian Coats, a Senior Water Resource Control Engineer in the Enforcement Section, supported Mr. Hess's use of the estimated annual demand of three-and-one-half acre-feet per acre, noting that this is the amount that the University of California Cooperative Extension used to irrigate an almond orchard in the northern San Joaquin Valley. (PT-40, p. 1, ¶ 2; p. 2, ¶ 4; PT-24, p. 6.)[12]

Merced ID billed Respondent $204,986.82 for unauthorized diversions from the Gonzalves Pond that the district asserted Respondent made from April 2014 through July 2017. (See Gonzalves-26, pp. 4, 10.) To calculate the monthly amounts that Merced ID asserted Respondent pumped from the Gonzalves Pond during this period,

[12] This exhibit states that the application rate for this orchard was 42 inches per year. (PT-24, p. 6.) An application rate of 42 inches of water equals an application rate of 3.5 acre-feet per acre.

the district first calculated the average monthly amounts Respondent received from Lateral 7 during 2011-2013 and then assumed that monthly demands during 2014-2017 equaled these amounts. (*Id.*, p. 3.) Merced ID subtracted the metered amounts Respondent received through Lateral 7 during April 2014 through June 2015 from these assumed monthly demands and assumed that Respondent's monthly pumping from the Gonzalves Pond during these months equaled these differences. (*Id.*, pp. 2-5.) During July 2015 through July 2017, Respondent did not receive any water through Lateral 7 and Merced ID assumed that Respondent's monthly pumping from the Gonzalves Pond equaled the entire assumed monthly demands. (*Id.*, pp. 4-5.) Using this method, Merced ID assumed that Respondent's total pumping from the Gonzalves Pond from August through October 2015 was 53.29 acre-feet (Gonzalves-26, p. 5, [23.32 + 12.12 + 18.29 = 53.73 af]), his total pumping during 2016 was 163.17 af (*id.*), and his total pumping from March through July 2017 was 99.18 af. (*Id.*) These amounts total 325.64 af. (53.29 + 163.17 + 99.18 = 325.64 af.)

Mr. Gonzalves's Initial Statement of Water Diversion and Use (S027064) stated that he diverted 110 af in 2016. (Gonzalves-7, p. 12.) Mr. Gonzalves testified that he used "110 acre-feet because I relied on MID's billing, but after I went back and looked at my hour meter readings, I calculated that I only used 45 acre-feet." (Gonzalves-38, p. 4.)

Mr. Gonzalves testified that his portable pond pump is a "600 gpm pump." (Gonzalves-38, p. 5.) He provided photographs of the pump's hour meter, which shows cumulative hours of pumping, on July 23, 2015 and October 6, 2017. (Gonzalves-24, pp. 2, 8.)[13] Using the hour meter readings on these two days, he calculated that the pump ran for 862.1 hours during this period. (Gonzalves-25.) Converting 600 gallons-per-minute (gpm) to 0.11 acre-feet per hour and using his records of hours pumped on various dates during the 2015-2017 irrigation seasons, he estimated that he pumped a total of

[13] Respondent's receipt for the pump, dated June 9, 2015, states "46.5 hrs" at the bottom of the page. (Gonzalves-17.) This document and the July 23, 2015 photograph of the pump meter, which also shows 46.5 hours (Gonzalves-24, p. 2), indicate that the pump meter showed 46.5 hours when Respondent purchased the pump, and that Respondent did not start operating this pump until some date on or after July 23, 2015.

22.44 af in 2015, 45.10 af in 2016 and 23.98 af through August 2017, a total of 91.52 af. (Gonzalves-36.)

Although Respondent did not submit any evidence that anyone calibrated the pump's hour meter or confirmed that the pump's pumping rate between August 2015 and August 28, 2017 actually was 600 gpm, this estimated pumping rate is corroborated by data for Respondent's pumping during 2018 and 2019.

The hour meter reading on October 6, 2017, at 2:07 pm, which apparently was at or near the end of Respondent's operations of the pump during 2017, was 908.3 hours. (Gonzales-5, p. 9; Gonzalves 36.) Respondent testified that he pumped water using this pump during 2018 and 2019 under his temporary pumping permit from Merced ID, and that he constructed and started using Lateral A in 2020. (See section 2.5.3.)[14] Respondent testified that he brought the pump down to its former location next to the Gonzalves Pond on August 7, 2020, before the site visit. (2020-08-07 Site Visit Recording, FILE0012, 0:45-1:14.) The hour meter reading during the August 7, 2020 site visit was 1821.0. (2020-08-07 Site Visit Recording, FILE0013, 1:07.) There is no evidence in the record that the pump ran between the end of the 2019 irrigation season and August 7, 2020. It therefore appears that the pump ran for a total of 912.7 hours between October 6, 2017 and the end of 2019. (1821.0 - 908.3 = 912.7.)

The amounts of Respondent's pumping under his temporary pumping permit from Merced ID were measured by an electromagnetic flow meter. (See section 2.5.3.) Merced ID's invoices indicate that this meter had a reading of 18.5950 af on October 8, 2017, and a reading of 98.4540 af on October 9, 2019. (Gonzalves-54, pp. 5, 35.) These readings indicate that 79.859 af were pumped between these two dates. (98.4540 - 18.5950 = 79.859.) This acre-foot pumping amount and the 912.7 hours of

[14] Unless the context indicates otherwise, references to "section" refer to sections of this order.

pumping discussed in the preceding paragraph indicate that the average pumping rate was 475 gpm during this period.[15]

During the site visit, Respondent testified that, at the revolutions per minute (rpm) rates he operated the pump, it pumped in the 400 to 600 gpm range. (2020-08-07 Site Visit Recording, 2:30-2:40.) This is consistent with the meter data, which show operations in the 900 to 1,200 rpm range (Gonzalves-5, pp. 3-5, 7-8) and the pump's rating curve, which shows that, at 1,000 rpm and 25 to 50 feet of pumping head, the pump's output is between 400 and 600 gpm (2020-08-07 Site Visit Recording, 3:25).

Mr. Gonzalves testified that the total almond production from Orchards 1, 2 and 3 dropped from 51,399 pounds in 2014 to an average of 31,886 pounds in 2015-2017 because of the lack of an adequate water supply. (Gonzalves-43.) The 2018 yield was even lower, 18,952 pounds. Mr. Gonzalves testified that this was because the almond trees took over a year to recover from the low irrigation rates during 2015-2017. (Recording, 2020-07-31, 39:12-43:59; 56:42-59:39.) These lower yields corroborate Mr. Gonzalves's testimony that his per-acre water use rates during 2015-2017 were lower than his prior per-acre use rates and the per-acre use rates for other almond orchards in the area.

For all these reasons, we conclude that Mr. Gonzalves's estimates of amounts pumped between August 1, 2015 and August 28, 2017, based on his records of the hours he operated the pump and his estimate of the pump's 600-gpm output, are reasonable estimates of these pumping amounts. We conclude that these estimates are more accurate than the Prosecution Team's estimates, which are based on estimated water duties of other almond orchards, and Merced ID's estimates, which were based on Respondent's 2011-2013 water use.

2.5.3 Temporary Pumping Permit and Construction of Lateral A

On August 28, 2017, Merced ID issued a temporary permit to Mr. Gonzalves for his pumping of water from the Gonzalves Pond. (Respondent's Closing Brief, p. 17.) From

[15] 79.859 af x 325,850 gal./af = 26,022,055 gal. 912.7 hr. x 60 min./hr. = 54,762 min. 26,022,055 gal./54,762 min. = 475 gal./min.

this date through the end of the 2019 irrigation season, Mr. Gonzalves pumped water from Gonzalves Pond under this permit and paid Merced ID for this water at in-district rates with no penalties. (Recording, 2020-07-30, 2:42:11-2:45:29; Gonzalves-37, p. 2.) An electromagnetic flow meter installed on July 6, 2017 measured these diversions. (S027064, 2018-06-29, Supp. Stmt. Water Div. and Use for 2018, p. 2, § 7; Recording, 2020-07-31, 28:00-29:11.) Mr. Gonzalves pumped a total of 8.59 af under this permit during September-October 2017, 46.06 af during 2018 and 33.76 af during 2019. (Gonzalves-54; Recording, 2020-07-31, 26:00-29:24.)[16]

Mr. Gonzalves testified that he installed a new pipeline in 2020. This pipeline, labeled "Gonzalves Lateral A" in Figure 2, conveys water from Merced ID's Escaladian Lateral A by gravity flow to the sprinkler pump and the irrigation system manifold. (Recording, 2020-07-30, 2:40:20-2:42:32; see Fig. 2.) Mr. Gonzalves testified that he paid a contractor $45,514 to install this new pipeline and also did trenching and finish work himself, taking a total time that he estimated was worth $10,000. (Gonzalves-43; Recording, 2020-07-30, 2:40:20-2:43:20.) Mr. Gonzalves stated that, now that he has this water supply, he does not intend to pump water from Canal Creek or the Gonzalves Pond in the future. (Respondent's Closing Brief, pp. 10-11.)

2.6 Merced ID's Penalties and Assessments; Settlement Agreement

On June 29, 2017, Merced ID's deputy general manager sent Respondent a letter. (PT-15, pp. 145-146.) This letter stated that the district had received information about a "possible unauthorized diversion and use of District water" on Respondent's parcels. (*Id.*, p. 145.) It noted that Respondent historically had used between 160 and 170 af/yr of district water (received through Lateral 7) to irrigate these parcels, that Respondent's orders of district water dropped to 70 af in 2014, 16 af in 2015 and 0 af in 2016 and

[16] The supplemental statements of water diversion and use Respondent filed for his 2017 and 2018 diversions are consistent with these numbers. (S027064, 2018-06-29, Supp. Stmt. Water Div. and Use for 2017, p. 1; S027064, 2019-06-26, Supp. Stmt. Water Div. and Use for 2018, p. 1.) Respondent's supplemental statement for 2019 lists zeros for amounts diverted during all months and states, in the comments, that the "floodwater" Respondent pumped "is not a diversion and is not reported on this Statement." (S027064, 2020-07-01, Supp. Stmt. Water Div. and Use for 2019, p. 1.)

2017. (*Id.*) The letter asked Respondent to schedule a field visit with the district's operations manager to discuss his water use. (*Id.*, p. 146.)

On July 13, 2017, the district's deputy general manager sent Respondent another letter. (PT-15, pp. 148-149.) The letter discussed a July 10 meeting between Respondent and the district's operations manager. The letter stated that, during the meeting, Respondent had said that he was diverting water from Canal Creek, that the district's operations manager had offered to set up an account under which Respondent would pay the district for the diverted water, and that Respondent had refused to agree to pay the district for the water, asserting that he had a riparian right that authorized the diversions. (*Id.*, p. 148.) The letter stated that all the water in Canal Creek during the irrigation season is water the district imports into the creek to serve its customers, and that riparian rights do not authorize the diversions of this water. (*Id.*, p. 149.) The letter stated that Respondent could expect additional correspondence from the district "with regard to financial remedies associated with the years of all unauthorized diversions and use of District water." (*Id.*) The letter ordered Respondent to cease and desist all unauthorized diversion and use of district water. (*Id.*)

On July 20, 2017, Merced ID's deputy general manager sent another letter to Respondent. (*Id.*, pp. 151-160.) This letter referred to and enclosed a copy of a 2014 resolution of the district's board of directors, which provided that the district would charge $1,000 plus three times the district's in-season water rate for each unauthorized use of district water. (*Id.*, pp. 151-153.) This letter asserted that Respondent's unauthorized diversions began during the 2014 irrigation season and continued through July 2017. (*Id.*, p. 152.) As discussed in section 2.5.2, Merced ID determined its assumed amounts of Respondent's diversions by calculating baseline monthly diversion rates using the monthly amounts of water Respondent received from the district through Lateral 7 during 2011-2013, subtracting the monthly amounts of water Respondent received through Lateral 7 during April 2014 through July 2017 from the 2011-2013 average monthly amounts, and assuming that the monthly differences equaled the monthly amounts of water Respondent pumped from the Gonzalves Pond. (*Id.*, pp. 152, 154-155.) Merced ID charged Respondent for these assumed monthly diversion

amounts at three times the applicable in-district water rates plus $1,000 for each assumed irrigation event. (*Id.*, pp. 156-159.) This resulted in a total charge of $204,986.82. (*Id.*, p. 160.)

On July 26, 2017, Respondent's attorney sent Merced ID's deputy general manager a letter, which appealed the $204,986.82 charge in the district's July 20 letter. (PT-15, pp. 178-238.) Respondent's attorney asserted that Mr. Gonzalves was not diverting any water from Canal Creek and never had. (*Id.*, p. 178.) He asserted that Mr. Gonzalves was taking water from the Gonzalves Pond, which "naturally forms as the result of a permanent flowage easement purchased by the United States Army Corps of Engineers." (*Id.,* pp. 178-179.) This letter states that Mr. Gonzalves "began irrigating out of the pond" in June 2015. (*Id.*, p. 180.)[17] This letter also asserted that Mr. Gonzalves had unexercised riparian rights that authorized him to divert water from Canal Creek. (*Id.*, p. 181.) Merced ID did not take any action on Respondent's appeal. (*Id.*, p. 29, ¶ 162.)

On October 3, 2017, Respondent filed a petition for writ of mandate and complaint for declaratory and injunctive relief against Merced ID and the Merced ID Board of Directors in Merced County Superior Court. (PT-15.) The petition and complaint challenged the charges Merced ID assessed against Respondent and asked the court to issue an order preventing the district from collecting them. (*Id.*, pp. 15-29; *id.*, p. 38, ¶ 2.) Apparently, the court did not grant this request. Respondent paid $204,986.82 in two installments, in December 2017 and February 2018. (Gonzalves-37, p. 2, ¶ 4.) Respondent testified that he had to make these payments because Merced ID's charge had been attached to his property taxes. (Gonzalves-38, p. 2.)

On November 17, 2017, Merced ID filed a complaint with the Enforcement Section against Respondent. (PT-14.) The complaint asked the State Water Board: (a) to reject Respondent's Statement of Water Diversion and Use S027064; and (b) "to

[17] As discussed in section 2.5.2, Mr. Gonzalves testified that he began this pumping in early August 2015, and this time frame is corroborated by Gonzalves-17 and Gonzalves-24, p. 2.

conduct an inquiry to confirm that the water in Canal Creek during the irrigation season is water placed there and owned by [Merced ID] and that it is not subject to diversion whether from either the creek or the pond." (*Id.*, p. 7.) Merced ID's complaint did not discuss the temporary pumping permit Merced ID issued to Respondent on August 28, 2017. (PT-14.)

On December 19, 2019, the parties signed a settlement agreement regarding the issues in Respondent's 2017 lawsuit and Merced ID's 2017 complaint to the State Water Board. (Gonzalves-37.) Among other things, the agreement required Respondent: (a) to "permanently remove" the portable pond pump; (b) to "withdraw" water rights claims and reports, including Statement of Water Diversion and Use S027064, and not to file any new water rights claims for his property; and (c) to install water conveyance facilities to convey water from Escaladian Lateral A to Respondent's irrigation system. (*Id.*, pp. 3-4, ¶¶ 4.a., 4.c. & 4.e.) The agreement provided that Merced ID would: (a) design and install the water delivery facilities necessary for Respondent to receive water from Escaladian Lateral A; and (b) notify the State Water Board of the settlement, withdraw its complaint and not initiate any new complaint with the Board or other regulatory agency regarding the claims raised in the litigation. (*Id.*, pp. 4-5, ¶¶ 5.a. & 5.b.)

The settlement agreement stated that Merced ID "will charge Gonzalves and retain for its use $154,986.82 for payment of costs and associated fees and penalties associated with the unauthorized diversion and use of water in this matter." (*Id.*, p. 5, ¶ 7.) During the hearing in this matter, Mr. Gonzalves explained that $154,986.82 is $50,000 less than the $204,986.82 he paid to MID in late 2017 and early 2018, and that, consistent with this agreement provision, in early 2020 Merced ID gave him two checks totaling $50,000, to be used for the new Gonzalves Lateral A pipeline. (Recording, 2020-09-16 3:03:21-3:05:34.)

2.7 Division of Water Rights Enforcement Section Actions

On January 25, 2018, Mr. Hess inspected Respondent's property. (PT-4, p. 4, ¶ 11; PT-12.) Another Division engineer, an attorney from the Board's Office of Enforcement,

Respondent, and Respondent's attorney also attended. (PT-12, p. 13.) During the inspection, the participants viewed Respondent's almond orchards, the Gonzalves Pond and the Tailwater Recovery Pond. (PT-12, pp. 13-17; Gonzalves-38, p. 6.)

Following the inspection, Mr. Hess prepared an inspection report, which is dated May 22, 2018. (PT-12.) The report had a detailed discussion about the origins of the Gonzalves Pond and the Castle Dam and Reservoir Project. (*Id.,* pp.17-26.) The report stated that Mr. Gonzalves said that there was an "outlet pipe" that drains water from the Gonzalves Pond back into Canal Creek, and noted that Respondent's attorney continued to claim that there was no such pipe, despite clear evidence to the contrary. (*Id.*, pp. 16, 23-26.) The inspection report analyzed natural flows in Canal Creek and concluded that there were no natural flows during the summer of 2015. (*Id.*, pp. 29-33.) The report concluded that the Canal Creek Berm Pipe "diverts lawfully appropriated water without authorization." (*Id.*, p. 38.) The report recommended "formal enforcement" and stated that the Gonzalves Pond "should be rendered incapable of storing water, or [Mr.] Gonzalves must comply with current measuring and reporting regulations and furnish proof of purchase of any imported water." (*Id.*) The report did not discuss the temporary pumping permit Merced ID issued to Mr. Gonzalves in August 2017.

On May 25, 2018, Mr. Hess mailed his Report of Investigation to Respondent's attorney. (PT-21; see PT-4, p. 9, ¶ 31; PT-37.) Mr. Hess's transmittal letter summarized the report's conclusions and recommendations, and stated that, if Respondent disagreed with the conclusions and recommendations, then Respondent should submit supporting evidence within 30 days after receiving the report. (PT-37, p. 2.) Respondent did not respond. (PT-4, p. 9, ¶ 32.)

On November 12, 2019, the Enforcement Section issued the draft CDO. (PT-1; PT-4, p. 10, ¶ 34.) The draft CDO contained proposed terms, that, if adopted by the Board, would have ordered Respondent: (a) to immediately cease and desist any unauthorized diversion or use of water from Canal Creek; (b) to submit draft and final compliance plans to "render the [Gonzalves Pond] incapable of storing water subject to

appropriation" and implement the final plan; and (c) to identify an alternate source of water for irrigation. (PT-1, pp. 10-11, ¶¶ 1-5.) The draft CDO did not discuss the temporary pumping permit that Merced ID had issued to Respondent in August 2017. (PT-1.)

Respondent did not accept the draft CDO and instead filed a timely request for hearing. (See 2019-11-25 e-mail chain, K. Gonzalves, J. Prager and A. Lilly.)

On May 5, 2020, one of the Division's assistant deputy directors sent the ACL Complaint to Respondent. (PT-2; PT-4, p. 10, ¶ 34.) The ACL Complaint alleged that Respondent made unauthorized diversions on an estimated 96 days between March 1, 2015 and November 1, 2017, for which Respondent was subject to a maximum total penalty of $82,000, and that Respondent's unauthorized diversions totaled 303 acre-feet, for which he was subject to a maximum penalty of $530,000, for a total maximum civil liability of $612,000. (PT-2, pp. 8-10, ¶¶ 23-25.) The ACL Complaint proposed total administrative civil liability of $165,000. (*Id.*, p. 17, ¶ 35.)

The ACL Complaint stated that Division staff concluded that Respondent avoided paying Merced ID for the water Respondent pumped from the Gonzalves Pond without authorization from Merced ID at the time of the pumping, and the ACL Complaint stated that this water had a value of $57,000. (PT-2, p. 16.) The ACL complaint stated that Respondent "ultimately paid [Merced ID] that amount." (*Id.*) The ACL Complaint did not discuss that Respondent's ultimate total net payment to Merced ID for this water actually was $154,986.82. (See section 2.6.)

The ACL Complaint alleged that Respondent had not attempted "to achieve compliance" or "to correct the violation." (PT-2, p. 15, ¶ 32.) The ACL Complaint did not discuss the temporary pumping permit Respondent obtained from Merced ID on August 28, 2017 or Respondent's construction of Gonzalves Lateral A and Respondent's present arrangements to purchase water that Merced ID delivers through that lateral. (See section 2.5.3.)

On May 21, 2020, the AHO received Respondent's request for a hearing on the ACL Complaint. (2020-05-21 Gonzalves Hearing Request; 2020-05-22 A. Lilly e-mail to K. Gonzalves.)

2.8 AHO Hearing

Water Code section 1112, subdivision (a)(2) provides that an AHO hearing officer shall preside over a hearing in a matter involving a notice of a proposed cease and desist order issued under Water Code section 1834. Water Code section 1112, subdivision (a)(1) provides that an AHO hearing officer shall preside over a complaint issued under section 1055. These statutes apply to the draft CDO and ACL Complaint in this matter.

On March 12, 2020, the AHO issued its Notice of Public Hearing and Pre-Hearing Conference for the draft CDO. On May 15, 2020, the AHO issued a Supplemental Notice of Public Hearing and Pre-Hearing Conference Order, which added additional hearing issues for the hearing on the ACL Complaint.

On July 17, 30, and 31, 2020, the AHO held its first three days of public hearing on the draft CDO and the ACL Complaint via Zoom teleconference. The Prosecution Team called three witnesses, Mr. Hess, Roberto Cervantes, the Enforcement Section program manager, and Bryan Elder, a Senior Water Resource Control Engineer with the Board's Office of Enforcement, who testified about Respondent's alleged economic benefits from his alleged violations. (PT-3, PT-4, PT-5, PT-9, PT-10 & PT-11; Recording, 2020-07-17, 41:23-1:01:54.) Mr. Gonzalves testified about his family's history of farming, his past practices for obtaining water and his current practices, the topography of his properties including Easement 108E-1, and flooding patterns. (Gonzalves-38; Recording, 2020-07-30, 19:31-1:26:52.)

On rebuttal, Mr. Hess testified about the Respondent's property location and Easement 108E-1, his conclusion that Respondent does not have any riparian rights to Canal Creek, and how water fills the Gonzalves Pond. (Recording, 2020-07-30, 3:35:56-3:59:03.) Brian Coats, a Senior Water Resource Control Engineer with the Enforcement Section, testified about the estimated amounts of water Respondent used in 2015-2017. (Recording, 2020-07-30, 3:59:41-4:06:45.) On rebuttal, Mr. Gonzalves presented

testimony regarding property boundaries, water sources and exhibits concerning those topics. (Recording, 2020-07-31, 4:41-34:14.)

Casey Lowry, a professional land surveyor hired by Mr. Gonzalves, testified about his draft record of survey of Mr. Gonzalves's properties. (Recording, 2020-09-09, 16:07-1:07:33.) Mr. Hess testified in rebuttal to Mr. Lowry's testimony and draft record of survey. (Recording, 2020-09-16, 2:17-1:48:38.) Mr. Lowry then provided further testimony about his survey. (*Id.* 1:59:14-2:54:15.)

The AHO hearing officer sent two letters to Merced ID requesting data from the district's gages that measure Canal Creek flows from January 1, 1990 to the present and a map showing the location of these gages. (2020-09-04 AHO ltr. to MID; 2020-09-10 AHO ltr. to J. Sweigard and H. Eltal (Merced ID).) In response, Merced ID uploaded a spreadsheet to the AHO's FTP site with these data and this map, which the AHO added to the administrative record. (Hearing Documents \ Merced ID files.)

Merced ID did not participate in this hearing, although it filed comments objecting to certain contentions in Mr. Gonzalves's testimony and related exhibits. (2020-07-13 T. Berliner e-mail to A. Lilly; 2020-07-13 T. Berliner Public Comment to A. Lilly.) The hearing officer overruled these objections. (Recording, 2020-07-17, 29:00-30:44.)

On November 6, 2020, the parties filed their closing briefs. On March 8, 2021, the AHO circulated a draft of its proposed order to the parties for their review and comments. The Prosecution Team and Respondent filed comments on the draft proposed order on April 14 and April 15, 2021. The AHO amended the draft proposed order and added Attachment A to address these comments. (Attachment A is incorporated into this order by reference and is part of this order.)

3.0 DISCUSSION

3.1 Should the State Water Board Issue a Cease and Desist Order to Respondent?

3.1.1 Is Respondent Violating, or Threatening to Violate, the Prohibition in Water Code Section 1052, Subdivision (a), Against Unauthorized Diversions of Water?

Water Code section 1831, subdivision (a), provides that, "when the [B]oard determines that any person is violating, or threatening to violate, any requirement described in subdivision (d), the Board may issue an order to that person to cease and desist from that violation." Subdivision (d) lists various types of violations, including the prohibition in Water Code section 1052 against the unauthorized diversion or use of water subject to Division 2 of the Water Code. (Wat. Code, §§ 1200-1851).

Water Code section 1052, subdivision (a), states:

> The diversion or use of water subject to this division other than as authorized in this division is a trespass.

The threshold question here is whether the water that Respondent has pumped from the Gonzalves Pond, and the water Respondent may pump from this pond or Canal Creek in the future, for irrigation purposes are "water subject to this division," as that term is used in this statute. In *Young v. State Water Resources Control Bd.* (2013) 219 Cal.App.4th 397, 406, the court held that any diversion of water that is not authorized by a valid water right "is unauthorized and subject to enforcement pursuant to Water Code sections 1052 and 1831." (See also *Millview County Water Dist. v. State Water Resources Control Bd.* (2014) 229 Cal.App.4th 879, 894 [in exercising its authority under section 1831, Board "necessarily must have jurisdiction" to determine whether a diverter's water-right claim is valid].) In Order WR 2016-0015, the Board, following *Young* and *Millview*, concluded that the Board's authority under these statutes extends to all diversions of water from natural streams, not just diversions of unappropriated water:

> [A]ny diversion made without a pre-existing basis of right is subject to the permitting authority of the Board; whether or not the water diverted is available for appropriation is a secondary matter. Therefore, the relevant

> question is not whether the water being diverted is unappropriated, but whether the water is being diverted and used pursuant to a valid pre-existing legal right.

(Order WR 2016-0015, p. 10.)[18] These precedents indicate that Water Code section 1831 authorizes the Board to review all diversions by Respondent of water from Canal Creek or the Gonzalves Pond and to issue a cease and desist order regarding any present or threatened unauthorized diversions of such water.

3.1.1.1 Types of Water in Canal Creek

There are two types of water in Canal Creek in the vicinity of Respondent's property at various times: (a) water that originates as rainfall in the Canal Creek watershed and flows down the creek, which we refer to as "natural flow water," and (b) water that Merced ID diverts from the Merced River, conveys through the Main Canal, and releases into Canal Creek or Edendale Creek, which we refer to as "imported water."

During the hearing, Respondent testified that, based on his review of various historical documents, he believed that, before the construction of Lake McClure, water flowed naturally from the Merced River through a series of subterranean channels into various local creeks, including Canal Creek, at rates up to 400 cfs during rainstorms, and up to 1,000 cfs during snowmelt conditions. (Recording, 2020-07-30, 2:50:39-2:57:10.) Respondent did not provide any specific information about historical flows in Canal Creek and the only technical expertise he said he had to support his opinion was that based on his experience as a well driller. (Recording, 2020-07-30, 2:53:20-2:53:33.) Respondent did not submit any documents or other substantial evidence to support this opinion.

During the hearing, Prosecution Team witnesses provided substantial evidence that, during the flood-control season, most water in Canal Creek water is natural flow water, and, during the irrigation season, and particularly during the irrigation seasons of dry years, all or almost all the water in Canal Creek is imported water. (See generally, PT-

[18] Unless the context indicates otherwise, references in this order to "Decision" and "Order" refer to prior decisions and orders of the State Water Board and its predecessors.

12, pp. 29-33; Recording, 2020-09-16, 3:20:40-3:21:20.) This conclusion is supported by photographs taken in August 2017 of Canal Creek and Edendale Creek upstream of Merced ID's Main Canal. (PT-14, pp. 5, 130-161.) They show that the channels of these two creeks upstream of their intersections with the Main Canal were completely dry.[19]

We conclude that all or almost all the water that flows in Canal Creek during the irrigation season is imported water.

3.1.1.2 Respondent's "Floodwater" Claims

Respondent argues that the water in the Gonzalves Pond is "floodwater"[20] and that he has "a right to use it," citing three court decisions that Respondent's attorneys cited in Respondent's petition for writ of mandate and complaint in his 2017 lawsuit against Merced ID. (PT-15.) These court decisions are *McManus v. Otis* (1943) 61 Cal.App.2d 432, 440; *Mogle v. Moore* (1940) 16 Cal.2d 1, 9-10; and *Fifield v. Spring Valley Water Works* (1900) 130 Cal. 552, 554-555. (Gonzalves-38, p. 6; see PT-15, p. 13, ¶ 67.) Respondent argues that the *McManus* and *Mogle* decisions held that "flood water is not surface water," and that the *Fifield* decision held that the plaintiff in that case had no right to enjoin the defendant's use of "flood water" that the plaintiff could not use. (Gonzalves-38, p. 6.)

Respondent argues that the waters in the Gonzalves Pond are "floodwaters" because they occur there due to the Corps of Engineers' operations of the Castle Dam and Reservoir Project, pointing out that this project has a permanent flowage easement (Corps Easement 108E-1, depicted in Figure 4) in the property on which the Gonzalves Pond is located, and that Water Code section 12667 adopted and authorized this

[19] As authorized by Government Code section 11513, subdivision (d), we consider the hearsay evidence in PT-14, p. 5, which describes the photographs in PT-14, pp. 130-161, for the purpose of supplementing the Prosecution Team's evidence described in this paragraph.

[20] We use the term "floodwater" when quoting Respondent's testimony to reflect Respondent's characterization of this water. Where we refer to court decisions using the legal term "flood water," we use the two-word term used in those decisions.

project as part of the Merced County Streams Project. (Gonzalves-38, pp. 4, 6-7; Respondent's Closing Brief, pp. 2-3.) Respondent's written testimony states that Merced ID "frequently pushes 400-800 cfs through [Canal] Creek and over the tops of the banks into the [Gonzalves Pond]" and argues that this water also is "floodwater." (Gonzalves-38, p. 8.)

Respondent's arguments are incorrect. As discussed in section 3.1.1.1, all or almost all of the water in Canal Creek at Respondent's property during the irrigation season is water that Merced ID imports from the Merced River through the Main Canal into Canal Creek or Edendale Creek. Merced ID does not abandon this water but uses the Canal Creek and Edendale Creek channels to convey this water to downstream water users, as authorized by Water Code section 7075. (See PT-4, p. 8, ¶ 27; *Stevinson Water Dist. v. Roduner* (1950) 36 Cal.2d 264, 267-268.) The facts that some of this water may be stored temporarily in the Castle Dam and Reservoir Project and that some flows of this water may overtop Canal Creek's banks do not alter Merced ID's rights under section 7075.

The *McManus* and *Mogle* cases involved disputes among landowners regarding their rights to control flood waters to prevent flood damages to their properties. These cases did not involve any diversions of water for beneficial uses and did not consider or decide any water-right issues. The *Fifield* decision held that the defendant, the owner of a reservoir, could store and use high-flow waters of a creek that the plaintiff, a downstream riparian landowner, could not beneficially use. That decision did not discuss the defendant's water rights. It does not support Respondent's argument that he does not need any water right to divert and use "floodwater," or his argument that he may divert and use water that Merced ID imports into Canal Creek for conveyance to downstream users.

One of the essential elements of an appropriation is the application of the appropriated water to some beneficial use. (*Fullerton v. State Water Resources Control Bd.* (1979) 90 Cal.App.3d 590, 598; *California Trout, Inc. v. State Water Resources Control Bd.* (1979) 90 Cal.App.3d 819, 820.) Following this rule, the Board has concluded that flood control is not a beneficial use of water, and that the Board should not issue water-right

permits for flood control purposes. (Decision 1651, pp. 37-38.) Accordingly, neither the Corps of Engineers nor the Central Valley Flood Protection Board needs, or may obtain, any water right to temporarily store water in the Castle Dam and Reservoir Project for flood-control purposes, including water that may back up behind Castle Dam into the Gonzalves Pond, as authorized by Corps Easement 108E-1. However, nothing in these entities' rights to temporarily store water in this project for flood-control purposes without any water rights gives Respondent any right to divert any of this water for irrigation or other purposes of use on Orchard 1, 2 or 3, the Former Orchard or the Unused Area without a water right authorizing such diversion and use.

3.1.1.3 Respondent's Riparian Right Claims

Respondent argues that he has riparian rights that authorize his diversions and use of water from Canal Creek. (Respondent's Closing Brief, pp. 4-5.)

For land to have riparian rights to a stream, the following three elements normally all must be present: (a) the land in question must be contiguous to or abut on the stream; (b) the land must be within the smallest tract held under one title in the chain of title leading to the present owner; and (c) the land must be within the watershed of the stream. (*Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 528-529.) Riparian rights do not extend to water imported into a watershed. (*Stevinson Water Dist. v. Roduner, supra,* 36 Cal.2d at p. 270; *Bloss v. Rahilly* (1940) 16 Cal.2d 70, 76.) When the owner of a riparian parcel has conveyed a noncontiguous portion of the parcel to a third party and it then becomes necessary to decide whether the noncontiguous parcel has retained its riparian rights, the general rule is that riparian rights of the noncontiguous parcel were lost at the time of the conveyance unless there is language in the conveyance document or some other evidence indicating that the parties intended to preserve those rights. (*Pleasant Valley Canal Co. v. Borror* (1998) 61 Cal.App.4th 742, 780.)

As discussed in section 3.1.1.1, all or almost all of the water that flows in Canal Creek during the irrigation season is water imported by Merced ID from the Merced River and released into and conveyed through Canal and Edendale Creeks pursuant to Water Code section 7075 for diversion and use by downstream water users. Riparian rights

do not authorize the diversion or use of such water. (*Stevinson Water Dist. v. Roduner, supra,* 36 Cal.2d at pp. 267-268; Decision 1590, p. 5.) Accordingly, even if some of Respondent's lands are riparian to Canal Creek, those lands' riparian rights do not authorize Respondent to divert imported water from Canal Creek for irrigation use during the irrigation season.

Even if there sometimes is some natural flow water in Canal Creek during the irrigation season, Respondent's lands do not have any riparian rights that would authorize the diversion and use of such water. In 1922, the Crocker-Huffman Land and Water Company (Company), which owned the lands Respondent now owns and neighboring lands, executed a deed that made numerous conveyances of real property, water rights and other interests to Merced ID. (PT-12, p. 94; Gonzalves-40, p. 2; Gonzalves-41.) These interests included all the Company's "right, title and interest" in specified parts of various creeks and natural waterways, which were depicted in Exhibit C to that deed and described in Exhibit E to the deed. (Gonzalves-40, pp. 10-11, ¶ 8.) The interests described in that Exhibit E included the reach of Canal Creek that is adjacent to Respondent's parcels. (*Id.*, p. 147.)[21] Because the deed conveyed "water rights" in this part of Canal Creek, this conveyance included the riparian rights of the lands that Respondent now owns. This conveyance severed these riparian rights from these lands, so the riparian rights did not pass with subsequent conveyances of these lands, including the conveyances to Respondent. (*Gould v. Stafford* (1891) 91 Cal. 146, 155; *Yocco v. Conroy* (1894) 104 Cal. 468, 471; see generally Hutchins, *The California Law of Water Rights* (1956) pp. 193-194.)[22]

---

[21] This part of Exhibit E to the 1922 deed refers to the reach of Canal Creek beginning at a point in Section 35, Township 5 South, Range 13 East and ending on the south side of the Oakdale Branch of the Southern Pacific Railroad. (Gonzalves-40, p. 147.) This reach of Canal Creek includes the part of the creek adjacent to Respondent's parcels, which are located in Section 8, Township 6 South, Range 13 East. (See Gonzalves-41, which is Exhibit C to the 1922 deed.)

[22] In the 1922 deed, the Company reserved rights for livestock to drink water from creeks on certain specified lands. (Gonzalves-40, pp. 21-25, ¶ 23.) The Company also reserved certain rights of entry. (*Id.*, p. 26, ¶ 25.) There are no other reservations in the deed. The Company therefore did not reserve or preserve any of its lands' riparian

During the hearing, Respondent called Mr. Lowry, a licensed land surveyor, who presented two draft records of survey of Respondent's property, to testify. (Recording, 2020-09-09, 15:45-30:44; 2020-09-16, 1:59:14-2:14:10; Gonzalves-55; Gonzalves-58.) The Prosecution Team argues that, because these surveys were preliminary drafts, the Board should not rely on them when it decides the riparian rights issues. (Prosecution Team's Closing Brief, pp. 10-12.) We do not need to decide what weight to give these drafts, because, as discussed in the preceding paragraphs, we conclude that there are not any significant amounts of natural flow in Canal Creek during the irrigation season for any diversions for irrigation purposes, and because the riparian rights of Respondent's lands were severed in 1922.

Even if Respondent's parcels contain parts of the Canal Creek bed that are under water during high creek flows, it does not appear that these parcels would contain Canal Creek surface water if only the small flows of natural flow water that would occur during the irrigation season were present. These small flows of natural flow water also would not reach the elevations of the Canal Creek Berm Pipes, and thus would not flow into the Gonzalves Pond. Any riparian rights that these parcels might have would not authorize diversions of natural flows of surface water that would not reach these parcels. (*Anaheim Union Water Co. v. Fuller* (1907) 150 Cal. 327, 332.)

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 on Orchard 1, 2 or 3, the Former Orchard or the Unused Area.

---

rights to Canal Creek. (Cf. *Carlsbad Mutual Water Co. v. San Luis Rey Development Co.* (1947) 78 Cal.App.2d 900, 910, 913 [grantee may grant part of his land's riparian rights while preserving the rest of the riparian rights].)

The Company also conveyed to Merced ID rights of way in various strips of land for the operation of "ditches and canals and to flow . . . water therein." (PT-12, p. 96.) One of these strips of land was along Canal Creek. (*Id.*, pp. 99-101.) But conveyance of this right of way did not affect the lands' riparian rights. (*Forgeus v. Santa Cruz County* (1914) 24 Cal.App. 193, 199.)

Respondent refers to an October 18, 2017 e-mail from a Division of Water Rights staff engineer, which stated that most of Respondent's place of use (APN 052-540-065) "appears to be riparian to Canal Creek." (Gonzalves-7, p. 1.) Respondent's Closing Brief concedes that this Division engineer stated in a subsequent e-mail that "the [State Water Resources Control Board] does not issue a legal or formal recognition of riparian water rights." (Respondent's Closing Brief, p. 6; see Gonzalves-7, p. 5.)

Division engineers normally are not in positions to make such determinations, because they normally do not have sufficient information about all of the relevant facts, including the details of the chain or chains of title for the relevant lands. As one of the Division's answers to its webpage's Frequently Asked Questions states, "These types of water rights can only be confirmed by the courts. You can only tell for certain that you have one of these types of water rights if a court has issued a decree that confirms that the right exists." (See https://www.waterboards.ca.gov/waterrights/board_info/faqs.html#toc178761092 [last visited July 3, 2021].)

Respondent's filing of Statement of Water Diversion and Use S027064 also did not establish that Respondent's lands have any riparian rights. (See Wat. Code, § 5106, subd. (a) ["Neither the statements submitted under this part nor the determination of facts by the board pursuant to Section 5105 shall establish or constitute evidence of a right to divert or use water"].)

3.1.1.4 Legal Status of Gonzalves Pond

In *Chowchilla Farms, Inc. v. Martin* (1933) 219 Cal. 1, the court considered the situation in which the Fresno Swamp, a natural area "overgrown with tules and other vegetation" (*id.*, p. 4), was, through various excavations, transformed into the channel that became known as the Zalda Canal or the North Fork of the Kings River (*id*, pp. 5-6). The court held:

> From the foregoing authorities we feel warranted in holding that a water course, although originally constructed artificially, may from the circumstances under which it originated and by long-continued use and acquiescence by persons interested therein become and be held to be a

> natural water course, and that riparian owners thereon and those affected thereby may have all the rights to the waters therein as they would have in a natural stream or water course.

(*Id.*, p. 18.) Following this rule, in *Buchanan v. Los Angeles County Flood Control Dist.* (1976) 56 Cal.App.3d 757, 767, the court stated: "[i]n the context of water law, a permanent man-made condition can become a natural one by the lapse of time."

In Decision 1618, the State Water Board considered a creek for which the flow had been re-directed into a natural lake by a 16-foot high, 1,100-foot long earthen dam constructed in 1910. (Decision 1618, p. 8.) In 1938, the natural lake filled, and the earthen dam was overtopped and almost failed. (*Id.,* p. 13.) The affected water users then built a spillway on the dam, and spills occurred in the subsequent wettest years. (*Id.*) There was no evidence that the dam was maintained after 1938 and the Board concluded that, with little attention, the dam could be expected to last indefinitely. (*Id.*, p. 14.) Following *Chowchilla Farms* and *Buchanan*, the Board concluded that the course of the creek and the dam were "permanent in nature," "long continued" and had been acquiesced to by the affected water users, and that the lake had "legal status as a natural lake." (*Id.*, p. 15.)

The Prosecution Team argues that the Gonzalves Pond has not become a natural condition for water-rights purposes because it has existed only since 1995, "operates entirely off-stream," and is "only maintained by the inclusion of a pipe" connecting it to Canal Creek. (Prosecution Team's Closing Brief, pp. 15-16.) The Prosecution Team also argues that Merced ID has not acquiesced in the pond's existence and filed a complaint with the Board when it became aware of the pond's existence. (*Id.*, p. 16.)

Absent any intervention, the bed of the Gonzalves Pond is likely to last indefinitely. By conveying water back-and-forth between Canal Creek and the Gonzalves Pond, the Canal Creek Berm Pipes help equalize the surface-water elevations in the creek and the pond, and thereby reduce the risk that differences in these elevations will create hydrostatic pressures that could cause the Canal Creek Berm to fail. Because these pipes provide this protection to this berm, they have a legal status similar to the spillway that protected the dam involved in the proceedings that led to Decision 1618.

The pond's 25-year period of existence is shorter than the periods involved in the *Chowchilla Farms* case and Decision 1618, but this period is far longer than the five-year prescriptive period for adverse possession of real property (see Civ. Code, § 1007; Code Civ. Proc., § 321).

In its 2017 complaint to the Board, Merced ID stated:

> During the irrigation season, MID releases irrigation water originating from the Merced River to Canal Creek and the Castle Dam pool fluctuates depending on downstream demand. Depending on the level of water fluctuations, stretches of the old creek banks, within the permanent flowage easements, are inundated. All areas within permanent floodways [sic] easements are considered integral parts of the hydrologic Castle Dam Pool in Canal Creek.

(PT-14, p. 6.) Merced ID's complaint does not contain any objections to the creation of any of the areas that are inundated by Castle Reservoir. Merced ID's complaint asks the State Water Board to reject Respondent's Initial Statement of Water Diversion and Use and to rule that Respondent may not divert water from Canal Creek or the Gonzalves Pond for irrigation purposes; the complaint does not challenge the existence of the Gonzalves Pond or ask the Board to take any actions regarding it. (*Id*., p. 7.) These statements about these permanent flowage easements and Merced ID's lack of any objections to the Gonzalves Pond indicate that Merced ID has acquiesced in the pond's existence. On the other hand, Merced ID clearly did not acquiesce in Respondent's diversions of water from the Gonzalves Pond. [23]

Water levels in the Gonzalves Pond will continue to fluctuate as water levels in the creek fluctuate, and there will not be any net seasonal storage of water in the pond. We

[23] As discussed in Attachment A, page 2, footnote 31, nothing in this order should be construed to indicate that the Board would conclude that a pond constructed initially for some beneficial use without a valid water right ever could attain the legal status of a natural waterbody. For such ponds, the Board normally will be authorized to exercise its enforcement authorities under Water Code section 1052. (See *People v. Shirokow* (1980) 26 Cal. 301, 309-310.) The critical distinction here is that Mr. Gonzalves's father excavated the area that became the Gonzalves Pond to obtain a supply of dirt to construct the Roadway Berm, and not for any beneficial uses of the water that then flowed from Canal Creek into the pond.

conclude that, for water-rights purposes, the Gonzalves Pond should be treated as part of the Canal Creek channel. Respondent therefore does not need any water right for the flows of water from Canal Creek into the pond, for the temporary detention of this water in the pond or for any in-pond use of this water. Respondent does need a water right, or an agreement with or permit from Merced ID, for any diversions of water from the Gonzalves Pond or Canal Creek for irrigation or any other purpose of use on Orchard 1, 2 or 3, the Former Orchard or the Unused Area (all depicted on Figure 2).

3.1.2 Should the State Water Board Issue a Cease and Desist Order to Respondent?

As discussed in section 2.5.3, Respondent has constructed Gonzalves Lateral A, and uses this lateral to receive water by gravity flow from Merced ID's Escaladian Lateral A. Because Respondent has this water supply, Respondent states that "Respondent has no intention of diverting any Riparian water from Canal Creek" and "Respondent no longer needs to pump from the pond." (Respondent's Closing Brief, pp. 10-11.) However, Respondent continues to assert that he has rights to divert water from Canal Creek and to pump water from the Gonzalves Pond. (Respondent's Closing Brief, pp. 2-9.)

If Merced ID reduces or eliminates its deliveries of water from Escaladian Lateral A to Respondent because of future drought or other shortage conditions, then Respondent may consider re-asserting his Canal Creek water-right claims, even though this order concludes that such claims are not valid. Because Respondent does not have any rights to divert water from Canal Creek or to pump water from the Gonzalves Pond for any of these purposes of use on these lands, and because Respondent may consider making such diversions or pumping in the future, there is a threatened violation of Water Code section 1052, subdivision (a), which justifies issuance of a cease and desist order under Water Code section 1831, subdivision (d)(1). Respondent also needs to file an amended Statement of Water Diversion and Use S027064 and amended supplemental statements for his 2016-2020 diversions that are consistent with this order.

3.1.3 Cease and Desist Order Terms

The draft cease and desist order prepared by the Enforcement Section would require Respondent to stop immediately any unauthorized diversion or use of water from Canal Creek and to prepare a compliance plan "to render the [Gonzalves Pond] incapable of storing water subject to appropriation." (PT-1, pp. 10-11, ¶¶ 1-5.) That draft order would require Respondent to obtain approval of the compliance plan from the Division, the Central Valley Flood Protection Board, Merced County and Merced ID before beginning construction work to implement the plan. (*Id.*, p. 10, ¶ 2.) The compliance plan also would have to identify the alternate source of water Respondent would use to irrigate his orchards. (*Id.*, p. 11, ¶ 4.)

According to the Prosecution Team, its draft order would not "prescribe a specific method of compliance or a specific engineering solution," but instead would "establish a framework" that would allow Respondent, "in consultation with a qualified professional, to find the most cost effective, efficient solution that also meets certain goals and conditions that the Prosecution Team asserts are reasonable and necessary to ensure the protection of human health, downstream water users, and public trust resources." (Prosecution Team's Closing Brief, p. 18.)

During the hearing, Mr. Hess testified that capping the Canal Creek Berm Pipes would cause the surface water elevations in the pond and the creek to differ more frequently and for longer periods. (Recording, 2020-09-16, 3:15:30-3:33:56.) He testified that he did not think that this berm was engineered as a levee, and that these different water levels would cause hydrostatic pressures on the berm that could cause the berm to fail. (*Id.*, PT-4, p. 17, ¶ 55.)

Because Respondent has no legal right to divert water from Canal Creek or the Gonzalves Pond for irrigation or other purposes of use on Orchards 1, 2 and 3, the Former Orchard or the Unused Area, this order prohibits Respondent from diverting any water from the creek or the pond for any such purposes of use on any of these lands unless Respondent has entered into a written agreement with Merced ID or has a written permit from the district that authorizes such diversions. This order requires

Respondent to file a copy of any such agreement or permit with the Enforcement Section before such diversions begin.

This order requires Respondent to maintain records of the monthly bills or statements he receives from Merced ID for deliveries of water from the district's Escaladian Canal through Gonzalves Lateral A, and to file copies of them with the Enforcement Section, if requested by the Enforcement Section.

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.)

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 the Corps of Engineers or the Central Valley Flood Protection Board orders Respondent to do so. This order directs Respondent to clean and maintain these pipes as necessary so that such flows are not obstructed. So long as water can flow back-and-forth through these pipes, water that flows from the creek into the pond when the creek has high water elevations will flow from the pond back into the creek when the creek's elevation drops (down to the point where the water-surface elevation in the pond equals the elevation of the pipes). Except for evaporation and percolation from the pond and some residual storage, to which Merced ID has not objected, the pond will not have any net impacts on the water supplies Merced ID imports into Canal and Edendale Creeks for conveyance to downstream water users.

It would not be appropriate for the Board to order Respondent to take any actions to limit flows through these pipes. Limiting these flows 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. As long as back-and-forth flows through these pipes are not restricted, the pond and the creek usually will have approximately the same surface-water elevations. We defer to the Corps of Engineers and the Central Valley Flood Protection Board to decide whether to investigate issues concerning the safety and integrity of the Canal Creek Berm and to consider potential follow-up actions. Nothing in this order should be construed as limiting the authorities of the Corps of Engineers and the Central Valley Flood Protection Board under Easement 108E-1.

This order requires Respondent to file a compliance plan with the Enforcement Section, for the Enforcement Section's review and approval. This compliance plan: (i) shall describe the actions Respondent will take to obtain authorizations from Merced ID for any future diversions of water from Canal Creek or the Gonzalves Pond for any purposes of use on Orchards 1, 2 or 3, the Former Orchard or the Unused Area; (ii) shall describe the actions Respondent will take to maintain the Canal Creek Berm Pipes; and (iii) shall contain provisions for submitting reports to the Enforcement Section for any future diversions from the Gonzalves Pond or Canal Creek for the purposes of use described in clause (i). Because any such diversions must be under a permit from, or agreement with, Merced ID, and will occur under Merced ID's water rights, Merced ID will be responsible for reporting such diversions to the Division's Report Management System.

This order provides that, if Respondent may not maintain the Canal Creek Berm Pipes free from obstructions because of an order from 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 shall advise the Enforcement Section, and work with the Enforcement Section to develop an alternative maintenance plan.

This order requires Respondent to file an amended initial Statement of Water Diversion and Use S027064 for Respondent's 2015 diversions, and amended supplemental statements for his 2016-2020 diversions, with the Enforcement Section for its review and approval, and, upon approval, to submit them to the Division's Report Management

System. This amended initial statement and these amended supplemental statements shall be consistent with this order.

This order provides that, if Respondent and the Enforcement Section cannot resolve any issues regarding any of these requirements, then the Enforcement Section shall notify the Board's Deputy Director for Water Rights, who shall consider the parties' issues and arguments, and resolve the relevant issues.[24]

3.2 Should the State Water Board Impose Administrative Civil Liability on Respondent?

3.2.1 Did Respondent Divert or Use Water Subject to Division 2 of the Water Code Other than as Authorized by Division 2?

As discussed in section 3.1.1 and the related subsections, Respondent's pumping of water from the Gonzalves Pond during 2015-2017 for irrigation purposes was not authorized by any water right and therefore violated Water Code section 1052, subdivision (a). We conclude that this order should impose administrative civil liability (ACL) on Respondent for these unauthorized diversions.

3.2.2 What is the Appropriate Administrative Civil Liability Amount?

Although the Prosecution Team argues that Respondent used and uses the Gonzalves Pond for the non-consumptive beneficial uses of recreation and aesthetic enhancement, and that this use was not and is not authorized by any water rights, the Prosecution Team, exercising its enforcement discretion, has asked the State Water Board to impose ACL only for Respondent's diversions of water from the Gonzalves Pond during 2015-2017 for irrigation purposes. (Prosecution Team's Closing Brief, p. 20.) This limitation is consistent with our conclusion that Respondent did not need a water right for the flows of water back-and-forth between Canal Creek and the Gonzalves Pond or for any in-pond use of the water in it. (See section 3.1.1.4.) We therefore consider only

[24] Any action by the Deputy Director under this order will be subject to review by the Board under Water Code sections 1120-1124.

Respondent's pumping of water from the Gonzalves Pond for irrigation purposes from August 2015 through August 2017 as we determine the appropriate ACL amount.

Assuming that Respondent pumped water from the Gonzalves Pond to irrigate his orchards one day per week during March through October in the period from July 1, 2015 through November 1, 2017, the Prosecution Team estimates that Respondent conducted such pumping on 80 days. (Prosecution Team's Closing Brief, p. 21:2-13.) The Prosecution Team estimates that 52 of those days were during the Governor's declared drought emergency and the other 28 days were after the end of this declaration. (*Id.*)

Applying the rates of $1,000 per day for the days during the declared drought emergency (see Wat. Code, § 1052, subd. (c)(1)(A)), and $500 per day for the other days (see *id.*, § 1052, subd. (c)(2)), the Prosecution Team calculates the maximum potential ACL for these events as $66,000 (52 days x $1,000/day + 28 days x $500/day = $66,000). (Prosecution Team's Closing Brief, p. 21.)

The Prosecution Team also argues that Respondent is subject to ACL for the amounts of water he pumped while the emergency drought declaration was in effect. The Prosecution Team estimates that Respondent pumped 12.5 acre-feet per month during 13 months while this declaration was in effect. (*Id.*, p. 22.) Applying the maximum liability of $2,500 per acre-foot for such pumping (see Wat. Code, § 1052, subd. (c)(1)(B)), the maximum potential ACL for this pumping would be $406,250 (13 months x 12.5 af/month x $2,500/af = $406,250). The Prosecution Team rounds this amount to $405,000. (*Id.*)

Discussing the relevant circumstances, including the factors specifically listed in Water Code section 1055.3, the Prosecution Team argues that the Board should impose ACL of $165,000. (*Id.*, pp. 22-29.)

Respondent asks the State Water Board not to impose any ACL. He notes that he had to pay Merced ID over $204,000 for the district's billings to Respondent based on the district's assumptions about the amounts of water the district claims he pumped from

the Gonzalves Pond during 2014-2017. (Respondent's Closing Brief, pp. 12-16.) He argues that, when deliveries of district water from the Escaladian Canal through Lateral 7 stopped, he had no choice but to pump water from the pond, which he thought he could do under his riparian right claim. (*Id.*, p. 22.)

Although Respondent does not challenge the Prosecution Team's estimates of 52 days of pumping while the Governor's declared drought emergency was in effect and 28 days after the end of the declaration, Respondent's evidence indicates that these may be overestimates. Respondent's records indicate that Respondent pumped water from the Gonzalves Pond during two 12-hour periods and five 36-hour periods in 2015. (Gonzalves-36.) Assuming that each 12-hour period occurred on no less than one day and each 36-hour period occurred on no less than two days, this is a total of no less than 12 days of unauthorized diversions during 2015. Respondent's records indicate that pumping occurred during one 20-hour period, three 24-hour periods, one 30-hour period and eight 36-hour periods in 2016. (*Id.*) Assuming that the 20-hour period and each 24-hour period occurred on no less than one day and that the 30-hour and 36-hours periods each occurred on no less than two days, this is a total of no less than 22 days of unauthorized diversions during 2016. Respondent's records indicate that pumping occurred during May through August 2017 occurred during one 12-hour period, two 13-hour periods and five 36-hour periods. Assuming that the 12-hour period and each 13-hour period occurred on no less than one day and that each 36-hour period occurred on no less than two days, this is a total of no less than 13 days of unauthorized diversions during May-August 2017.

The drought emergency ended on April 7, 2017, (PT-23), which was before Respondent's 2017 pumping began in May. (S027064, 2018-06-29, Supp. Stmt. Water Div. and Use for 2017, p. 1.) Accordingly, Respondent's unauthorized diversions during the time when the Governor's drought emergency declaration was in effect occurred on no less than 34 days: 12 days during 2015 and 22 days during 2016.

Using an estimate of 34 days of unauthorized diversions in 2015-2016 while the Governor's drought emergency declaration was in effect and an estimate of 13 days of

unauthorized diversions in 2017 after the drought emergency ended, the maximum total ACL for days of unauthorized diversions is $40,500. (34 days x $1,000/day + 13 days x $500/day = $40,500.)

As discussed in section 2.5.2, Respondent does not agree with the Prosecution Team's estimates of the amount of water Respondent pumped from the Gonzalves Pond during 2015-2017. Using the meter readings of cumulative hours pumped by his portable pond pump and the pump's rated pumping rate of 600 gallons per minute (gpm), he argues that the amount of water he pumped from the Gonzalves Pond during 2015-2017 was 91.52 af. (Gonzalves-36.) We have concluded that Respondent's estimates are the best estimates of the amounts he pumped during 2015-2017.

All of Respondent's pumping during 2015 and 2016 was while the Governor's drought emergency declaration was in effect, and all of his pumping during 2017 was after the drought emergency ended. Using Respondent's estimates of 22.44 af pumped during 2015 and 45.10 af pumping during 2016, the best estimate of his total pumping during the drought emergency is 67.54 af. (22.44 af + 45.10 af = 67.54 af.) Applying the maximum liability of $2,500 per acre-foot for such pumping (see Wat. Code, § 1052, subd. (c)(1)(B)), the maximum potential ACL for this pumping is $168,850 (67.54 af x $2,500/af = $168,850).

The total maximum potential ACL therefore is $209,350. ($40,500 for number of days of unauthorized diversions + $168,850 for total amount of water pumped during drought emergency = $209,350.)

Water Code section 1055.3 provides that, in determining the amount of ACL to be imposed, the Board shall take into consideration all relevant circumstances, including, but not limited to: (a) the extent of harm caused by the alleged violation; (b) the nature and persistence of the alleged violation; (c) the length of time over which the alleged violation occurred; and (d) the corrective actions, if any, taken by the violator. The following subsections discuss these factors.

3.2.2.1 Extent of Harm

The Prosecution Team argues that Respondent's unauthorized diversions of water from the Gonzalves Pond to irrigate his orchards "resulted in a direct harm" to Merced ID, its customers and the Stevinson Water District by reducing the amounts of water available for their use, and "indirectly harmed" all other holders of downstream rights that were unable to divert water from Canal Creek and downstream watercourses during the height of the 2015 drought. (Prosecution Team's Closing Brief, p. 23.) The Prosecution Team notes that the Division sent a notice of unavailability of water on April 23, 2015 to all holders of all post-1914 appropriative rights in the San Joaquin River watershed. (*Id.*; PT-4, pp. 15-16, ¶ 52; PT-29; PT-30.) The Prosecution Team also argues that Respondent's unauthorized diversions during 2015-2017 reduced the amounts of water available for wildlife habitat in the San Luis and San Joaquin National Wildlife Refuges. (Prosecution Team's Closing Brief, pp. 23-24; PT-4, pp. 16-17, ¶¶ 53-54; PT-31; PT-32; PT-33.)

The Prosecution Team does not discuss the fact that Respondent paid a net amount of $154,986.82 to Merced ID for the amounts of water the district asserted Respondent pumped from the Gonzalves Pond during 2014-2017. (See section 2.6.) Using Respondent's estimated pumping amounts (see section 2.5.2), the best estimate of the total amount that Merced ID would have charged Respondent for the amounts of water he pumped from the Gonzalves Pond during 2015-2017 before he obtained the temporary pumping permit, if the district had billed Respondent at the district's normal water rates for these years, is $8,816.94.[25] Thus, contrary to the Prosecution Team's argument that Merced ID was harmed by Respondent's unauthorized diversions, the

[25] 22.44 af x $225/af + 45.10 af x $66/af + 23.98 af x $33/af = $8,816.94. (Gonzalves-26, pp. 6-8 [Merced ID's normal water rates for 2015-2017]; Gonzalves-36 [amounts Respondent pumped during 2015 and 2016, and during 2017 before Merced ID issued temporary pumping permit].)

district apparently obtained a substantial economic benefit, as high as $146,169.88 ($154,986.82 - $8,816.94 = $146,169.88), from these diversions.[26]

There is no evidence in the record that Merced ID's deliveries of water to its other customers or the Stevinson Water District during 2015-2017, or the amounts of money the district received from these customers, were reduced because of Respondent's unauthorized diversions. We agree with the Prosecution Team that Respondent's unauthorized diversions may have caused indirect impacts on other downstream water users or the amounts of water available for wildlife habitat in the San Luis and San Joaquin National Wildlife Refuges.

3.2.2.2 Nature and Persistence of Violation; Length Over Which Violation Occurred

Respondent's unauthorized diversions of water from the Gonzalves Pond for irrigation purposes began in August 2015 and lasted through August 28, 2017, when Respondent obtained a temporary pumping permit from Merced ID. (Respondent's Closing Brief, p. 17.) These diversions from the pond caused water-surface elevations in the pond to drop, which induced additional amounts of water to flow from Canal Creek into the pond. Respondent's unauthorized diversions during 2015 and 2016 were particularly serious because they occurred and persisted during the Governor's declared drought emergency. (PT-23.)

3.2.2.3 Respondent's Corrective Actions

Respondent took two major corrective actions to address his unauthorized diversions from the Gonzalves Pond for irrigation purposes.

First, Respondent obtained a temporary pumping permit from Merced ID on August 28, 2017 and paid the district for the water Respondent pumped from that date through 2019. (Respondent's Closing Brief, p. 17; Recording, 2020-07-31, 26:00-30:08; Gonzalves-54.) This permit authorized Respondent to pump water from the Gonzalves

[26] There is no evidence in the record of Merced ID's enforcement costs related to Respondent's unauthorized diversions.

Pond for irrigation purposes. Because Merced ID had the right under Water Code section 7075 to import Merced River water into Canal Creek and convey it to Respondent, this arrangement between Respondent and Merced ID corrected the prior unauthorized-diversion condition.

Second, Respondent completed a new irrigation system in the spring of 2020 that conveys water by gravity flow from Merced ID's Escaladian Lateral A to Gonzalves Lateral A and Respondent's property. (Gonzalves-43.) This new system eliminated the need for Respondent to pump water from the Gonzalves Pond for irrigation purposes after the new system began operating.

3.2.2.4 Other Relevant Circumstances

Besides directing the Board to consider the specific factors listed in the statute, Water Code section 1055.3 also directs the Board to consider "all relevant circumstances" in determining the amount of ACL. We consider the following additional relevant circumstances.

Economic benefits to Respondent. In prior orders, the Board has considered the economic benefits the respondent received as a result of respondent's unauthorized diversions when the Board was determining the appropriate ACL amount. For example, in Order WR 2019-0149, the Board stated:

> All else equal, a civil penalty for unlawful diversion should at minimum recover the economic benefit obtained from the violation.

(Order WR 2019-0149, p. 100; see Order WR 2015-0025, p. 15 [Board considered economic benefit to respondent when it determined appropriate ACL amount].)

During the hearing, Prosecution Team witness Bryan Elder testified that he believed that Respondent obtained three types of economic benefits from his unauthorized diversions of water: (a) benefits from delaying his payments to Merced ID for his purchases of water; (b) benefits from delaying his costs of constructing his new Lateral A; and (c) benefits from avoiding applying for appropriative water-right permits from the Board. (Recording, 2020-07-17, 55:10-1:01:54; PT-5, pp. 2-3, ¶¶ 4-7.)

Mr. Elder concluded that Respondent's economic benefits from the delays in his payments to Merced ID for water purchases were *"de minimus* [sic]." (PT-5, p. 2, ¶ 5.) Mr. Elder estimated that Respondent's total cost of constructing Lateral A was approximately $57,000. (*Id.*, pp. 2-3, ¶ 6.) Applying a 7.4-percent annual discount rate, Mr. Elder estimated that Respondent obtained an economic benefit of $37,157 by delaying this construction from 2015 to 2020. (*Id.*; PT-2, p. 20.) Mr. Elder estimated that Respondent avoided water-right application fees of approximately $5,200 by not applying for any water-right permit for the Gonzalves Pond or for his 2015-2019 diversions from the pond for irrigation purposes, and that the economic benefit associated with not paying these fees was $4,654. (PT-5, p. 3, ¶ 7.)

Respondent testified that he did not receive any economic benefits from the water he pumped from the Gonzalves Pond during 2015-2017, and that he actually incurred very substantial costs. These costs included: (1) $204,986.82 in payments to Merced ID for the amounts of water the district asserted he pumped from the Gonzalves Pond during 2014-2017 (Gonzalves-26, p. 10; Gonzalves-38, p. 2; Gonzalves-43); (2) $12,000 for the temporary system to pump water from the pond to his orchards (Gonzalves-43); and (3) a total of $226,042 in legal fees to two law firms for Respondent's litigation against Merced ID (*Id.*).

We subtract $50,000 from the total payments Respondent made to Merced ID because Respondent admitted during the hearing that he received this amount back from Merced ID as part of settlement of his lawsuit against the district. (See section 2.6.) This reduces the net amount Respondent paid to Merced ID for his unauthorized diversions of water to $154,986.82. The best estimate of the market value of this water is $8,816.94, which we calculated using Merced ID's normal rates for water delivered to its customers during 2015-2017. (See section 3.2.2.1.) Thus, rather than receiving any economic benefit from his unauthorized diversions, Respondent experienced a direct economic impact of $146,169.88. ($154,986.82 - $8,816.94 = $146,169.88.)

In the economic-benefit analysis in a recent order involving ACL for unauthorized diversions of water for water bottling, the Board considered the estimated amount of the

respondent's gross sales of bottled water that the respondent produced using the water that he was not authorized to divert. (Order WR 2019-0149, pp. 85, 100.) The Board used this estimated amount because there was no evidence in the record of the respondent's avoided costs associated with his unauthorized diversions of water (*id.*, p. 85), and because the respondent did not produce any evidence that his economic benefit was less than the gross-sale amount (*id.*, p. 100).

In the present matter, Respondent testified that the total gross receipts from his sale of the almonds produced on Orchards 1, 2 and 3 during 2015-2017 were $239,142. (Gonzavles-43.) The total of Respondent's net payments to Merced ID for the water he pumped during 2015-2017, his costs of pumping that water, and his legal fees for his dispute with Merced ID is $393,028.82. ($154,986.82 + $12,000 + $226,042 = $393,028.82.) Thus, even if we do not consider Respondent's production costs for these almonds (of which there is no evidence in the record), the evidence in the record indicates that Respondent did not receive any economic benefit from his unauthorized diversions; instead he experienced a significant economic impact.

The Prosecution Team argues that Respondent's payments to Merced ID "made MID whole, but they did not address the harm done by [Respondent] to downstream water rights holders, public trust resources, and to the State Water Board's ability to orderly and efficiently administ[er] the State's water resources." (Prosecution Team's Closing Brief, p. 29.) The Prosecution Team further argues that these payments do not deter Respondent or others from violating the statutory prohibition against unauthorized diversions, "and should not be considered as a mitigating factor in the assessment of the State Water Board's penalty." (*Id.*)

We agree that the State Water Board normally should assess substantial ACL on people and entities that make unauthorized diversions of water in California. Such liability normally is necessary to deter such unauthorized diversions in the future and to further the Board's ability to efficiently administer the State's water resources. (See Order WR 2018-0088, p. 17.)

In this case, however, Respondent's unauthorized 2015-2017 diversions of water from the Gonzalves Pond resulted in substantial direct economic impacts to Respondent. Potential future impacts like these will strongly deter future non-compliance by Respondent and others who may face similar circumstances. It is appropriate for us to consider these economic impacts and related deterrence, and the lack of any economic benefit to Respondent from his unauthorized diversions, as we determine the appropriate amount of ACL in this matter. (See Order WR 2008-0015, p. 13 ["each case is determined on its own merits and circumstances"].)

Respondent testified that it cost him approximately $56,000 to construct Lateral A, $45,514 paid to contractors and $10,000 for his own work. (Gonzalves-43; Recording, 2020-07-30, 2:42:18-2:43:00.) This amount is very close to Mr. Elder's estimate of $57,000 for this construction. We disagree with Mr. Elder's opinion that we should consider his estimate of the economic benefit to Respondent of the approximately five-year delay in completing Lateral A as we determine the appropriate ACL amount. It necessarily took some time for Respondent to develop the plans for this new lateral and to make arrangements with Merced ID to connect it to Escaladian Lateral A. Also, Respondent obtained a temporary permit from Merced ID in August 2017 for his pumping of water from the Gonzalves Pond for irrigation purposes, so his delay after that date in completing Lateral A did not result in any additional unauthorized diversions.

We do not accept Mr. Elder's argument that Respondent received an economic benefit from not filing applications for water-right permits for the Gonzalves Pond or his diversions from the pond for irrigation purposes. As discussed in section 3.1.1.4, we conclude that Respondent did not need a water right for the back-and-forth flows of water between Canal Creek and the Gonzalves Pond or for in-pond uses of pond water. Respondent could not have obtained his own water right to divert and use for irrigation purposes the water that Merced ID imports into Canal Creek. Rather, Respondent needed a temporary permit from Merced ID, or an agreement with Merced ID, to pump and use this water.

State Water Board staff costs. In prior orders, the Board has considered the amount of its staff's costs when the Board was determining the appropriate ACL amount. (See, e.g., Order WR 2015-0025, p. 14.)

Mr. Cervantes, the program manager of the Enforcement Section, testified that the Prosecution Team estimated that its staff costs to investigate Respondent's activities and to develop the enforcement documents totaled $43,293. (PT-3, p. 1, ¶ 2, p. 3, ¶ 10; see PT-4, p. 19, ¶ 63; PT-34.) He testified that these amounts include the costs of the over 300 hours that Mr. Hess spent investigating this matter. (PT-34.)[27] The Prosecution Team argues that we should consider this amount when we determine the appropriate amount of ACL. (Prosecution Team's Closing Brief, p. 28.)

As discussed in section 3.2.2.6, we consider the Enforcement Section's staff costs when we determine the appropriate ACL amount.

Incorrect factual allegations and legal contentions. The primary legal contentions made by Respondent and his attorneys during 2017-2018 were based on two fundamentally incorrect factual allegations.

First, Respondent's attorney repeatedly asserted that there was no hydraulic connection between Canal Creek and the Gonzalves Pond, except when the creek overtopped the Canal Creek Berm. For example, the July 26, 2017 letter from Respondent's attorney to Merced ID's deputy general manager states: "The [Gonzalves Pond] is formed from water that permanently pools on his land through seasonal flooding and which does not have—and never can have—a natural outlet" and water in the pond "cannot drain away on its own, and is never going to rejoin Canal Creek." (PT-15, p. 180.) Merced ID's attorney responded with a memorandum, which stated that "District staff has determined that there is a hydrologic connection between Canal Creek and the pond on Mr. Gonzalves property." (*Id.*, p. 245.) Respondent's attorney replied, stating:

> As demonstrated in the picture below, the pool of standing water [in the Gonzalves Pond] is bounded on all sides by a private roadway and levee. The water can only enter from Canal Creek through flooding over the

[27] The Prosecution Team did not provide the hourly rates for any of the Enforcement Section staff or the dates during which the work occurred. (See PT-34, p. 2.)

> roadway. There are no channels or breaks in the levee that would allow the water in any other way. The [memorandum from Merced ID's attorney] is incorrect in its assessment that the pond and Canal Creek are "physically" connected. They are not.

(*Id.*, p. 250.)

Respondent's October 2, 2017 petition for writ of mandate against Merced ID, signed by Respondent's attorney and verified by Respondent (PT-15, pp. 38-39), contains similar incorrect statements. For, example, it states: "The Gonzalves Pond is physically separated from Canal Creek by the private roadway and levee" (*id*, p. 9, ¶ 37) and "If Mr. Gonzalves does not divert water from the Gonzalves Pond, it will just sit there unused and it will never flow back into Canal Creek" (*id*, p. 14, ¶ 66).

During the January 25, 2018 field inspection, Respondent told Mr. Hess about one of the Canal Creek Berm Pipes, which Mr. Hess then photographed. (PT-12, p. 16.) Nevertheless, a few weeks later, Respondent's attorney sent an e-mail to Mr. Hess, which stated "[t]here are no channels or pipes through which Mr. Gonzalves could divert the water [of Canal Creek] to the [Gonzalves Pond]." (*Id.*, p. 54.) Mr. Hess replied the next day, describing one of the pipes in the Canal Creek Berm. (PT-66, p. 1.) Mr. Hess testified that he did not receive any subsequent communications from Respondent's attorney (PT-39, p. 14, ¶ 26), and there is no evidence in the record that Respondent's attorney took any follow-up actions.

As demonstrated by Respondent's statements to Mr. Hess during the January 28, 2018 field investigation, Respondent knew that there was at least one pipe that conveys water back-and-forth between Canal Creek and the Gonzalves Pond, that Canal Creek does not need to overtop the berm for water to flow from the creek into the pond because the elevation of this pipe is several feet below the top of the Canal Creek Berm, and that water may flow from the pond back into the creek. (PT-12, pp. 13-16.) The contrary allegations and assertions by Respondent's attorney clearly were incorrect.

Second, Respondent's attorney repeatedly asserted that water flows naturally from the Merced River into Canal Creek and that, as a result, there are significant natural flows in

Canal Creek during the irrigation season, even during drought years like 2015. For example, the August 14, 2017 letter from Respondent's attorney to Merced ID states:

> There appears to be a native, natural flow in Canal Creek despite the District's assertion to the contrary. In 2015, despite the fact that the District expressly stated it was prohibited by federal and state law from releasing water from its surface water supply reservoir, Lake McClure, there continued to be a flow of water in Canal Creek. Canal Creek was not dry and had a flow significant enough to overtop the roadway and levee and enter Mr. Gonzalves's property even through the District had implemented the 2015 [Water Management Implementation Plan]. So, in 2015, the District was either releasing water from Lake McClure in violation of state and federal law, or Canal Creek maintains a significant perennial native flow even when the District does not use it to transport foreign water.

(PT-15, pp. 254-255.)

Respondent's petition for writ of mandate similarly alleges that "Canal Creek had a flow of water throughout 2015 sufficient to overtop the levee surrounding the Gonzalves Pond, even when [Merced ID] was not releasing surface water from Lake McClure." (*Id*., p. 13, ¶ 60.) The February 6, 2018 e-mail from Respondent's attorney to Mr. Hess states "the flooding [of the Gonzalves Pond] still occurred even when the District was not making any surface water releases during the drought in 2015." (PT-12, p. 54.)

A simple review of the relevant geography (see Figures 1 & 3) demonstrates that Canal Creek can receive significant amounts of imported Merced River water through Merced ID's Main Canal, even when the district is not releasing stored water from Lake McClure. Also, anyone with even a rudimentary understanding of California hydrology would know that a creek like Canal Creek, which has a small, low-elevation watershed, would not have any significant natural flow water during the spring and summer of a drought year like 2015 (see section 3.1.1.1) and that any substantial creek flows during those seasons must be flows of imported water. As discussed in section 3.1.1.1, there is no substantial evidence supporting Respondent's argument that water flows from the Merced River through subterranean channels into Canal Creek.

Respondent's attorney used these incorrect factual allegations to make the legal contentions that the water in Gonzalves Pond is "flood water" that Respondent may

divert and use for irrigation purposes without any water right (see PT-15, pp. 13-14, ¶¶ 64-67), that Respondent may divert water from Canal Creek under riparian rights for irrigation purposes (*id*., pp. 14-15, ¶ 70), and that Water Code section 7075 does not apply to Merced ID's use of Canal Creek to convey imported water to downstream water users (*id*., pp. 255-257). These contentions clearly are incorrect. (See sections 3.1.1.2 & 3.1.1.3.)

Code of Civil Procedure section 128.7 applied to Respondent's attorney's signing and filing of the petition for writ of mandate. (See PT-15, pp. 1, 38.) This statute generally provides that, by signing and filing this document, the attorney certified its allegations and other factual contentions "have evidentiary support" and its legal contentions "are warranted by existing law." Code of Civil Procedure section 446 applied to Respondent's verification of the petition. This verification, signed by Respondent under penalty of perjury, stated that the matters in it were "true of my own knowledge." (PT-15, p. 39.) Although these statutes do not apply to documents that parties and attorneys sign and file with the State Water Board, we expect the same levels of accuracy in such documents.

We are disturbed that Respondent and his attorney repeatedly made these incorrect factual allegations and legal contentions. Respondent relied on these legal contentions to attempt to justify his unauthorized diversions of water from the Gonzalves Pond for irrigation purposes during 2015-2017. While we do not know the details of Respondent's interactions with Merced ID, it appears that Respondent could have avoided the district's triple water charges and additional penalties (see Gonzalves-26, p. 1), his litigation with MID (see PT-15), and this State Water Board proceeding, if he and his attorneys had acknowledged the key facts and used them to make an accurate legal analysis in the summer of 2015 when Respondent's water supply from Lateral 7 was shut off. This analysis would have demonstrated that Respondent needed authorization from Merced ID for Respondent's pumping of water from the Gonzalves Pond for irrigation purposes. After completing this analysis, Respondent could have applied to the district then for a temporary pumping permit like the one Respondent obtained two years later.

Because Respondent did not take these actions in 2015, the State Water Board Prosecution Team had to expend considerable resources to address the unauthorized diversions.[28]

3.2.2.5 Recent Board Administrative Civil Liability Orders

In three recent orders, the Board imposed ACL under Water Code section 1055.3 for unauthorized diversions of water.

In Order WR 2015-0025 (Robert Mann), the Board considered unauthorized diversions associated with an unpermitted reservoir constructed on the respondent's property, which was in Sonoma County within the area subject to the Board's Policy for Maintaining Instream Flows in Northern California Coastal Streams (North Coast Instream Flow Policy). (Order WR 2015-0025, pp. 1-2, 6.) The reservoir had a volume of approximately 183 af and a surface area of more than 13 acres. (*Id.*, p. 5.) The respondent had hauled water from the reservoir by trucks for stockwatering. (*Id.*) Division staff estimated that approximately 28 af/yr evaporated from the reservoir and about 5 af/yr were used from the reservoir for stockwatering. (*Id.*, p. 7.)

Applying the Water Code section 1055.3 factors, the Board concluded that: (a) impoundment of water in the reservoir had resulted in injury and harm to other water users and aquatic life (*id.*, p. 11); (b) the respondent's lack of diligence in pursuing a remedy to the violations had been persistent (*id.*, p. 13); (c) the unauthorized dam and reservoir had been in place for roughly 60 years and the respondent had owned the property since 1992; and (d) the respondent had not taken any actions to correct the unauthorized diversion other than to submit a statement of water diversion and use and to stop diverting water from the reservoir for stockwatering (*id.*, p. 14). The order noted

[28] We also are disturbed that Respondent repeatedly stated that his total payments to Merced ID for the water he pumped from the Gonzalves Pond for irrigation purposes during 2015-2017 were over $204,000 (see, e.g., Gonzalves-38, p. 3; Gonzalves-39, p. 1 [slide 4]; Gonzalves-43, p. 1) and did not disclose until questioned by the hearing officer that Merced ID refunded $50,000 of this amount (see Section 2.6). We expect witnesses who appear in future Board hearings to be more forthcoming about key facts like these.

that the Board "had incurred considerable costs in handling this enforcement action," but did not state the amount of those costs. (*Id.*) Considering these factors, the Board set the ACL amount at $125,000, suspended $100,000 of that amount pending successful implementation of the respondent's compliance plan, and specified that the remaining $25,000 would be due immediately. (*Id.*, pp. 15-16, 19-20.)

In Order WR 2018-0088 (Stornetta Family Trust), the Board considered unauthorized diversions associated with a reservoir in Napa County, within the area subject to the North Coast Instream Flow Policy. (Order WR 2018-0088, pp. 1-2, 4.) Division staff estimated that the reservoir had a volume of approximately 24.2 af and a surface area of about two acres. (*Id.*, p. 6.) The respondent used the reservoir for stockwatering. (*Id.*, pp. 6-7.) The order concluded that at least six af/yr evaporated from the reservoir. (*Id.*, p. 15.)

Applying the Water Code section 1055.3 factors, the Board concluded that: (a) the reservoir's unauthorized diversions contributed to the risk of injury or harm to aquatic life, particularly Central California Coastal steelhead, and reduced the amount of water available to downstream users (*id.*, p. 14); (b) the reservoir had been in place since 1964 and used consistently as a stockpond, and the respondent had owned the property since 2005 or earlier (*id.*, pp. 15-16); (c) the respondent took the limited corrective action of filing a livestock stockpond registration in 2014, shortly before the hearing began (*id.*, p. 16); and (d) the respondent obtained an economic benefit of $3,000 per year until 2014 and $6,000 per year thereafter by leasing the property (*id.*). Considering these factors, the Board set the ACL amount at $75,000, suspended $45,000 of that amount pending successful implementation of the respondent's compliance plan, and specified that the remaining $30,000 would be due immediately. (*Id.*, pp. 18-19, 22-23.)

In Order WR 2019-0149 (G. Scott Fahey), the Board consider diversions from two springs in Tuolumne County for water bottling. (Order WR 2019-0149, pp. 36-37.) The respondent had two water-right permits for these diversions and use, and the permits had terms requiring permittee to provide replacement water to a downstream reservoir when the respondent diverted water during a specified summer period. (*Id.*, pp. 41-44.)

The respondent diverted water during this summer period in 2014 and 2015 but did not provide replacement water. (*Id.*, pp. 46-62, 72-73.)

Applying the Water Code section 1055.3 factors, the Board concluded: (a) the respondent diverted 25.33 af of water over 178 days in 2014-2015, while the Governor's drought emergency declaration was in effect (*id.,* p. 81), 28.3 af in 2012, and 10.4 af in 2013, for a total of 64.03 af (25.33 af +28.3 af + 10.4 af = 64.03 af); (b) the respondent's gross sales of bottled water from unauthorized diversions were estimated at $181,000 and no replacement water was available for the 2014-2015 diversions (*id.*, pp. 83-87); (c) the respondent was negligent in failing to comply with the terms in his water-right permits (*id.*, pp. 87-90), but "genuinely misunderstood" his obligations to senior diverters (*id.*, pp. 90-97); (d) the respondent did not take any significant corrective actions (*id.*, pp. 97-98); and (e) the Prosecution Team staff spent $15,624 investigating the respondent's diversions and preparing the enforcement action (*id.*, p. 98). Considering these factors, the Board set the ACL amount at $215,000, suspended $165,000 of that amount pending respondent's successful implementation of the required corrective actions, and specified that the remaining $50,000 would be due immediately. (*Id.*, pp. 101, 103, 106-107.)

In an earlier order, Order WR 2004-0004, the Board considered the ratios of the ACL amounts to the "equivalent costs" of the amounts of the respondents' unauthorized diversions. (Order WR 2004-0004, pp. 29-34.) Those ratios ranged from 1.96 to 2.69.[29]

[29] Order WR 2004-0004 (Phelps, Ratto, Conn) involved diversions during periods when respondents' water-right licenses did not authorize diversions. (Order WR 2004-0004, pp. 21-29.) The Board imposed the following administrative civil liability amounts on the respondents where the diverted water had the following "equivalent costs": (a) Phelps: $45,000 for water with an equivalent cost of $20,000 (*id*., p. 31); (b) Ratto: $7,000 for water with an equivalent cost of $2,600 (*id.*, p. 32); (c) Silva & Conn: $10,000 for water with an equivalent cost of $5,100 (*id.*, pp. 33-34). The ratios of these ACL amounts to the corresponding equivalent costs are: (a) Phelps: $45,000/$20,000 = 2.25; (b) Ratto: $7,000/$2,600 = 2.69; and (c) Silva & Conn: $10,000/$5,100 = 1.96.

3.2.2.6 Appropriate Administrative Civil Liability Amount

In the present case, the following Water Code section 1055.3 factors and related facts support substantial ACL: (a) Respondent's unauthorized diversions persisted for over two years, most of which was during extreme drought conditions and while the Governor's drought emergency declaration was in effect; (b) Respondent and his attorney repeatedly made incorrect factual allegations and used them to make clearly incorrect legal arguments; and (c) as a result, the Enforcement Section incurred substantial costs to investigate Respondent's activities and to prepare its investigation report.

On the other hand, the following facts militate against substantial ACL: (a) because Respondent ended up paying Merced ID for the water he pumped from the Gonzalves Pond from August 2015 through August 2017 at rates that far exceeded the district's in-district rates for normal water deliveries, Merced ID was not harmed by, and received a significant economic benefit from, Respondent's diversions and associated payments; (b) for the same reason, Respondent ultimately did not receive any economic benefits, and instead experienced significant economic impacts, from these diversions; and (c) Respondent took actions to correct the unauthorized-diversion problem by obtaining a temporary pumping permit from Merced ID in August 2017 and by constructing and starting to use Gonzalves Lateral A in 2020.

We conclude that $45,000 is the appropriate ACL amount here. Of this amount, $25,000 should be due immediately and the remaining $20,000 should be suspended pending Respondent's preparation of the compliance plan and the amended statement of water diversions and use and supplemental statements required by this order.

This $45,000 total liability amount is substantially less than the $125,000, $75,000 and $215,000 total liability amounts in Orders WR 2015-0025, WR 2018-0088 and WR 2019-0149. This difference is appropriate because Respondent's unauthorized diversions, while very serious, did not have the same persistence, and did not last nearly as long, as the unauthorized diversions involved in these three prior orders.

Also, Respondent took significant corrective actions by obtaining the temporary pumping permit from Merced ID in August 2017 and by constructing Gonzalves Lateral A in 2020 before the hearing. This contrasts with the respondents in the matters leading to the three prior orders, who had not taken any significant corrective actions before their hearings.

The $25,000 amount that is due immediately is in the range of the $25,000 and $30,000 "due immediately" amounts required by Orders WR 2015-0025 and WR 2018-0088. This amount is somewhat less than the $50,000 "due immediately" amount required by Order WR 2019-0149. This difference is appropriate because Respondent already has made a net payment of $146,169.88 to Merced ID, in addition to the $8,816.94 Respondent paid Merced ID based on its normal fees for the water he pumped from the Gonzalves Pond during August 2015 through August 2017. The respondent in the proceeding that led to Order WR 2019-0149 had not made any similar payments to the injured parties and had not experienced economic impacts like Respondent's.

The $25,000 amount is approximately 2.8 times the $8,816.94 market value of the diverted water. ($25,000/$8,816.94 = 2.84.) This ratio is higher than the ratios of the administrative liability amounts imposed in Order WR 2004-0004 on the respondents for their unauthorized diversions of water to the "equivalent costs" of the water involved in that matter. (Order WR 2004-0004, pp. 29-34; see section 3.2.2.5.) This higher ratio is appropriate, considering the other factors and facts discussed in this order.

Order WR 2019-0149 states, "[a]ll else equal, a civil penalty for unlawful diversion should at a minimum recover enforcement costs and disgorge the economic benefit obtained from the violation." (Order WR 2019-0149, p. 83.) Because Respondent paid Merced ID far more than the value of the water Respondent diverted from the Gonzalves Pond from August 2015 through August 2017, it is not necessary for this order to impose ACL to address any economic benefits to Respondent or to deter Respondent from making unauthorized diversions of water in the future. The Board will consider such factors in future cases involving unauthorized diversions where the

diverter has not already paid the injured party for the diverted water at rates that substantially exceeded the injured party's normal rates for such water.

While the Board considers Board staff's enforcement costs in determining appropriate civil penalty amounts in matters involving unauthorized diversions of water, the Board will not necessarily set the amount that the respondent must pay in every matter at a level that would recover all staff enforcement costs. The Board's Water Quality Enforcement Policy emphasizes the Board's discretion in this analysis:

> The Water Boards may exercise their discretion to include some of the costs of investigation and enforcement in a total administrative civil liability. Including some staff investigation and enforcement costs is valid from an economic standpoint as it requires those who commit water quality violations to pay a greater percentage of the full costs of their violations. However, this important consideration must be balanced against the potential of discouraging a discharger from exercising its right to be heard and other important due process considerations. . . . Whether, and the extent to which, staff costs should be included in a civil liability should be considered separately by the Water Boards under this factor because they are unrelated to impacts to water quality and not specifically identified as a statutory factor to be considered in determining the amount of a liability.

(State Water Board, Water Quality Enforcement Policy, p. 22 (2017).) The same considerations apply to staff costs in enforcement matters involving unauthorized diversions of water.[30]

4.0 CONCLUSIONS

1. For water-rights purposes, the Gonzalves Pond and Canal Creek Berm Pipes should be treated as parts of Canal Creek, under *Chowchilla Farms, Inc. v. Martin* (1933) 219 Cal. 1, and subsequent decisions.

[30] The North Coast Instream Flow Policy similarly recognizes the Board's discretion on the staff costs issue, stating that the ACL "should be high enough to take into consideration . . . the costs to the State Water Board in taking enforcement action." (North Coast Instream Flow Policy, App. H, p. H-1, underlining added.) Although the policy goes on to state that the ACL amount "should, at a minimum, be set at a level that recovers economic benefit plus staff costs" (*id.*, p. H-3), this latter statement is tempered by the earlier statement, which confirms that the Board should take into consideration all relevant facts and factors when setting an ACL amount.

2. Respondent does not have any water rights that authorize the diversion of water from the Gonzalves Pond or Canal Creek for irrigation or any other purpose of use on Orchard 1, 2 or 3, the Former Orchard, or the Unused Area (as these areas are depicted in Figure 2).

3. We issue a cease and desist order consistent with our conclusions in the preceding two paragraphs.

4. We impose administrative civil liability in the total amount of $45,000 for Respondent's unauthorized diversions of water from the Gonzalves Pond for irrigation purposes during 2015-2017. Of this amount, $25,000 is due immediately. The remaining $20,000 is suspended pending Respondent's preparation of the compliance plan and the amended statement of water diversions and use and supplemental statements required by this order.

ORDER

IT IS HEREBY ORDERED THAT:

1. Pursuant to Water Code sections 1831-1836, Respondent, Kevin Gonzalves, and any successor owner of Merced County APNs 052-540-015 and 052-540-065 (collectively referred to in the following paragraphs as "Respondent") shall comply with the following orders:
    a. Respondent shall not divert any water from the Gonzalves Pond or Canal Creek for irrigation or any other purpose of use on Orchard 1, Orchard 2, Orchard 3, the Former Orchard or the Unused Area (all depicted in the attached Figure 2) unless Respondent has entered into a signed written agreement with Merced Irrigation District, or has a signed written permit from the district, authorizing such diversions, and has filed a copy of the agreement or permit with the Division of Water Rights Enforcement Section (Enforcement Section).
    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 the United States Army Corps of Engineers or the Central

Valley Flood Protection Board orders Respondent to take some other action.

c. Respondent shall maintain copies of all of the invoices Respondent received or receives from Merced Irrigation District for water Respondent received or receives from the district from the district's Escaladian Canal through Gonzalves Lateral A, and shall provide copies of the invoices to the Enforcement Section within 30 days after any request from the Enforcement Section for such copies.

d. Respondent shall file with the Enforcement Section, within 60 days of the date of this order, for the Enforcement Section's review and approval, a compliance plan with the following elements: (i) a description of the actions Respondent will take to obtain the necessary authorizations from Merced Irrigation District for any future diversions of water from the Gonzalves Pond or Canal Creek for any purposes of use on Orchard 1, 2 or 3, the Former Orchard or the Unused Area, before beginning any such diversions; (ii) a description of the actions Respondent will take to maintain the Canal Creek Berm Pipes free from any obstructions, including a maintenance schedule; and (iii) provisions for submitting reports to the Enforcement Section for any future diversions from the Gonzalves Pond or Canal Creek for the purposes of use described in clause (i). If Respondent and the Enforcement Section cannot resolve any disputes regarding the sufficiency of this compliance plan, then the Enforcement Section shall advise the Board's Deputy Director for Water Rights, who then shall consider the parties' arguments and resolve the relevant issues.

e. If Respondent may not maintain the Canal Creek Berm Pipes free from any obstructions that would impede flows of water in either direction in such pipes, because of an order of the United States Army Corps of Engineers, the Central Valley Flood Protection Board or a court, then Respondent shall advise the Enforcement Section within 30 days of such order or other action, and Respondent shall work with the Enforcement

Section to develop an alternative plan for maintenance of the Canal Creek Berm Pipes and the Gonzalves Pond that is consistent with this State Water Board order. If Respondent and the Enforcement Section cannot resolve any disputes regarding such alternative plan, then the Enforcement Section shall advise the Board's Deputy Director for Water Rights, who then shall consider the parties' arguments and resolve the relevant issues.

f. Respondent shall file with the Enforcement Section, within 60 days of the date of this order, for the Enforcement Section's review and approval, drafts of an amended initial Statement of Water Diversion and Use S027064 for Respondent's 2015 diversions of water from the Canal Creek Pond, and draft amended supplemental statements of water diversion and use for Respondent's 2016-2020 diversions from this pond. This draft amended initial statement and these draft amended supplemental statements shall be consistent with this order and: (i) shall state that these diversions started in 2015; (ii) shall not list any claims of riparian rights and instead shall state that the Water Board determined in this order that the 2015, 2016, and May-August 2017 diversions were not authorized by any water right, and that the September-October 2017 diversions and all diversions during 2018 and 2019 were authorized by a temporary pumping permit Respondent received from Merced ID; (iii) shall list the monthly and annual amounts diverted from the Gonzalves Pond during 2015-2019, based on the best available meter records; and (iv) shall not list any amounts of water that Respondent received from the district's Escaladian Canal. After filing this draft amended initial statement and these draft amended supplemental statements with the Enforcement Section, Respondent shall work with the Enforcement Section, and, as necessary with the Records Management Unit, to complete a final amended initial statement, and final amended supplemental statements. After Respondent, the Enforcement Section and the Records Management Unit have reached agreement on the amended initial statement and amended

supplemental statements, Respondent shall submit them to the Board's eWRIMS Report Management System (RMS), and Respondent shall advise the RMS that Statement S027064 will be inactive for future years. If Respondent, the Enforcement Section and the Records Management Unit cannot resolve any disputes regarding this amended statement or these amended supplemental statements, then the Enforcement Section shall advise the Board's Deputy Director for Water Rights, who then shall consider the parties' arguments and resolve the relevant issues in a manner that is consistent with this order.

2. Pursuant to Water Code section 1052, subdivision (c), Respondent shall pay administrative civil liability in the amount of $45,000, which is due in two installments as follows:

   a. The first installment of $25,000 is due immediately. Within 30 days of the date of this order, Respondent shall transmit a check or money order payable to the State Water Resources Control Board in the amount of $25,000 to:

      State Water Resources Control Board
      Division of Water Rights
      Enforcement Section
      P. O. Box 2000
      Sacramento, CA 9512-2000

      If Respondent does not make this payment by the specified deadline, then the Assistant Deputy Director for the State Water Board's Division of Water Rights Permitting and Enforcement Branch (Assistant Deputy Director) may seek recovery of the administrative civil liability of this first installment, pursuant to Water Code section 1055.4.

   b. If Respondent meets the requirements of subparagraphs 1.d. and 1.f. of this order by the specified deadlines, and the Enforcement Section or the Deputy Director for Water Rights has approved the compliance plan required by subparagraph 1.d. and the amended initial statement and amended supplemental statements required by subparagraph 1.f., and Respondent has fully and timely paid the first installment, then the $20,000 second installment will be indefinitely suspended. If Respondent fails to meet any of

the requirements of subparagraph 1.d. or subparagraph 1.f. by the specified deadlines, or fails to fully and timely pay the first installment, then the Assistant Deputy Director shall issue a written order directing Respondent to immediately pay the second installment. If any portion of the second installment is unpaid 30 days after the date of delivery of this written order to Respondent, then the Assistant Deputy Director may seek recovery of the administrative civil liability of this second installment, pursuant to Water Code section 1055.4

3. Fulfillment by Respondent of his obligations under this order will constitute full and final satisfaction of Respondent's liability for the violations described in this order. The State Water Board retains its right to take further enforcement actions for any other or future violations, including any violations of this order.

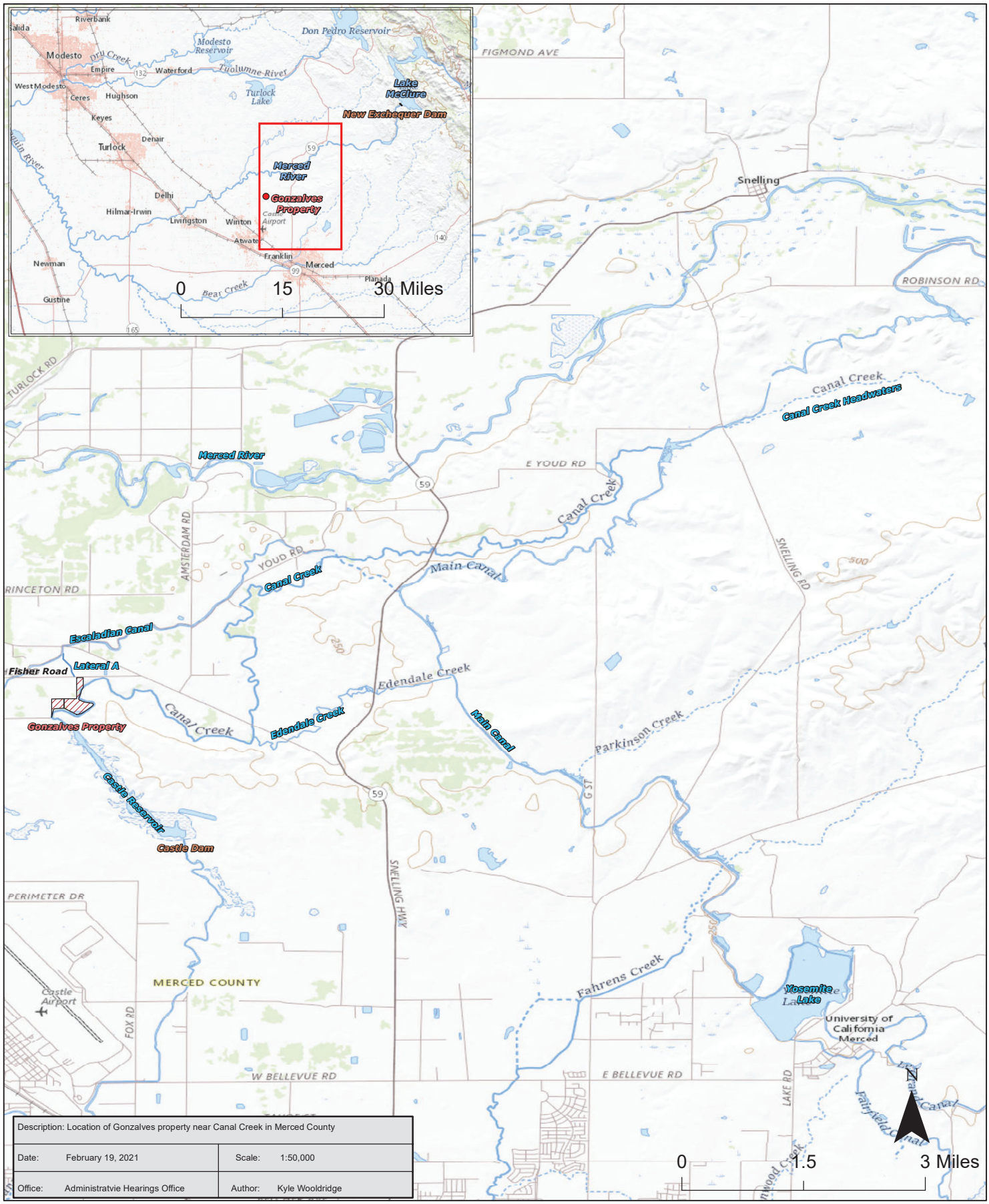
CERTIFICATION

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 October 5, 2021.

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

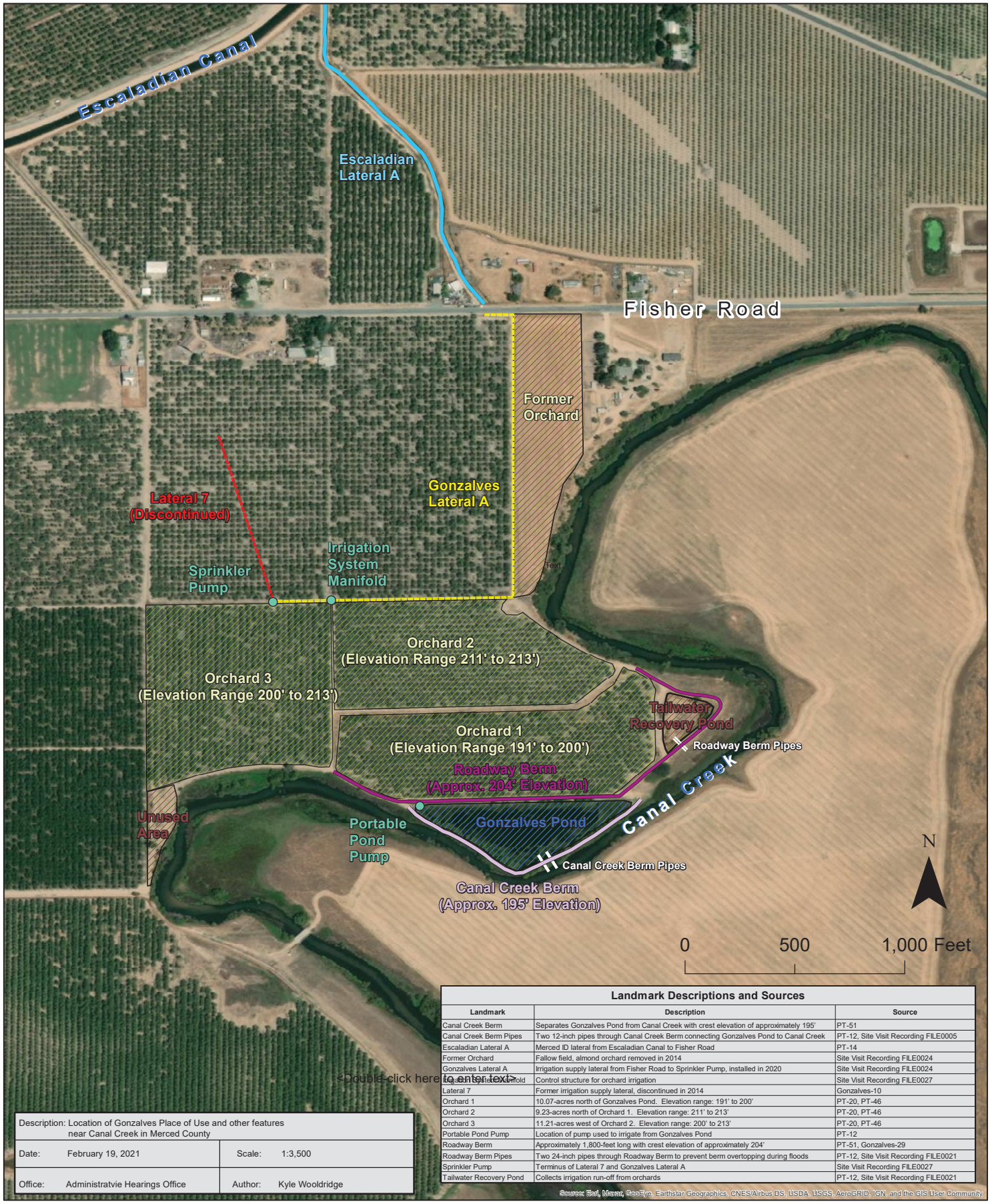
Jeanine Townsend
Clerk to the Board

Figure 1 - General Location of Gonzalves Property



Description: Location of Gonzalves property near Canal Creek in Merced County			
Date:	February 19, 2021	Scale:	1:50,000
Office:	Administratvie Hearings Office	Author:	Kyle Wooldridge

Figure 2 - Detailed Location Map of Gonzalves Property



Landmark Descriptions and Sources

Landmark	Description	Source
Canal Creek Berm	Separates Gonzalves Pond from Canal Creek with crest elevation of approximately 195'	PT-51
Canal Creek Berm Pipes	Two 12-inch pipes through Canal Creek Berm connecting Gonzalves Pond to Canal Creek	PT-12, Site Visit Recording FILE0005
Escaladian Lateral A	Merced ID lateral from Escaladian Canal to Fisher Road	PT-14
Former Orchard	Fallow field, almond orchard removed in 2014	Site Visit Recording FILE0024
Gonzalves Lateral A	Irrigation supply lateral from Fisher Road to Sprinkler Pump, installed in 2020	Site Visit Recording FILE0024
Irrigation System Manifold	Control structure for orchard irrigation	Site Visit Recording FILE0027
Lateral 7	Former irrigation supply lateral, discontinued in 2014	Gonzalves-10
Orchard 1	10.07-acres north of Gonzalves Pond. Elevation range: 191' to 200'	PT-20, PT-46
Orchard 2	9.23-acres north of Orchard 1. Elevation range: 211' to 213'	PT-20, PT-46
Orchard 3	11.21-acres west of Orchard 2. Elevation range: 200' to 213'	PT-20, PT-46
Portable Pond Pump	Location of pump used to irrigate from Gonzalves Pond	PT-12
Roadway Berm	Approximately 1,800-feet long with crest elevation of approximately 204'	PT-51, Gonzalves-29
Roadway Berm Pipes	Two 24-inch pipes through Roadway Berm to prevent berm overtopping during floods	PT-12, Site Visit Recording FILE0021
Sprinkler Pump	Terminus of Lateral 7 and Gonzalves Lateral A	Site Visit Recording FILE0027
Tailwater Recovery Pond	Collects irrigation run-off from orchards	PT-12, Site Visit Recording FILE0021

<Double-click here to enter text>

Description: Location of Gonzalves Place of Use and other features near Canal Creek in Merced County			
Date:	February 19, 2021	Scale:	1:3,500
Office:	Administratvie Hearings Office	Author:	Kyle Wooldridge

Source: Esri, Maxar, GeoEye, Earthstar Geographics, CNES/Airbus DS, USDA, USGS, AeroGRID, IGN, and the GIS User Community

Figure 3 – Merced Irrigation District Map Showing Gauge, Creek and Canal Locations

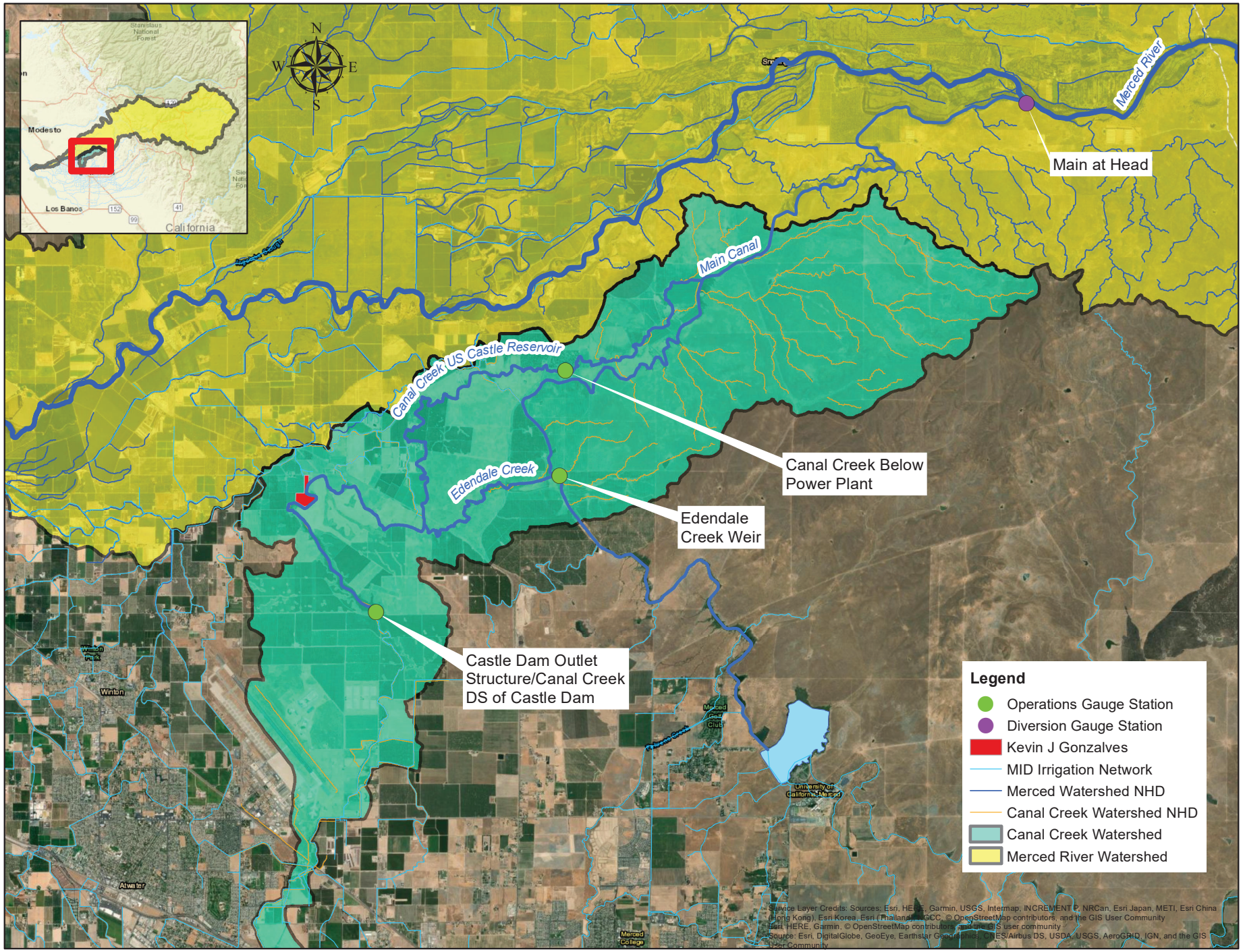
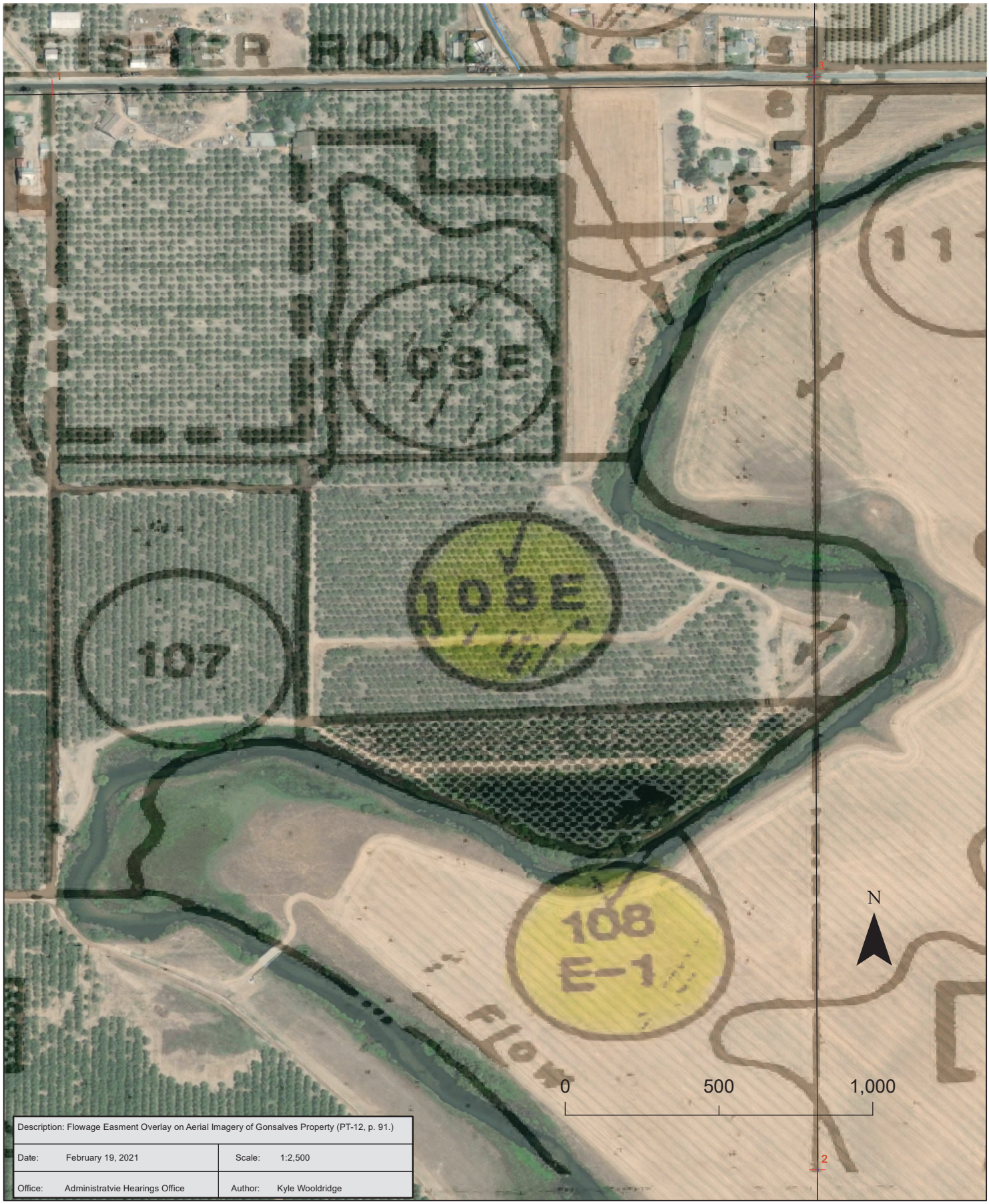


Figure 4 - Flowage Easment Map Overlay



Attachment A

RESPONSES TO PARTIES' COMMENTS ON DRAFT PROPOSED ORDER

As discussed in section 2.8 of this order, the AHO circulated a draft proposed order and the parties submitted comments on it. This attachment summarizes these comments and the Board's responses.

Prosecution Team's Comments

1. Prosecution Team's Comment. The Gonzalves Pond should not be considered "legally natural." (2021-04-14 PT Comments on Gonzalves Draft Proposed Order ("PT Comments"), pp. 10-16.)
   a. The court's analysis in *Chowchilla Farms v. Martin, supra,* 219 Cal. 1 relies on riparian rights attaching to artificial watercourses and should not apply here because Respondent has no riparian rights. (PT Comments, pp. 10-11.)
   Response: The rule announced in *Chowchilla Farms* and discussed in subsequent decisions is not limited to situations involving riparian rights. For example, the senior water users involved in the Decision 1618 proceedings had adjudicated pre-1914 appropriate rights (Decision 1618, pp. 11-12), and the applicants were applying for post-1914 appropriative water-right permits (*id.*, pp. 2-4). Contrary to the PT's Comment, none of these water users were "upstream riparians." (See PT Comments, p 10.) The PT also is incorrect in arguing that the decision in *Buchanan, v. Los Angeles County Flood Control Dist.* (1976) 56 Cal.App.3d 757, 767, was limited to riparian right holders. (See PT Comments, p. 11.) The *Buchanan* decision states, without limitation, "In the context of water law, a permanent man-made condition can become a natural one by the lapse of time." (56 Cal.App.3d, p. 767.)
   b. The *Chowchilla Farms* analysis is premised on the concept of community reliance, but no community relies on the Gonzalves Pond. (PT Comments, pp. 11-12.)
   Response. Neither the Board's analysis in Decision 1618 nor the court's decision in *Buchanan, supra,* indicates that community reliance is a necessary element for the conclusion that an artificially created body of water has become a

natural condition. (See Decision 1618, pp. 13-15; *Buchanan, supra*, 56 Cal.App.3d, p. 767.)

c. The Gonzalves Pond does not satisfy the three main elements necessary to establish a legally natural waterbody. (PT Comments, pp. 13-15.)

Response. As the Board stated in Decision 1618, the three elements necessary to establish a legally natural waterbody are that the waterbody: (i) is "permanent in nature," (ii) is "long continued" and (iii) has "been acquiesced in" by the other affected water users. (Decision 1618, p. 15.) These elements all are satisfied here.

(i) As discussed in section 3.1.1.4, absent intervention, the Gonzalves Pond is likely to last indefinitely and thus can be considered "permanent in nature." While the Prosecution Team argues that the Canal Creek Berm Pipes will need to be maintained (PT Comments, p. 14), this need does not provide a legal basis for distinguishing these pipes from the dam spillway involved in Decision 1618, which also might require some maintenance (see Decision 1618, p. 14).

(ii) Although the Prosecution Team argues that the 25-year period of existence of the Gonzalves Pond is less than the periods involved in *Chowchilla Farms* and Decision 1618 (PT Comments, p. 13), the only legal requirement is that the period be "a long time beyond the prescriptive period" (see C*howchilla Farms, supra*, 219 Cal., p. 17) and that requirement is satisfied here (see section 3.1.1.4).[31]

[31] The evidence in the record indicates that the Gonzalves Pond probably was created in 1995 when Respondent's father excavated dirt from the area that became the pond to supply dirt for the Roadway Berm. There is no evidence that these excavations were made to create a pond for beneficial uses, or that anyone used the Gonzalves Pond to supply water for irrigation until 20 years later in 2015.

Nothing in this order should be construed to indicate that the Board would conclude that a pond constructed initially for water-supply purposes or other beneficial uses without any valid water right could attain the legal status of a natural waterbody. (See *People v. Shirokow* (1980) 26 Cal.3d 301, 309-310 [State may obtain injunction under Water Code section 1052 prohibiting storage of water in pond constructed for stockwatering purposes].)

(iii) The Prosecution Team cites a provision of Merced ID's complaint that discusses the purpose of the permanent flowage easement that the Fishers granted to the United States in 1994 (see section 2.3) and a provision of the settlement agreement between Merced ID and Respondent that requires the two parties to meet and confer regarding removal of the Canal Creek Berm Pipes. The Prosecution Team argues that these provisions indicate that Merced ID has not acquiesced in the ongoing existence of the Gonzalves Pond. (PT Comments, pp. 14-15; see Gonzalves-37, pp. 3-4, ¶ 4.b.)

We disagree. These provisions address Merced ID's concerns about the effects of Respondent's pumping of water from the Gonzalves Pond on Canal Creek flows. While these provisions indicate that Merced ID did not acquiesce in Respondent's diversions of water from the Gonzalves Pond for irrigation purposes, they do not indicate that Merced ID had any objection to the on-going existence of the Gonzalves Pond, and, as discussed in section 3.1.1.4, Merced ID's complaint did not ask the Board to order Respondent to take any actions regarding the pond.

d. The AHO did not provide adequate notice to Merced ID that the AHO would consider the legal status of the Gonzalves Pond. (PT Comments, pp. 15-16.)

Response. The first hearing issue in the AHO's March 12, 2020 notice stated:

> 1) Is the Respondent violating, or threatening to violate, the prohibition in Water Code section 1052, subdivision (a) (which is referred to in Water Code section 1831, subdivision (d)(1)) against the unauthorized diversion or use of water subject to Division 1 (which begins with section 1000) of the Water Code?

(2020-03-12 Notice of Public Hearing and Pre-Hearing Conference, p. 3.) The Enforcement Section's Report of Investigation and its Draft CDO discussed the history of construction of the Gonzalves Pond and the associated water-right issues (PT-12, pp. 17-38; PT-1, pp. 6-12.) The Enforcement Section's November 12, 2019 letter transmitting the Draft CDO (which included the Report of Investigation) indicates that the Enforcement Section sent a copy to Merced ID's

attorney. (PT-1, p. 2.)[32] With these prior document transmittals to Merced ID's attorney, the AHO's hearing notice provided Merced ID with adequate notice that the AHO might consider issues associated with the legal status of the Gonzalves Pond.

2. Prosecution Team's Comment. The CDO terms in subparagraphs a., b. and c. of paragraph 1 of the draft proposed order should be amended. (PT Comments, pp. 19-21.)

   a. The prohibition on diversions for irrigation purposes in subparagraph 1.a. of the order should be expanded to apply to all purposes of use. (PT Comments, pp. 19-20.)

      Response: The AHO amended this subparagraph of the proposed order so that the prohibition in it applies to all purposes of use of water on Orchards 1, 2 and 3, the Former Orchard and the Unused Area (all depicted on Figure 2).

   b. The requirement in subparagraph 1.b. of the order for Respondent to maintain the Canal Creek Berm Pipes free from any obstructions conflicts with the provision of the settlement agreement between Respondent and Merced ID that requires Respondent to meet and confer with Merced ID regarding how the pipes will be removed. (PT Comments, p. 20; see Gonzalves-37, pp. 3-4, ¶ 4.b.) To address this conflict, subparagraph 1.b. should be amended to require Respondent to hire a licensed geotechnical engineer or engineering geologist to prepare a report regarding the Canal Creek Berm and appropriate capping or valving of the Canal Creek Berm Pipes, and to submit an erosion control plan to the Division. (PT Comments, p. 20.)

      Response. Because of the risks that would occur from capping or valving the Canal Creek Berm Pipes, and because this order concludes that the Gonzalves Pond has become a natural condition that is part of the Canal Creek channel, this order prohibits Respondent from blocking the flows of water in either direction

[32] The cc list for this letter states that a copy was sent to "John Berliner." (PT-1, p. 2.) Merced ID's attorney actually is Thomas Berliner. (PT-14, pp. 1, 7.) Because the address in the cc list was the address for Mr. Berliner's law firm, we assume he received copies of the letter, Draft CDO and Report of Investigation.

through the Canal Creek Berm Pipes, unless the Army Corps of Engineers, the Central Valley Flood Protection Board or a court orders Respondent to do so, and this order directs Respondent to clean and maintain these pipes. (See section 3.1.3.)

The State Water Board has the authority to issue these orders, even if the orders are inconsistent with agreements between other parties. If such inconsistencies prevent Respondent from complying with provisions of his settlement agreement with Merced ID, then his compliance with those provisions may be excused. (See Civ. Code, § 1511, ¶ 1; *Baird v. Wendt Enterprises, Inc.* (1967) 248 Cal.App.2d 52, 55 [no liability for breach of contract whose performance has been made impossible by operation of law; "operation of law" includes governmental regulatory action].)

c. The requirement in subparagraph 1.c. that Respondent maintain copies of the invoices he receives from Merced ID for water deliveries from the Escaladian Canal, and to file them with the Enforcement Section if the Enforcement Section requests them, should be amended to require Respondent to file those invoices each year. (PT Comments, p. 21.)

   Response. The Enforcement Section's Draft CDO contained a provision that would require Respondent to provide these documents to the Enforcement Section "upon request." (PT-1, p. 8.) Subparagraph 1.c. tracks that provision.

d. The order should require Respondent to "withdraw or amend" the Statement of Water Diversion and Use (S027064) and to comport with this order's conclusions regarding Respondent's riparian right claims. (PT Comments, p. 21.)

   Response. The AHO added a new subparagraph 1.f. to the order, which describes the actions Respondent must take to prepare and submit an amended Statement of Water Diversion and Use S027064 and amended supplemental statements.

3. Prosecution Team's Comment. The calculation of the maximum ACL in section 3.2.2 should be revised based on the Prosecution Team's estimates of the amounts of Respondent's diversions and the number of days on which unauthorized diversions occurred. (PT Comments, pp. 16-17.)

Response. As discussed in section 2.5.2, we conclude that Respondent's estimates of amounts pumped, based on his pump's hour meter and his estimates of the pumping rate, are the best available estimates of these amounts. These estimates are more reliable than estimates based on the water duties of other almond orchards, which may have different soils and different irrigation practices.

4. Prosecution Team's Comment. The amount of ACL imposed by this order should be higher, considering Board staff costs, Respondent's culpability, and economic benefits to Respondent. (PT Comments, pp. 1-6, 17-19.)

   Response. The AHO added a new section 3.2.2.5, which discusses the three most-recent Board orders imposing ACL for unauthorized diversions of water. This discussion provides background and context for the order's discussion of ACL amounts in section 3.2.2.6.

   a. The Prosecution Team argues that the order inappropriately discounts the Enforcement Team's staff costs in determining the ACL amount. (PT Comments, pp. 1-4.) The Prosecution Team also argues that enforcement costs "may include costs for investigation, hearing preparation, and the hearing itself." (*Id*., p. 1.)

      Response. The AHO revised the text regarding staff costs in section 3.2.2.4, and added text regarding staff costs to section 3.2.2.6, to address the Prosecution Team's comments. This new text discusses relevant provisions of the Board's 2017 Water Quality Enforcement Policy, which emphasizes the Board's discretion when considering staff costs in its analysis of the appropriate ACL amount.

      The Water Quality Enforcement Policy states that, when staff recommends that investigation costs be included in a civil liability, staff should submit a declaration that itemizes staff costs, including the staff classification, applicable hourly rate and number of hours worked on the specific enforcement action by each staff member. (2017 Water Quality Enforcement Policy, p. 22.) The Prosecution Team's submittal in this case lists the number of hours worked by each staff member but does not include their classifications or hourly rates. We

recommend that the Prosecution Team include this information, and the dates worked by each staff member on the specific action, in declarations of staff costs for future enforcement matters.

The Prosecution Team's argument that enforcement costs may include costs for hearing preparation and the hearing is inconsistent with the Water Quality Enforcement Policy, which warns against "the potential for discouraging a discharger from exercising its right to be heard and other important due process considerations," and states: "Staff costs should not be allowed for any investigation or enforcement work undertaken by staff regarding the specific allegations set for in the ACL Complaint after it is issued. Attorney staff costs and any staff costs associated with preparing for or attending a hearing should never be included in a civil liability." (2017 Water Quality Enforcement Policy, p. 22.)

b. The Prosecution Team argues that the Board has considered culpability as part of "the nature and persistence of the violation," citing Order WR 2019-0149, pages 87-97, and argues that "this important factor" is "not reflected in the proposed penalty." (PT Comments, pp. 4-6.) The Prosecution Team cites Order WR 2006-0001, which imposed ACL of $125,000 on the Lake Arrowhead Community Services District, in part because the district had not produced important information regarding its historical diversions during the Division's investigation. (Order WR 2006-0001, p. 19; PT Comments, p. 2.)
Response. The subsection of section 3.2.2.4 titled "Incorrect factual allegations and legal contentions" discusses Respondent's culpability. By considering the ACL amounts imposed in Order WR 2019-0149, we have incorporated the Board's prior consideration of a respondent's culpability when the Board sets the ACL amount.

While the respondent's failure to produce information was an important factor in the Board's determination of the ACL amount imposed by Order WR 2006-0001, another critical factor in that matter was the $5,050,000 avoided cost of the water the district diverted without authorization. (Order WR 2006-0001, p. 19.) That

amount was far greater than the $8,816.94 avoided-cost amount in the present matter and justified the substantially higher ACL amount in that matter.

c. The Prosecution Team argues that the Board should not consider the amounts Respondent paid to Merced ID for the water Respondent diverted during 2015-2017 when determining the economic benefits Respondent received from his unauthorized diversions. (PT Comments, p. 18.) The Prosecution Team argues that the Board should consider the $239,142 in revenues Respondent received from selling his almonds in 2015-2017. (PT Comments, p. 19.)

   Response. Under the unique circumstances of this case, where Respondent's payments to Merced ID far exceeded the amounts the district would have charged Respondent under the district's normal water rates for the diverted water, it is appropriate for us to consider these additional payments in our economic-benefits analysis. The AHO edited the "Economic benefits to Respondent" subsection of section 3.2.2.4 to add text regarding the revenues Respondent received from selling his almonds in 2015-2017.

5. Prosecution Team's Comment. The substantial additional amounts Respondent paid Merced ID for the water Respondent pumped during 2015-2017 should be considered "corrective actions" and should not be considered in the Board's analysis of the harm caused by the unauthorized diversions. (PT Comments, pp. 6-8.)

   Response. We disagree with the Prosecution Team that these substantial additional payments should not be considered in our analysis of the harm Respondent's unauthorized diversions caused Merced ID. These payments eliminated or substantially reduced the harm Merced ID suffered due to Respondent's unauthorized diversions.

Respondent's Comments

1. Respondent's Comment. Respondent paid $204,986.41 to Merced ID three months before the Water Board completed its investigation. Respondent should not now have to "pay twice" by making additional payments to the State Water Board. (2021-04-15 K. Gonzalves Comments on Gonzalves Proposed Order ("Respondent's Comments"), p. 3.)

Response. The Board has the authority to issue cease-and-desist orders under Water Code sections 1831-1836 and to impose ACL under Water Code section 1052 whether or not any party has a pending complaint with the Board, and are not limited by Merced ID's actions to obtain payments from Respondent and Respondent's payments to the district.

As discussed in section 3.2.2.1, we considered Respondent's net payment of $154,986.82 to the district in our analysis of the extent of harm caused by Respondent's unauthorized diversions, and in our analysis of the economic impacts Respondent experienced because of these diversions.

2. Respondent's Comment. Respondent would like to exchange 80 hours of community service to help develop a public outreach program pertaining to riparian rights in return for reducing the ACL amount to zero. (Respondent's Comments, p. 3.)

   Response. The Board is imposing the ACL amounts specified in this order on Respondent because of his unauthorized diversions, many of which were during the Governor's drought emergency declaration, and to deter others from making unauthorized diversions in the future. Community service would not have the same statewide deterrent effect.

3. Respondent's Comment. Part of Respondent's agreement with Merced ID was that the SWRCB complaint would be withdrawn. That did not happen. (Respondent's Comments, p. 4.)

   Response. Respondent's settlement agreement with Merced ID provides that, after certain events have occurred, the district "will notify the State Water Resources Control Board of the settlement and will withdraw the complaint filed with the State Water Resources Control Board." (Gonzalves-37, p. 4, ¶ 5.b.) There is no information in the record regarding whether the specified events occurred, Merced ID never notified the State Water Board of the settlement, and the district never withdrew its complaint. If Respondent believes that Merced ID has not complied with the settlement agreement, then Respondent should address that issue with the district.