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21 **MERCED IRRIGATION DISTRICT**

22 **BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

23 In the Matter of the Draft Cease and Desist Order
24 and Administrative Civil Liability Complaint issued
25 by the Division of Water Rights Enforcement
26 Section against Kevin Gonzalves for alleged
27 unauthorized diversion of water within the Canal
28 Creek watershed in Merced County

**Merced Irrigation District's Petition for
Reconsideration of Order WR 2021-
0094, and Statement of Points and
Authorities in Support of Petition for
Reconsideration**

29 Pursuant to Water Code section 1122, and title 23, section 768 of the California Code of
30 Regulations, Merced Irrigation District ("MID" or "District" or "Petitioner") hereby petitions the
31 State Water Resources Control Board ("Water Board") for reconsideration, in part, of the Cease and
32 Desist Order and Administrative Civil Liability Order, Order WR 2021-0094, issued October 5,
33 2021 "In the matter of the Draft Cease and Desist Order and Administrative Civil Liability
34 Complaint issued by the Division of Water Rights Enforcement Section against Kevin Gonzalves for
35 alleged unauthorized diversion of water within the Canal Creek watershed in Merced County"
36 ("Order" or "Order WR 2021-0094"). Specifically, and narrowly, MID seeks reconsideration of
37 Ordering Paragraphs 1.b and 1.e. (Order, pp. 60-62.)

1 **INTRODUCTION**

2 MID brings this action to protect its interests and property rights. MID does not challenge
3 the underlying conclusions of the Order that Mr. Gonzalves did not have any water rights that
4 authorize diversion of water from a pond on his property (“Gonzalves Pond”) or Canal Creek. After
5 all, the water that Mr. Gonzalves was diverting and using without authorization was MID water.
6 MID only challenges, and asks for reconsideration of, the Order’s specific directive to Mr.
7 Gonzalves that he maintain the unpermitted pipes connecting the Gonzalves Pond and MID’s Canal
8 Creek, which are located on MID property and which Mr. Gonzalves agreed to *remove* in a
9 settlement agreement with MID. (See *Gonzalves v. Merced Irrigation District et al.* (Super. Ct.
10 Merced County, 2017, No. 17cv-03333).)

11 Mr. Gonzalves does not have an agreement with MID, as required by MID’s Rules and
12 Regulations Governing the Distribution and Use of Water (“Rules and Regulations”), to maintain the
13 pipes on MID property. Mr. Gonzalves also does not have a permit from any other agency with
14 jurisdiction over Canal Creek under the Castle Dam Unit of the Merced County Streams, California
15 Project to maintain the unpermitted pipes in the bank of Canal Creek, such as the U.S. Army Corps
16 of Engineers, the Central Valley Flood Protection Board (formerly the Reclamation Board) or
17 Merced County.

18 The Water Board acted in excess of its authority in requiring Mr. Gonzalves to maintain the
19 illegal pipes on MID’s property. The evidence in the record establishes that MID is the owner of the
20 Canal Creek berm in which the illegal pipes are located. The Water Board’s determinations that the
21 unlawful or unpermitted pipes cannot be removed, that it has the authority to order the continued
22 maintenance of the pipes in the Canal Creek berm, that Mr. Gonzalves has the ability and/or access
23 to continue maintaining the pipes in the Canal Creek berm and its ordering paragraph requiring Mr.
24 Gonzalves to do so are not supported by substantial evidence.

25 Finally, the Order also effectively creates a burden on MID to monitor in perpetuity Mr.
26 Gonzalves’ actions maintaining the illegal pipes on MID property, which have the potential to affect
27 its operations of Canal Creek, an important component of its water distribution system.

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1 supported by substantial evidence. The assumption that Mr. Gonzalves has the ability
2 to access the property – owned by MID and for which Mr. Gonzalves has no permit
3 to occupy – to maintain the unpermitted pipes is unsupported by any evidence in the
4 record. The evidence in the record, including evidence submitted by Mr. Gonzalves,
5 establishes that the property on which the unpermitted pipes are located belongs to
6 MID, not Mr. Gonzalves. Further, the determination that continued maintenance of
7 the pipes is necessary to maintain the structural integrity of the Canal Creek berms is
8 based on inadequate and speculative findings, and relies on evidence not supported by
9 the record.

6 **5. The Specific Action which the Petitioner Requests. (23 Cal. Code Regs. §
7 769(a)(5).)**

8 MID requests that the Water Board grant reconsideration and set aside or vacate Order WR
9 2021-0094 to reconsider Ordering Paragraphs 1.b and 1.e. MID requests a formal hearing before the
10 Water Board.

11 **6. A Statement that Copies of the Petition and any Accompanying Materials have
12 been sent to all Interested Parties. (23 Cal. Code Regs. § 769(a)(6).)**

13 Pursuant to the October 22, 2021 cover letter issued by the Administrative Hearing Office
14 (“AHO”) transmitting the adopted Order WR 2021-0094, and distributed via the Lyris list serve,
15 MID served this Petition via email to Ms. Jeanine Townsend, Clerk to the Board at
16 jeanine.townsend@waterboards.ca.gov, as well as to the service list for the proceeding as follows:

17 Kevin Gonzalves and Jennifer Gonzalves
18 kgonzalves@live.com

17 Kenneth Petruzzelli, John Prager
18 Division of Water Rights,
19 Prosecution Team
20 Kenneth.petruzzelli@waterboards.ca.gov
21 John.Prager@Waterboards.ca.gov

20 MID does not know the identity of any other interested parties with respect to Order WR
21 2021-0094.

22 **STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR**
23 **RECONSIDERATION**

24 **I. BACKGROUND AND STATEMENT OF FACTS**

25 **A. The Merced Irrigation District**

26 MID provides high quality, affordable irrigation water to customers in a service territory that
27 encompasses approximately 164,000 acres in Merced County, California. Its service area includes
28 approximately 138,000 acres of irrigable agricultural land. More than 2,000 customers, mostly small

1 family farms, rely on MID’s water supplies. Approximately 70% of MID’s customers are small
2 family farms with an average parcel size of less than 50 acres. MID is governed by a five member,
3 publically-elected Board of Directors. (See also PT-12, p. 8.)¹

4 MID meets its customers’ irrigation demands through conjunctive management of surface
5 water and groundwater resources. MID’s primary source of surface water is the Merced River. MID
6 holds a variety of rights on the Merced River, including pre-1914 and post-1914 appropriative water
7 rights to both store and divert Merced River water for a variety of beneficial uses, including
8 irrigation, municipal, power generation and recreation, as well as riparian water rights. MID holds
9 its water rights for the benefit of its customers.

10 MID’s main storage reservoir is Lake McClure, which is formed by New Exchequer Dam on
11 the Merced River. McSwain Reservoir, which is formed by McSwain Dam, is located immediately
12 downstream of New Exchequer Dam on the Merced River and, among other things, serves to
13 regulate flow releases from Lake McClure and to help ensure steady instream releases. MID’s water
14 rights also include impoundment at the Crocker-Huffman Diversion Dam, which is operated to
15 divert water at MID’s Main Canal, and at Lake Yosemite, which is located in the foothills along the
16 Main Canal and off-stream of the Merced River.

17 MID conveys water diverted from the Merced River, and other sources, to its customers
18 through an extensive conveyance system, which includes more than 800 miles of canals, irrigation
19 ditches, pipelines and natural waterways, including Canal Creek. There is no surplus water in the
20 MID water conveyance system, during the irrigation season or otherwise. MID does not release
21 water from New Exchequer Reservoir (Lake McClure) or divert water into its water conveyance
22 system without having a beneficial use for that water.

23 MID’s Main Canal diverts water from the Merced River and carries the water roughly south
24 away from the Merced River and out of the Merced River watershed. Along its route, the Main
25 Canal provides water to multiple canals, lateral and creeks, eventually intersecting and merging with
26 a section of Canal Creek, a natural waterway entering from the east. Upon intersecting with Canal

27 ¹ The Prosecution Team’s exhibits in the AHO proceeding are labeled “PT-” Mr. Gonzalves’
28 exhibits are labeled “Gonzalves-”.

1 Creek, the Main Canal merges with the creek for approximately 3,500 feet before they diverge again.
2 At this point of separation, a gate allows MID to convey a portion of the controlled Merced River
3 water releases from the Main Canal down Canal Creek. Further downstream, the Main Canal can
4 again introduce Merced River water to Canal Creek through a hydroelectric plant. Lastly, further
5 downstream on the Main Canal, Edendale Creek, another stream, enters from the east, through
6 control gates, and in turn also feeds back into Canal Creek. Through the use of gates at each of these
7 intersections, MID controls and regulates the flow of water from the Merced River in the Main
8 Canal, into Canal Creek, and elsewhere.

9 In 1922, the Crocker Huffman Company, MID's predecessor in interest, conveyed certain
10 property and water rights and interests to MID, including rights to and along Canal Creek. Among
11 other rights and interests, MID acquired a fee simple property interest consisting of all right, title,
12 and interest "in and to a right of way over all those certain strips of land, and natural water courses,"
13 including, but not limited to, a 150-foot strip of land encompassing the stream bed of Canal Creek.
14 The 150-foot strip of land along Canal Creek extends onto land and includes, at minimum, the banks
15 of Canal Creek in which the unpermitted pipes are located. (See PT-12, pp. 27-28; PT-14, Exs. AA,
16 BB, CC.)

17 Castle Dam is a multi-purpose dam on Canal Creek that was constructed by the U.S. Army
18 Corps of Engineers downstream of Gonzalves' parcels. (See generally PT-12, pp. 19-20 and App.
19 E.) MID operates and maintains Castle Dam for irrigation purposes during MID's irrigation season
20 (generally between March and October each year), and as a regulating reservoir for MID's water
21 conveyance system. During the winter months, Castle Dam and Reservoir serve as a flood control
22 mechanism as part of the Castle Dam Unit of the Merced County Streams, California project.

23 In 1992, in connection with the completion and operation of the Castle Dam Unit, the U.S.
24 Army Corps of Engineers obtained an easement for occasional flooding on 28.8 acres of APN 052-
25 540-065, from Gonzalves' predecessors. In 1994, the U.S. Army Corps of Engineers obtained an
26 additional permanent flowage easement over the southernmost 6.75 acres of APN 052-540-065,
27 which includes the location of the Gonzalves Pond. Neither the unpermitted Gonzalves Pond nor the
28 unpermitted pipes are official facilities of the Castle Dam Unit. (See PT-4, pp. 20-22; PT-39, pp. 2-

1 3.) The permanent flowage easement stated that no structures shall be constructed or maintained on
2 the land and no excavation shall be conducted and no landfill placed on the land without written
3 approval by the Reclamation Board of the State of California. (See PT-14, Exs. C and W.)

4 MID's Rules and Regulations, Section 2, prohibit any encroachment constructed or placed in,
5 on, over, under or across any District Facility or any District Right of Way, either temporarily or
6 permanently, unless an application in writing has been made to the District and written authorization
7 is granted upon the form(s) and agreements required by the District. Any unauthorized
8 encroachment is unlawful. A true and correct copy of MID's current Rules and Regulations is
9 attached hereto as **Exhibit 1**.

10 **B. Unauthorized Division of Water**

11 In late June 2017, MID received information regarding the possible unauthorized diversion
12 and use of water by Mr. Gonzalves on the Gonzalves Parcels, APN-052-540-015 and 052-540-065.
13 MID conducted an investigation and concluded that Mr. Gonzalves was diverting and using MID
14 water from Canal Creek without authorization, using a temporary pump placed in the Gonzalves
15 Pond to irrigate his orchards.

16 On June 30, 2017, Mr. Gonzalves filed an Initial Statement of Water Diversion and Use
17 (S027064) with the Water Board claiming a riparian right to divert water from Canal Creek for
18 irrigation. (PT-12, App. A.) On July 13, 2017, based on its investigation, MID sent Mr. Gonzalves
19 a Notice and Order to Cease and Desist Unauthorized Water Diversions. (PT-14, Ex. E.) On July
20 20, 2017, MID sent Mr. Gonzalves a letter levying charges for the prior unauthorized diversion and
21 use of MID water without authorization. (PT-14, Ex. F.) On July 26, 2017, MID received a written
22 appeal from Mr. Gonzalves, by and through his legal counsel. (PT-14, Ex. G.) On August 14, 2017,
23 MID received a second letter from Mr. Gonzalves in support of his appeal. (PT-15, Ex. X.)

24 At its regular meeting on August 15, 2017, the MID Board of Directors heard Mr.
25 Gonzalves' appeal and declined Mr. Gonzalves' request to grant the appeal, leaving in effect the
26 Notice and Order to Cease and Desist Unauthorized Water Diversions and related charges against
27 Mr. Gonzalves.

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1 On or about August 28, 2017, Mr. Gonzalves signed a permit for MID approval of a
2 temporary pump for irrigation use authorizing Mr. Gonzalves, going forward, to irrigate with MID
3 water and soon thereafter Mr. Gonzalves activated a water account with MID. (Order, p. 14.)

4 On October 3, 2017, Mr. Gonzalves filed a verified petition for writ of mandate and
5 complaint for declaratory and injunctive relief in Merced Superior Court (Case No. 17cv-03333)
6 against MID related to the Notice and Order to Cease and Desist Unauthorized Water Diversions and
7 related charges issued by MID. (See PT-15.)

8 On November 17, 2017, MID, through its counsel, filed a water rights complaint (“Objection,
9 Protest and Complaint”) with the Water Board’s Division of Water Rights concerning Mr.
10 Gonzalves’ Initial Statement of Water Diversion and Use (S027064) and unauthorized diversion of
11 water from Canal Creek. (See PT-14.) MID’s water rights complaint stated that the 150-f strip of
12 land, conveyed in fee to MID by the Crocker-Huffman Land and Water Company in 1992 for the
13 Canal Creek right-of-way, is inclusive of the bed and banks of Canal Creek and physically separates
14 the Gonzalves Parcels from Canal Creek. (See PT-14, pp. 6-7.) MID attached as exhibits the 1922
15 Crocker-Huffman Land and Water Company Deed as well as an additional description of the Canal
16 Creek Right-of-Way dated May 27, 1925 and a 2015 parcel map. (See PT-14, Exs. H, AA, BB, CC.)

17 On July 25, 2018, staff with the Water Board’s Division of Water Rights, including Water
18 Resources Control Engineer Damon Hess, conducted a site inspection of the Gonzalves Parcels.
19 (See PT-12, p. 13.)

20 On May 22, 2018, the Division of Water Rights issued a Report of Investigation, Inv. 9538,
21 authored by Mr. Hess. (PT-12.) Among other findings, Mr. Hess verified the existence of an open
22 pipe connecting Canal Creek with the Gonzalves Pond, concluded that the Gonzalves Pond was
23 constructed in June to July of 1995, and also concluded that the Gonzalves’ property was not
24 contiguous to Canal Creek and that the riparian rights of the property were severed when the
25 Crocker-Huffman Land and Water Company conveyed Canal Creek in fee to MID. (PT-12.) In
26 addition, the Report of Investigation includes a statement that Mr. Gonzalves, with respect for a
27 permit allowing culverts elsewhere on his property, “has shown disregard for the conditions of his
28 CVPFB permit that allows the existing levee by blocking the required culverts.” (PT-12, p. 37.)

1 The Report of Investigation recommended formal enforcement against Mr. Gonzalves. (PT-12, p.
2 38.) The Report of Investigation provides no evidence that at any time during the one-day
3 inspection was any technical study or analysis conducted concerning the stability of the bank or
4 berm of Canal Creek in which the pipes are located, or the impacts of removal of the unpermitted
5 pipes. (PT-12.)

6 On July 13, 2018, MID filed a cross-complaint for unauthorized diversion of water, trespass,
7 trespass to land, trespass-interference with easements, quiet title, intervening public use, fraud and
8 deceit, declaratory relief and injunctive relief against Mr. Gonzalves in Merced Superior Court, Case
9 No. 17cv-03333.

10 On November 12, 2019, the Water Board's Division of Water Rights Enforcement Section
11 issued a draft cease and desist order ("CDO") against Mr. Gonzalves pursuant to Water Code section
12 1831 for the unauthorized diversions of water. (PT-1.) The draft CDO stated that the reservoir
13 (Gonzalves Pond) impounded and stored water from Canal Creek via a connecting pipe, and that the
14 parcel containing the reservoir was not contiguous to Canal Creek. (PT-1, pp. 9-10.) Mr. Gonzalves
15 was ordered to immediately cease and desist any unauthorized diversion and use of water from
16 Canal Creek and to submit a draft compliance plan for review and approval within 60 days to render
17 the reservoir incapable of storing water. Mr. Gonzalves requested a hearing on the draft CDO. (PT-
18 1, pp. 10-11.) The CDO required Mr. Gonzalves to obtain approval of the compliance plan from the
19 Division of Water Rights, the Central Valley Flood Protection Board, Merced County and MID
20 before implementation. (*Id.*)

21 On or about December 20, 2019, Mr. Gonzalves signed a settlement agreement with MID,
22 which among other conditions, required Mr. Gonzalves to remove the pipes connecting Canal Creek
23 to the Gonzalves Pond and to restore the bank of Canal Creek to its prior, pre-installation condition,
24 with MID approval as to the proposed action. (Gonzalves-37.)

25 Any project to remove the unpermitted pipes and restore the bank would require the approval
26 of MID, and potentially the Central Valley Flood Protection Board, the U.S. Army Corps of
27 Engineers and Merced County to ensure that the design of the project adequately protected the
28 stability of the Canal Creek berm, Canal Creek operations and the operations of the Castle Dam

1 Unit. (See Ex. A, Section 2, attached hereto; Gonzalves-37; PT-12, pp. 19-20; PT-14, Ex. C.)

2 On March 12, 2020, the Water Board’s Administrative Hearings Office (“AHO”) issued a
3 Notice of Public Hearing to determine whether to adopt a proposed CDO to Kevin Gonzalves.

4 On May 5, 2020, the Division of Water Rights issued an Administrative Civil Liability
5 Complaint (“ACL Complaint”) against Mr. Gonzalves imposing civil liabilities pursuant to Water
6 Code section 1052 based on essentially the same allegations of the CDO. (PT-2.) Mr. Gonzalves
7 again requested a hearing on the ACL Complaint.

8 On May 15, 2020, a Supplemental Notice of Public Hearing was issued by the AHO to
9 determine whether to adopt a proposed CDO and administrative civil liability order to Kevin
10 Gonzalves.

11 The AHO held a hearing on the draft CDO and ACL Complaint on July 17, 30 and 31, 2020
12 and on September 9 and 16, 2020. The Presiding Hearing Officer and AHO staff conducted a site
13 visit on August 7, 2020. (Order, p. 2) Kevin Gonzalves and the Water Board’s Prosecution Team,
14 members of the Enforcement Section and the Board’s Office of Enforcement, participated as parties
15 in the public hearing and site visit. (Order, p. 2.) MID was not a party to the AHO hearing
16 proceeding.

17 On March 8, 2020, the AHO Presiding Hearing Officer issued a Notice of Draft Proposed
18 Order for review and comment by the parties to the proceeding. The Prosecution Team in comments
19 dated April 14, 2020 pointed out that:

20 According to the Lowery survey, prepared by [Gonzalves] and the QK survey, prepared
21 for MID, a sizable portion of the pond is located on land owned by MID – particularly
22 the land where the pipes maintaining the pond exist. (Gonzalves-58, PT-72.) The
23 Diverter has no easement or right of way for the pipes. It’s not reasonable to assume
24 MID has acquiesced to a pond’s existence that encroaches on their land and interferes
with the flow of water flowing in the permanent flowage easement that supports the
functions of the reservoir that MID controls. MID’s settlement requiring the removal
of the pipes is consistent with the protection, and control of their property rights.

25 On July 14, 2021, the AHO Presiding Hearing Officer issued a Notice of Transmittal of
26 Proposed Order to the Clerk of the Board.

27 On August 13, 2021, pursuant to Water Code section 1114(c)(4), MID submitted comments
28 to the proposed Order to the Clerk of the Board requesting that the proposed Order be revised,

1 pursuant to the evidence presented in the proceeding demonstrating that MID owned the land on
2 which the pipes were located, to require that the pipes be removed unless an agency with jurisdiction
3 requires that they be maintained.

4 Consideration of the proposed Order was placed on the agenda for the September 21-22,
5 2021 meeting of the Water Board. In advance of the meeting, MID submitted timely additional
6 comments on September 16, 2021 reiterating its point that the pipes were trespassing on MID's
7 right-of-way for Canal Creek. MID also appeared and provided oral comments at the September 21,
8 2021 meeting. The Water Board did not make a determination on the proposed Order at the
9 September 21, 2021 meeting.

10 Consideration of the proposed Order was then placed on the agenda for the October 5, 2021
11 meeting of the Water Board. MID again appeared and provided oral comments. The Proposed
12 Order was adopted by the Water Board on October 5, 2021.

13 The adopted Order concludes that: (1) for water rights purposes, the Gonzalves Pond and
14 Canal Creek Berm Pipes should be treated as parts of Canal Creek, under *Chowchilla Farms, Inc. v.*
15 *Martin* (1933) 219 Cal. 1, and subsequent decisions; (2) Mr. Gonzalves does not have any water
16 rights that authorize the diversion of water from the Gonzalves Pond or Canal Creek for irrigation or
17 any other purpose on the described property; (3) a cease and desist order is issued; (4) civil liability
18 is imposed in the total amount of \$45,000 with \$20,000 suspended pending Mr. Gonzalves'
19 compliance with specified directives. (Order, pp. 59-60.)

20 The adopted Order, among other directives, orders (pp. 60-62):

21 1.b. Respondent shall maintain the Canal Creek Berm Pipes free from any obstructions
22 that would impede flows of water in either direction in such pipes, unless the United
23 States Army Corps of Engineers or the Central Valley Flood Protection Board orders
Respondent to take some other action.

24 1.e. If Respondent may not maintain the Canal Creek Berm Pipes free from any
25 obstructions that would impede flows of water in either direction in such pipes, because
26 of an order of the United States Army Corps of Engineers, the Central Valley Flood
27 Protection Board or a court, then Respondent shall advise the Enforcement Section
28 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

1 Deputy Director for Water Rights, who then shall consider the parties' arguments and
2 resolve the relevant issues.

3 **II. LEGAL RIGHT TO PETITION FOR RECONSIDERATION**

4 On the filing of a petition of any interested person or entity, the Water Board may order
5 reconsideration of all or part of a decision or order. (Water Code § 1122; see also 23 Cal. Code
6 Regs. § 768.) "The petition shall be filed not later than 30 days from the date the board adopts a
7 decision or order." (Id.) "The board shall order or deny reconsideration on a petition therefor not
8 later than 90 days from the date the board adopts the decision or order." (Water Code § 1122.)

9 A petition for reconsideration may be based on the following grounds:

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

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

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

15 (d) Error in law.

16 (23 Cal. Code Regs. § 768.)

17 **III. BASES FOR RECONSIDERATION**

18 **A. Errors in Law. (23 Cal. Code Regs. § 768(d).)**

19 The Water Board acted in excess of its authority in ordering Gonzalves to maintain pipes on
20 what the record established was not Gonzalves' property, but on property owned and operated by
21 MID.

22 The right to exclude is universally held to be a fundamental element of the property right,
23 and is one of the most essential sticks in the bundle of rights that are commonly characterized as
24 property. (See *Cedar Point Nursery v. Hassid* (2021) 594 U.S. _____, 141 S.Ct. 2063, 2072.) A
25 California irrigation district generally has the power to perform all acts necessary to carry out fully
26 the provisions of Water Code § 20500 et seq., the Irrigation District Law. (Water Code § 22225.) A
27 district may acquire by any means any property, or interest in property to carry out its purposes.

28 (Water Code § 22425.)

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1 As shown by the uncontroverted evidence in the proceeding, Mr. Gonzalves' property is not
2 contiguous to Canal Creek, rather MID owns the property on which the illegal and unpermitted pipes
3 connecting MID's Canal Creek with the Gonzalves Pond are located. This evidence includes, but is
4 not limited to:

- 5 • PT-4 [Testimony of Damon Hess], p. 6, ¶ 22 and pp. 7-8, ¶ 26.
- 6 • PT-12 [Report of Investigation], pp. 27-28 and Appendices D [Recorded Documents]
7 and G [Canal Creek Conveyance].
- 8 • PT-14 [MID Complaint with Exhibits], Exs. H [2015 Parcel Map], AA/BB [1922
9 Crocker-Huffman Land and Water Co. Deed], CC [Description of Canal Creek Right-
10 of-Way].
- 11 • PT-39 [Rebuttal Testimony of Damon Hess], pp. 9-10, ¶¶ 12-14.
- 12 • PT-58 [Parcel map with reference line]
- 13 • PT-70 [Rebuttal Testimony of Damon Hess Revised]
- 14 • PT-71 [Photo of original Parcel Map]
- 15 • PT-72 [QK Survey Commissioned by MID]
- 16 • PT-73 [Lowry Survey Annotated]

17 Mr. Gonzalves himself submitted evidence demonstrating that the pipes specifically were not
18 located on his property as follows:

- 19 • Gonzalves-39 [Gonzalves Testimony Slides], slide 35 [Survey Commissioned by
20 MID]
- 21 • Gonzalves-10 [Contract of Sale with Deed Description]
- 22 • Gonzalves-40 [1922 Crocker-Huffman Land and Water Co. Deed]
- 23 • Gonzalves-49 to Gonzalves-51 [Lowry Survey Commissioned by Gonzalves]

24 Though Mr. Hess questioned the accuracy of the Lowry Survey commissioned by Mr.
25 Gonzalves, all the available evidence (deeds, parcel maps and draft surveys) indicated that the pipes
26 were not located on land owned by Gonzalves. There was no dispute in the proceeding regarding
27 ownership of the land on which the pipes were located.² Instead, Mr. Gonzalves attempted

28 ² In the context of approving permits to appropriate water, Water Board regulations state that it will
not undertake to determine title to land or the right to occupy or use land or other property going on
to state that a protest based solely upon such disputed title or right will ordinarily be rejected as not

1 unsuccessfully to rebut Mr. Hess' testimony regarding contiguity to prove that, at *some point or*
2 *place*, his property was contiguous to Canal Creek entitling him to riparian rights. This is not
3 relevant to the question of whether the pipes themselves are located on Gonzalves' property, which
4 the evidence in the record clearly demonstrates they are not.

5 Under its Rules and Regulations, adopted pursuant to Water Code section 22257, MID does
6 not permit encroachments on or in its facilities or right-of-ways without approval. (MID Rules and
7 Regulations, Section 2.) MID has never provided approval for Mr. Gonzalves or anyone else to
8 either install or maintain the pipes in the Canal Creek Berm. Further, installation of the pipes was
9 never authorized or permitted by the U.S. Army Corps of Engineers or the Central Valley Flood
10 Protection Board, which have jurisdiction over the Castle Dam Unit.

11 As relevant here, the powers of the Water Board include authority over certain water rights
12 and permitting (Water Code §§ 1200 et seq. [Part 2 Appropriation of Water]), including enforcement
13 authority over unauthorized diversions of water (Water Code §§ 1052, 1825 et seq.). Nothing,
14 however, in the Water Board's water rights enforcement authority to prevent unauthorized
15 diversions, or its authority more broadly over water rights, provides the Water Board with the
16 authority to order actions performed by Mr. Gonzalves on the private real property of a third party.
17 The Water Board conversely lacks the authority to order MID (who was not a party to the AHO
18 proceeding) to "host" the unpermitted pipes or to allow Gonzalves access to its property to maintain
19 the unpermitted pipes. In a similar vein, the Water Board lacks authority to order the continued
20 operation and maintenance of unpermitted pipes in the Canal Creek berms within the Castle Dam
21 Unit, which the evidence established were installed without the authorization of the U.S. Army
22 Corps of Engineers, Central Valley Flood Protection Board, or Merced County (or MID). (See PT-4,
23 p. 7, ¶ 25; PT-39, p. 9, ¶ 11.) Simply put, nothing authorizes the Water Board to order the invasion
24 of MID's private property in order to maintain the unlawful pipes in the bank/berm of Canal Creek.

25
26 _____
27 presenting an issue within the board's jurisdiction. (See 23 C.C.R. § 777.) Here, there is not protest
28 or dispute regarding title, and this is not a proceeding for an application to develop a water right.
Instead, in issuing its Order, the Water Board merely ignored evidence in the record regarding
property ownership at the location of the pipes, before ordering Gonzalves to take action.

1 The Order, however, never discusses the issue of ownership of the land on which the
2 unpermitted pipes are located, despite the evidence before it and the comments to the proposed
3 Order submitted by the Prosecution Team and MID raising the issue that the unpermitted pipes are
4 located on MID property. Further, nothing in the Order discusses the basis of the Water Board's
5 authority (or lack of authority) to order Mr. Gonzalves to maintain unpermitted and unlawful pipes
6 on MID property, or indirectly to order MID to host the pipes on its property or allow Gonzalves
7 access to its property to maintain the pipes. Moreover, Order does not require Gonzalves to obtain
8 the permits and agreements necessary to maintain the unpermitted pipes in the bank of Canal Creek,
9 essentially authorizing continued illegal behavior.

10 The Water Board's adoption of the Order directing Mr. Gonzalves to maintain the pipes in
11 the Canal Creek berm (Ordering Paragraphs 1.b and 1.e) located on MID property was in excess of
12 the Water Board's authority.

13 **B. The Decision or Order is not Supported by Substantial Evidence. (23 Cal. Code**
14 **Regs. § 768(b))**

15 Ordering paragraphs 1.b and 1.e of Order WR 2021-0094, requiring Mr. Gonzalves to
16 maintain the illegal and unpermitted pipes (presumably in perpetuity), are not supported by
17 substantial evidence.

18 As detailed in the previous section, Order WR 2021-0094 entirely ignores the evidence in the
19 record that Mr. Gonzalves does not own the property on which the pipes are located and does not
20 have an agreement allowing access to the property on which the pipes are located. Evidence in the
21 record establishes that MID, not Mr. Gonzalves, is the owner of the real property on which the
22 unpermitted pipes are located and that MID operates Canal Creek as part of its water distribution
23 system. (See also PT-4, p. 8, ¶ 27.) No credible evidence in the record indicates that Mr. Gonzalves
24 owns the property on which the illegal pipes are located. The Order's assumption that the pipes
25 connecting Canal Creek with the (equally illegal and unpermitted) Gonzalves Pond are on property
26 to which Mr. Gonzalves has the ability to access is unsupported by substantial evidence in the
27 record.

28 ///

1 The Order expresses the concern that the removal of the pipes could cause the Canal Creek
2 berm to fail due to hydrostatic pressures, relying on testimony of Mr. Hess, and uses this concern as
3 the basis for ordering the continued maintenance of the unpermitted pipes. (Order, pp. 37-38.) This
4 determination that continued maintenance of the pipes is necessary to maintain the Canal Creek
5 berms is based on inadequate and speculative findings, and relies on evidence not supported by the
6 record. Mr. Hess' sparse testimony on the issue was not based on any engineering analysis of Canal
7 Creek or the stability of the berm. (See PT-4, p. 17, ¶ 55; PT-12 [Report of Investigation].) Further,
8 Mr. Hess conducted no analysis, and provided no testimony, concerning any engineering measures
9 that could be taken if the unlawful pipes were removed to ensure the stability of the Canal Creek
10 berm, as might be required by a permitting or authorizing agency overseeing the work. Indeed, the
11 evidence in the record demonstrates that MID, the owner and operator of Canal Creek, believes the
12 pipes can be removed, as shown by the settlement agreement with Mr. Gonzalves. (Gonzalves-37.)

13 For these reasons, ordering paragraphs 1.b and 1.e of Order WR 2021-0094, and more
14 specifically the findings in support of these ordering paragraphs, are unsupported by substantial
15 evidence.

16 IV. CONCLUSION

17 MID requests that the Water Board grant reconsideration, and in light of the evidence
18 indicating that MID, not Gonzalves, owns the property on which the pipes are located, issue a new
19 order directing Mr. Gonzalves to work with MID, as the owner of Canal Creek, to remove the pipes,
20 subject to any applicable permitting required by other agencies with jurisdiction over the Canal
21 Creek/Castle Dam Unit to perform the work.

22
23 Dated: November 4, 2021

DUANE MORRIS LLP

24 By: 

25 Thomas M. Berliner
26 Jolie-Anne S. Ansley
27 Bridget S. Cho

28 Attorneys for Petitioner
MERCED IRRIGATION DISTRICT

EXHIBIT 1



Rules and Regulations
Governing the
Distribution and Use of Water

Main District Office
744 W. 20th Street
Merced, CA 95340
209-722-5761

Main Office Hours

7:30 am to 4:30 pm
Monday – Friday

Water Ordering Options

Online: www.mercedid.org
Customer Service: 209-722-2720 or 800-750-2720
Automated Phone Ordering System: 866-825-2475
In person at the District Main Office
Fax: 209-354-2876

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**RULES AND REGULATIONS
GOVERNING THE
DISTRIBUTION AND USE OF WATER**

ADOPTED BY THE BOARD OF DIRECTORS

December 15, 2020

PREAMBLE

These Rules and Regulations Governing the Distribution and Use of Water (“Rules”) are established pursuant to Water Code Section 22257 to ensure the orderly, efficient, and equitable distribution, use and conservation of MID's water resources. The District will endeavor to deliver District Water in a flexible, timely manner consistent with the physical and operational limits of the District’s Facilities.

The masculine, feminine, or neuter gender and the singular or plural number shall each include the others whenever the context so indicates.

DEFINITIONS

As used herein, the following words, whether or not initially capitalized, shall have the following meanings:

“**Board**” means the Board of Directors of the District.

“**Construction and Engineering Design Standards**” means such technical design specifications and construction details as may be required by the District when changes or improvements are made to District Facilities, as they may be updated from time to time by the District’s Engineering Department.

“**Customer Account (Customer ID’s or Billable Accounts)**” consist of one or more District water accounts owned or leased by the same entity.

“**Deputy General Manager, Water Resources**” means the Deputy General Manager, Water Resources of the District, or his/her authorized representative.

“**Deputy General Manager, Water Rights/Supply**” means the Deputy General Manager, Water Rights/Supply of the District, or his/her authorized representative.

“**District**” means the Merced Irrigation District.

“**District Facilities**” means all water conveyance facilities of the District, including but not limited to, for example, District canals, creeks used for conveyance, laterals, ditches, drains, flumes, pipes, measurement and control devices, rights-of-way for canal banks or roadways and all related operational facilities, including dams, structures, wells, pumps, power plants, reservoirs, and all other facilities of the District.

“**District Water**” means any District water supply, whether from surface or groundwater resources, such as for example, surface water diverted from the Merced River and Lake McClure into the District’s water conveyance system for District purposes; or groundwater pumped as part of the District’s conjunctively managed Supplemental Groundwater Supply Pool Program. For purposes of these Rules, District Water shall also include other water wheeled or conveyed through District Facilities.

“**DSO**” means a Distribution System Operator of the District.

“General Counsel” means the General Counsel of the District, or the General Counsel’s authorized representative.

“General Manager” means the General Manager of the District, or the General Manager’s authorized representative.

“Irrigator” means the Landowner or tenant of a parcel of land who has the primary responsibility for irrigating the parcel. The term includes the Irrigator’s officers, employees and agents. In the event the customer is a water purveyor, municipal or industrial user, or other water user that requires District Water for purposes other than agricultural irrigation, then this term shall mean that water user, its officers, employees, volunteers and agents.

“Landowner” means a holder of title or evidence of title to land.

“Master ID” means an identification number that can be assigned to two or more Customer Accounts, at the customer(s)’s written request.

“Pollutant” means any foreign or deleterious substance or material including, but not limited to, garbage, rubbish, refuse, animal carcasses, matter from any barnyard, stable, dairy or hog pen, herbicides, pesticides, or any other material which is offensive to the senses or injurious to health, or which pollutes or degrades the quality of the receiving water as defined by federal, state or local law.

“Private Irrigation Facility” means any water distribution facility or appurtenance that is not a District Facility, whether owned by or serving a single or multiple property(s) or Irrigator(s). May also be referred to herein as a “community facility.”

“ROW” means a District right-of-way.

“Standby Charge” generally means the annual charge per acre for the District’s Facilities and maintenance and improvement of District Facilities.

“Tenant” means a person or entity who leases, rents, or sharecrops land from a Landowner.

“Turnout” means a gate, stop gates, gate structure, pump intake, standpipe, valve or pipeline installed in a District Facility for the purposes of diverting water from an MID Facility to a Private Irrigation Facility or a private parcel. The turnout includes all gates, valves, standpipes, pipelines and other appurtenances located within MID right-of-way.

“Vehicle” means any motor vehicle, self-propelled O.H.V. (Off Highway Vehicle), or all-terrain vehicle.

“Water Charge” means the volumetric charge for an acre foot of water.

“Water Operations Superintendent” means the Water Operations Superintendent of the District, or the Water Operations Superintendent’s authorized representative.

“Water Transfer or Transfer” means the contract for the lease, sale, use or exchange of District Water for use outside of the District’s boundaries.

SECTION 1 – GENERAL

1. The ability to use District Water when it is made available is subject to full compliance with these Rules together with any rules or regulations adopted pursuant hereto. Violation of any of these Rules may result in, in addition to any other remedy available to the District, the termination of District Water deliveries to any and all property owned or irrigated by the Irrigator and a red tag as provided below.
2. At any time, but typically before the beginning of each irrigation season, the Board may adopt rules and/or procedures to, among other things, govern the delivery of water or operation of District Facilities for that year, e.g., a water management implementation plan. Water management implementation plans are intended to temporarily supplement these Rules during the year in which they are adopted and typically expire at the end of that year's irrigation season (unless otherwise indicated). To the extent there is a conflict with these Rules, the water management implementation plan and the rules and/or procedures adopted by the Board shall take precedent.
3. In its discretion, the District may require Landowners to provide the District with a written application for water (or other informational form) with pertinent information, such as the number of acres to be irrigated, the kind of crops to be grown that year, or any other such information that may be required by the District. The District may require a cash deposit not to exceed the water charge for water applied for.
4. District Water Allocation
 - a. All allocations of District Water are at the parcel(s) level, and are based on Merced County assessed acreage.
 - b. Annually, the Board will determine the District Water supplies to be made available to its Class I and Class II customers, typically but not necessarily on an acre foot per acre basis.
 - c. Unless otherwise directed by the Board, total allocations will be managed at the Customer Account or Master ID level.
5. Every District Director, officer, employee, authorized agent or representative shall have free access, together with appropriate vehicle or equipment, at all times (including weekends and holidays) to enter any land irrigated with District Water for any of the following purposes: (1) investigating or inspecting District Facilities or Private Irrigation Facilities, the flow of water within the facilities (including measurement) or seepage therefrom, and the use of water on the land; (2) performing a land or crop survey; and (3) inspecting, maintaining or operating District Facilities.

SECTION 2 – ENCROACHMENTS

1. No encroachment of any kind shall be planted, constructed or placed in, on, over, under or across any District Facility or any District ROW, either temporarily or permanently, unless an application in writing has been made to the District and written authorization is granted upon the form(s) and agreements required by the District. In their sole discretion, the obligation to submit an application prior to execution of an agreement may be waived by the District's General Manager or Deputy General Manager, Water Resources. Examples of encroachments include, but are not limited to turnouts, screens, trash racks, flow measurement devices, weirs,

well discharges and well discharge structures or pipelines, filter backflush discharges and backflush discharge structures or pipelines, temporary pumping facilities, trees, vines, shrubs, corrals, fences, buildings, shade structures, bridges, roadways, ditches and pipelines. Due to the unique nature of land and District Facilities, and encroachment permitted in one instance is not precedence in any other instance.

2. All agreements or other documents required by the District containing terms and conditions granting an encroachment shall be executed, and all costs and fees paid prior to planting, constructing or placing the permitted encroachment.
3. All permitted encroachments shall be at the sole cost of the applicant and at no cost or liability to the District, and unless otherwise approved by the District shall be constructed by a licensed contractor to then-current District Construction and Engineering Design Standards.
4. Turnouts
 - a. After approval and acceptance upon inspection, permitted turnouts shall become the sole property of the District upon completion and acceptance by the District. The correction of undisclosed defects in the materials for construction of the turnout by the District shall be paid for or reimbursed by Landowner regardless of when the defect is discovered.
 - b. Subject to Section 4.a, maintenance and replacement of permitted turnouts shall be at the expense of the District.
 - i. Any maintenance required on a turnout that has not been used for three (3) consecutive years shall be at the sole expense of the Landowner(s) being served by said turnout.
 - c. The location and number of turnouts and flow measurement devices required for the delivery of water from District Facilities, and the manner of delivery therefrom, shall be determined solely by the District.
 - d. All turnouts must include MID approved flow measurement devices which meets the accuracy and other requirements of then current state law, District requirements including MID's Construction and Engineering Design Standards, and any other applicable standard in place at the time of use.
 - i. Existing turnouts that do not meet flow measurement requirements must be upgraded by and at the cost of the Landowner(s) being served by said turnout upon written notice by MID as a condition of water service.
 - ii. Flow meters must be able to only read District water deliveries. Sufficient metering must be installed so District water deliveries to in-District parcels are measured separately from out-of-District parcels.
5. Any encroachment not permitted by the District may be removed by the District. At the District's sole discretion and after three (3) consecutive years of non-recordable use, the District may remove any turnout from District Facilities together with any associated appurtenances and equipment.
 - a. The Landowner will be solely liable for all District costs, including staff time and out-of-pocket costs related to the removal of any encroachment, appurtenances and equipment. The Landowner is solely liable for all costs to repair or restore its property once encroachment is removed.
 - b. Replacement of facilities removed because of non-use shall be at the sole expense of the Landowner(s).

- c. Replacement of facilities removed because of not being permitted shall follow the standard encroachment process defined herein.
6. The applicant shall not acquire any rights in the District's Facilities or ROW other than those set forth in the applicable executed agreement.
7. Unauthorized Encroachments
 - a. Any unauthorized encroachment on District Facilities contrary to the provision of these Rules is unlawful. An unauthorized encroachment may be removed by the District at the expense of the Landowner.
 - b. The Board authorizes the General Manager and General Counsel to enforce violations of this section by, among other things and in addition to any other remedies permitted under these Rules or applicable law, seeking injunctive relief from the Superior Court requiring the immediate removal of any unauthorized encroachments at the expense of the Landowner, including the recovery of any fees and costs expended by the District to obtain such relief. The Board shall be made aware of any such filing as soon as reasonably practical.
 - c. The Board delegates the authority to the General Manager, General Counsel, Deputy General Manager, Water Resources, or their designee, to review and consider such applications for encroachment, grant or reject any application, or impose any condition upon approval of such application, in their discretion. By delegating such authority, the Board further hereby approves all such discretionary decisions made by the General Manager, General Counsel, Deputy General Manager, Water Resources, or their designees.

SECTION 3 – MODIFICATIONS TO PRIVATE IRRIGATION FACILITIES OR PREVIOUSLY UN-IRRIGATED GROUNDS

1. Whenever previously un-irrigated ground is to be irrigated or previously irrigated ground is divided, District Water may not be delivered across property not owned by the Irrigator without written agreement from the District.
2. Irrigators must notify the District in writing when grounds that have not been served with District Water within the last five (5) years are to be irrigated; when changes are made to property ownership, changes are made to Private Irrigation Facilities; or changes are made to irrigation methods.
 - a. Upon notification and at the expense of the Landowner, the District may require modification or replacement of an existing turnout or District Facility improvement as a condition of water service, at the sole discretion of the District.
 - b. If modification or replacement of an existing turnout or District Facility improvement is required, it shall be modified or replaced in accordance with Section 2 and this section.

SECTION 4 – CONTROL OF DISTRICT FACILITIES

1. District Facilities are under the exclusive control and management of the Board, District staff and their authorized agents. No other persons shall have any right to operate or interfere with District Facilities in any manner, except as expressly authorized herein.
2. District staff and their authorized agents have sole and exclusive right and responsibility to operate turnouts on District Facilities, including opening and closing gates.

- a. An Irrigator may make arrangements in advance with the Irrigator's DSO to allow the Irrigator to operate turnouts during the period the Irrigator is scheduled to receive water, to place or remove a board in a weir or drop, or to lock their turnout(s) from the District Facilities.
3. Use of District roadways/canal banks/ROW: Use of District roadways/canal banks/ROW is at the sole risk of the user. The District reserves its right to limit the public and private use of its roadways/canal banks/ROW.
 - a. No person shall drive any vehicle upon any District roadways/canal banks/ROW unless such person has received permission from the District ahead of time.
 - b. The following persons have permission to drive a vehicle upon a District roadway/canal bank/ROW:
 - i. Any District Director, officer, employee, or agent in the course of their duties.
 - ii. Private parties actively involved with farming a parcel of land adjacent to the specific District roadways/canal bank/ROW, or that require the use of a specific District roadway/canal bank/ROW for access to irrigation facilities serving that parcel of land.
 - iii. Any sheriff, police, fire, or public safety personnel on official business.
 - iv. Any District contractor performing work under a contract with the District.
 - c. The General Manager or Deputy General Manager, Water Resources is authorized to adopt regulations setting forth the procedure for other persons to obtain permission to drive a vehicle on specific District canal bank roads or rights-of-way.
4. Interference with District Facilities: Any interference with or damage to any District Facility is prohibited. Interference with or damage to District Facilities includes, but is not limited to, unauthorized encroachments, interference or damage by pedestrians, livestock, vehicles, parking of vehicles, any alterations to District Facilities or installation or placement of any obstruction or object, whether temporary or permanent, placed on, in, buried under or upon District Facilities including District rights-of-way. Costs for repair of damages to District Facilities shall be borne by the party causing said interference or damage.
5. Except for authorized District employees, agents and representatives, and persons authorized under these Rules, no person shall be permitted to do any of the following, except as expressly authorized herein:
 - a. To open or close a turnout located on a District Facility, attach or place any boards, chains, ropes, locks, pipes, hoses, pumps or any other object to, on, in, under or upon any District conduits or other District Facilities;
 - b. To place or remove a weir board in a weir or drop;
 - c. To tamper with any counter weight, cable, or any parts of an automatic gate;
 - d. To remove or tamper with any chain, board, post, lock or gate placed on or across any canal bank road of the District or on any other District Facility.
6. Public Use of District Facilities: District Facilities shall be used solely for the purposes of the District, including conveying District Water for beneficial use and at times, for the conveyance of storm water.

- a. Use of District Facilities by a private party shall only be permitted if authorized in writing by the District. The use of District Facilities by a private party shall be at the sole risk of the user, subject to receipt of written permission from the District.
- 7. District wells and pumps are to be operated by District staff or their authorized agents only.
- 8. Limits of Liability
 - a. The District's responsibility shall cease when the District Water leaves the turnout from a District Facility onto the Irrigator's land or into a Private Irrigation Facility.
 - b. The District shall not be liable for any damage caused by District Facilities operated, managed or interfered with by any Irrigator or private party in violation of these Rules.

SECTION 5 – DUTIES OF IRRIGATOR

- 1. Irrigator Responsibilities
 - a. The District will not be liable for damage of any kind or nature resulting directly or indirectly from an Irrigator's use of any Private Irrigation Facility or the water flowing therein, or for negligent, wasteful, unreasonable or other use or handling of water by the users thereof.
 - b. The Irrigator is responsible and liable for any damage caused by the Irrigator's negligent, wasteful, unreasonable or other careless use of water, or the result of failure of the Irrigator to properly operate or maintain any Private Irrigation Facility, or other facility for which the Irrigator is wholly or partially responsible.
 - c. When District Water is made available to an Irrigator by a DSO, the Irrigator must have a responsible person present, and the land to be irrigated must be properly prepared to efficiently take the water.
 - i. From the time delivery of the water is commenced to the completion of irrigation, the Irrigator shall, day and night, attend and control the water.
 - ii. When water is delivered to the Irrigator, the Irrigator shall be responsible for the water at all times after it leaves the District Facility.
 - d. It is the Irrigator's responsibility to close all of the Irrigator's private valves at the end of each irrigation.
 - e. It is the Irrigator's responsibility to clear any community facilities by opening stop gates and closing delivery gates, unless directed otherwise.
 - f. It is the Irrigator's responsibility to call their DSO immediately after the irrigation to report irrigation times on and off. Irrigation times and resulting billings may be estimated by the DSO if the Irrigator does not call in a timely manner.
 - g. It is the Irrigator's responsibility to provide the DSO adequate notification prior to the completion of an irrigation event, dependent on the particular distribution system. Failure to provide adequate notification may result in the Irrigator being billed for unused water in the system.
- 2. Waste of Water: All water must be applied efficiently and used in a reasonable and beneficial manner. Any Irrigator who wastes water, such as by excessive application, ponding, flooding of roads, vacant land, neighboring land, land previously irrigated, or in any other fashion, either willfully, carelessly, or on account of defective or inadequate conduits or facilities, or inadequately prepared land, or by flooding a portion of the land to an unreasonable depth or amount in order to irrigate other portions of the land or other parcels, in which case the

Irrigator may be refused District Water until such conditions are remedied. Such determinations may be made by District staff, in their sole discretion.

3. Private Irrigation Facilities

- a. All Private Irrigation Facilities must be kept free from weeds and other obstructions, be of sufficient capacity, and be properly constructed and maintained to carry the flow of District Water made available, without the danger of breaks, constrictions, overflow, or undue leaks or seepage.
- b. Where private open channel conduits are constructed parallel to open channel District Facilities, a full and complete bank must be constructed adjacent to and in addition to the bank of the District Facility. Prior to construction of an open channel private conduit that parallels open channel District Facilities, the Landowner shall obtain approval from the District, such approval to remain conditioned upon construction in compliance with the District's Construction and Engineering Design Standards. If upon review of engineering plans the District requires alterations to the proposed private facility, the alterations shall be made by Landowner, at its sole cost. Neither review of any engineering plans nor any requirement to alter said plans shall result in any liability to the District or waiver of any immunities accorded the District by state law.
- c. The District may terminate delivery of District Water to any Irrigator or Private Irrigation Facility not meeting the above requirements and require them to be cleaned, repaired, or reconstructed before water is made available.
- d. District Water made available to Irrigators who utilize community facilities shall be delivered to the head of these facilities by the DSO. It shall be the Irrigator's responsibility to coordinate the actions of other individuals taking water from said community facilities to mitigate or address individual concerns. The responsibility of the District shall cease once the water leaves the MID turnout and enters the community facility.

4. Private Lift Pump Facilities

- a. The Irrigator will be required to install and operate private lift pumps to receive District Water where the District is unable to deliver water using existing District Facilities.
- b. All Irrigators who pump from District Facilities shall be governed in all respects by these Rules.
- c. Private pump installations must be approved by District staff and include flow measurement devices meeting the requirements of MID's Construction and Engineering Design Standards.
- d. District personnel shall have free access at all times to private facilities and land to take flow measurements of the District Water pumped.

5. "Borderlands" – facilities must be configured with sufficient controls (valves, gates, additional turnouts, etc.) and water measurement devices to be able to physically isolate and accurately measure District water supplies delivered to out-of-District parcels versus water delivered to lands located within the District. If facilities do not meet configuration requirements, facility improvements may be required prior to the commencement of irrigation, at no cost to the District. Failure to meet configuration requirements shall be sufficient reason for the District, in its sole discretion, to refuse to deliver District water to either in-District parcel(s), or out-of-District parcel(s), or both as may be appropriate.

SECTION 6 – DELIVERY OF DISTRICT WATER

1. Water Rates and Charges
 - a. Each year, the Board may establish such policies, rates, charges and fees as may be necessary including, but not limited to, standby fees, administrative fees, in-District and in-season and Supplemental Water Supply Pool Program prices, and water wheeling rates. These charges may be made payable in advance. The Board or staff may also establish the beginning and ending dates for the irrigation season.
 - b. All water charges and other related charges shall be due and payable as stated by the District in applicable notices and billing statements.
2. Failure to Pay Charges
 - a. The District may refuse to furnish water to any water account and associated parcel(s) if outstanding charges for water or services already furnished or rendered such Irrigator or parcel (including any accrued interest and penalties) have not been paid in full by the District-prescribed payment date.
 - b. All charges shall be made for individual parcels and are the responsibility of the recorded owners of that water account and associated parcel(s) even if the Irrigator is only a tenant and not the Landowner. All delinquent charges and assessments, together with any accrued interest and penalties, may result in a lien on the property and will be collected in accordance with the procedures specified in Water Code Section 25806.
3. Irrigation Service
 - a. The District will make reasonable efforts to meet a requested time for delivery of District Water within the capacity limitations of the District Facilities while maintaining efficient and equitable water distribution between Irrigators. A time limit may be applied to each delivery of water in the discretion of the District, or to prevent unreasonable use or waste of water.
 - b. To schedule an irrigation, the Irrigator must place a water order a minimum of four (4) days in advance of the time the water is desired to be used. The District does not guarantee any or all such water will be delivered within four (4) days, but staff will endeavor to do so. In the initial water order, the Irrigator should give an estimate for the requested flow rate and length of time the water will be used and the day the water is desired for each individual water account to be irrigated. The Irrigator must have the land ready to receive water when the water order is placed.
 - c. After receiving a water order, the DSO will call the Irrigator to inform the Irrigator of the anticipated flow rate, time of water delivery, and where applicable, to whom the water is received from and passed to.
 - i. When the DSO is unable to locate the Irrigator after making two separate calls to the contact number provided by the Irrigator and leaving word when water will be available, it shall constitute a refusal and forfeiture of that irrigation. This applies to irrigations that have been scheduled as well as to those which have not been scheduled.
 - d. All measurements of District Water shall be made by the District at the District approved flow measurement device location. Where a flow measurement device has not yet been installed or approved, the District, in its sole discretion, will determine the delivered flow rate at the District turnout or nearest available point.
 - i. Water measurement devices shall be provided at the sole cost of the Irrigator, and shall comply with all applicable State and District standards.

- e. The District shall maintain records of the names of each Irrigator, the water account that each Irrigator has irrigated, the number of acre feet of water used by each water account, and other such irrigation and operations information as required by the District.
 - f. Regular billings for water usage will be forwarded to water users by the District. Any dispute regarding a billed irrigation should be filed with the District within 20 days of the billing or invoice date, but in unusual circumstances and in the sole discretion of the District, the District may consider a disputed billing or invoice received up to 45 days from the date of the billing or invoice.
4. Irrigation Scheduling, On-Demand, and Time-of-Use Operations
- a. Due to capacity limitations on certain MID Facilities, on-demand and time-of-use scheduling is not guaranteed and is subject to approval by MID.
 - b. Irrigators requesting on-demand or time-of-use scheduling shall provide their desired schedules on a weekly basis to their DSO.
 - c. MID will perform a scheduling analysis once all schedules have been received and will operate the system to meet the Irrigators' schedules whenever possible. However, where said schedules cannot be met, the DSO will inform Irrigators what hours they can run.
5. Refusal of Water by Irrigator: If an Irrigator fails or refuses to continuously use the entire head of water ordered, then the following shall apply:
- a. The full amount will be charged to the Irrigator;
 - b. The Irrigator shall not be entitled to use the unused portion of water at any other time;
 - c. The Irrigator shall forfeit the unused portion of water.
6. Interruptions of Service: In case of an interruption in a District Facility, such as a pump failure or a canal or pipe break, the District Water shall be turned onto the nearest land above the interruption that can take water without substantial damage to the land or to the crops thereon until the DSO can otherwise allocate the water.
- a. Receiving District Water in such cases shall not affect the right of any Irrigator to receive water in the Irrigators' regular turn, but if the Irrigator desires to complete the irrigation of land under such circumstances, the DSO shall facilitate such request as operationally feasible. Irrigators whose irrigation was interrupted shall be allowed to finish irrigating when service is restored and as reasonably practical.
7. Unauthorized Use of Water
- a. Any person who uses District water without the District's authorization may become subject to criminal prosecution and civil liability.
 - b. A red tag may be issued for anyone using water without authorization. (See Section 10.)
 - c. The taking and use of District Water without authorization is a violation of the District Rules. The first such offense shall result in additional charges for the water taken in the amount(s) currently set by the Board.
 - d. The subsequent taking and use of District Water without authorization shall result in forfeiture of irrigation water for the remainder of the season, as well as additional charges for the water taken in the amount(s) currently set by the Board.
 - e. The District shall be entitled to make a reasonable estimation of the District Water taken and the number of occurrences of unauthorized taking using any information it has

available. Reasonable estimates made by staff that are not appealed to the Board, or not amended by the Board on appeal, shall be deemed conclusive and final.

- f. In addition to any other remedy available to the District, the Board hereby authorizes staff through its General Manager and General Counsel to enforce violations of this section by seeking immediate injunctive relief from the Superior Court requiring the cessation of unauthorized diversions of District Water, in addition to any other remedies permitted under these Rules or applicable law, including the recovery of any fees, penalties and costs expended by the District to obtain such relief.

SECTION 7 – DISTRICT WATER MADE AVAILABLE FOR TRANSFER

1. At its sole discretion and without regard to the amount of water made available to in-District customers in any given year, the Board may determine that it is in the best interest of the District to make District Water available for transfer outside of the District’s boundaries. By accepting District Water, purchasers and users of water outside of District boundaries confirm that the water supplies made available are intermittent, a supplemental supply, not a firm supply to be delivered every year, and are likely not sufficient to grow a crop. The decision of the District to enter into a water transfer agreement(s), is made on a case-by-case basis, and at the sole discretion of the District. The Board hereby delegates authority to the General Manager to make such determinations.

SECTION 8 – DISCHARGE TO DISTRICT FACILITIES, WATER QUALITY

1. No discharge, including but not limited to agricultural runoff, lagoon water, tail water, sheet flow from storms or rainfall events that traverses across developed land, or excess irrigation water is permitted to enter or be drained into any District Facility, at any time, without prior written permission from the District.
2. The District shall not be responsible for any trash or debris that may flow or accumulate in any District Facilities or Private Irrigation Facilities or water, or for any interference with the operation or decrease in the capacity of any Private Irrigation Facilities.
3. No pollutant or water shall be placed, emptied, discharged, or otherwise allowed to enter into any District Facility without the prior express written approval of the District.
4. Discharge or drainage of nutrient enriched water is not permitted to any District Facility. Upon discovery of any nutrient enriched water discharged to District Facilities, whether intentional or unintentional, it shall be the Irrigator’s or Landowner’s sole responsibility to modify their Private Irrigation Facilities to prevent future occurrences. Such modifications shall be at the Irrigator or Landowner’s sole cost and liability, and subject to application to and permission granted by the District.
5. Groundwater Quality: Salinity and other pollutants from well water that discharge into District Facilities can adversely impact the quality of water delivered to Irrigators or spilled to creeks, streams and rivers. Discharges into District Facilities from wells shall be subject to water quality testing in compliance with District water quality requirements as determined by the District, at the Irrigator’s expense. The District reserves the right to prohibit discharges based on the water quality testing and compliance with District water quality requirements, as determined by the District.

6. Any person who willfully or negligently allows any discharge or pollutant to enter any District Facility without the prior express written approval of the District shall be liable for all damages caused thereby, including but not limited to the costs of the cleanup of all affected District Facilities and of all property adversely affected, as well as any related costs, fees, fines or charges imposed. In addition, the District may, in its sole discretion, refuse to deliver District Water to any land owned or operated by the Irrigator or Landowner until such time as the Irrigator or Landowner comes into compliance with all District Rules.
7. The District is authorized to enforce violations of this section by seeking injunctive relief from the Superior Court requiring the cessation of unpermitted discharges to any District Facility, in addition to any other remedies permitted under these Rules or applicable law, including the recovery of any fees, penalties and costs expended or imposed by the District to obtain such relief.

SECTION 9 – REGULATIONS

1. Authority to Adopt and Implement Regulations: the General Manager, General Counsel, Deputy General Manager, Water Resources, Deputy General Manager, Water Rights/Supply, or either of them, are hereby authorized to adopt rules or regulations to implement or supplement these Rules. The General Manager, General Counsel, Deputy General Manager, Water Resources, Deputy General Manager, Water Rights/Supply, or either of their designees, is authorized to do any and all things necessary or appropriate to implement and effectuate these Rules, and to exercise their reasonable discretion in doing so.
2. Violation of a Regulation Constitutes a Violation of These Rules: A violation of a regulation duly adopted pursuant to this section shall constitute a violation of these Rules.

SECTION 10 – ENFORCEMENT OF RULES AND REGULATIONS

1. Notice and Orders
 - a. The Deputy General Manager, Water Resources or his/her designee is authorized to issue a Notice and Order to any Landowner or Irrigator determined to be in violation of any Rule herein. An oral or written warning may be issued in lieu of a Notice and Order.
 - b. The Notice and Order shall contain a brief description of the violation and a statement of the corrective action to be taken by the Landowner or Irrigator.
 - c. A Notice and Order may or may not be accompanied by a Red Tag, in the District's discretion.
2. Red Tags, Termination of District Water Delivery for Failure to Comply with Rules or Regulations: Violation of any of these Rules, or failure or refusal of any Landowner or Irrigator to comply with any of these Rules shall be sufficient grounds for the immediate termination of delivery of District Water to any and all lands of such Landowner or Irrigator without liability for any loss or inconvenience, and District Water shall not again be furnished until there is full compliance with all District Rules. A notice of termination or termination of District Water delivery for failure to comply with Rules constitutes a "red tag" of the Landowner's or Irrigator's property, whether owned or leased, that is or may be receiving District Water.
 - a. The Deputy General Manager, Water Resources or his/her designee is authorized to immediately terminate the delivery of District Water to any and all lands of a Landowner or Irrigator under any one of the following circumstances:

- i. If the land or irrigation facility in question is in such a condition so as to make it immediately dangerous to any person, to the public, or to any property, including but not limited to the flooding of property.
 - ii. If the Landowner or Irrigator has failed to comply with a prior District Notice and Order or warnings pertaining to the same or similar problem, including corrective actions to be taken.
 - iii. Any violation of these Rules or regulations adopted pursuant hereto.
 - b. Notice of an immediate termination of the delivery of District Water shall be given with a Notice of Order with a Red Tag.
 - c. When a Red Tag is issued, the Board will be notified by District staff at an upcoming Board meeting, as determined by District staff.
3. Service of Notice and Orders and Red Tags: Each Notice and Order and/or Red Tag shall be served upon the Landowner or Irrigator, either personally, by email or by regular mail at the address indicated in the District's records. Service by mail shall be effective on the date of mailing. The Red Tag may also be posted on the affected land or irrigation facility.
4. Compliance with Notice and Orders and Decisions
 - a. After a Notice and Order or a decision of the Deputy General Manager, Water Resources or his/her designee or of the Board has become final, no person to whom any such order or decision is directed shall fail, neglect, or refuse to obey any such order or decision.
 - b. If, after an order or decision has become final, the person to whom such order or decision is directed fails, neglects, or refuses to comply with such order or decision, the District may refuse or continue to refuse to furnish water to any and all land owned or operated by that person, and the District may institute such other actions or proceedings as may be appropriate under these Rules or applicable law, including but not limited to a request for a court order or injunction.
5. Appeals of Notice and Orders and Red Tags
 - a. Any Landowner or Irrigator affected by a Notice and Order and/or Red Tag may appeal from said Notice and Order and/or Red Tag. A Notice and Order, either with or without a Red Tag, becomes final if a written appeal is not filed with the Deputy General Manager, Water Resources within ten (10) calendar days of the date of such Notice and Order. If denied, the Deputy General Manager, Water Resources' decision may be appealed to the Board. However, the decision shall become final if a written appeal to the Board is not filed within ten (10) calendar days of the date of service of the denial. The Board's decision becomes final on the day the decision is issued.
 - b. If the final decision requires compliance with the Notice and Order or any portion thereof and delivery of water is terminated for failure to comply with the Notice and Order, no further appeal is allowed and the Landowner or Irrigator must fully comply with the Notice and Order and demonstrate compliance with all District Rules and regulations before District Water will be delivered.

APPENDIX

Pertinent provisions of law:

The Merced Irrigation District is a California irrigation district, organized and operating under the Irrigation District Law contained in the California Water Code. Applicable provisions of California law set forth generally the powers and purposes of an irrigation district, including the broad power to do any act necessary to furnish sufficient water in the District for any beneficial purpose, and to perform all acts necessary to carry out its powers and purposes.

Water Code Section 22257 provides in part as follows:

“Each district shall establish equitable rules for the distribution and use of water, which shall be printed in convenient form for distribution in the district. A district may refuse to deliver water through a ditch which is not clean or not in suitable condition to prevent waste of water and may determine through which of two or more available ditches it will deliver water.

A district may close a defective gate in a community water distribution system used for irrigation purposes and may refuse to deliver water through the defective gate if the landowner fails to repair the gate or outlet to the satisfaction of the district within a reasonable time after receipt of notice from the Board through its authorized water superintendent, manager, or ditchtender to repair the gate or outlet.”

Water Code Section 22282.1 provides that:

“A district may refuse service to any land if outstanding charges for services already rendered such land have not been paid within a reasonable time.”

Penal Code Section 592 provides that:

“(a) Every person who shall, without authority of the owner or managing agent, and with intent to defraud, take water from any canal, ditch, flume or reservoir used for the purpose of holding or conveying water for manufacturing, agricultural, mining, irrigating, generation of power, or domestic uses is guilty of a misdemeanor.

(b) If the total retail value of all the water taken is more than nine hundred fifty dollars (\$950), or if the defendant has previously been convicted of an offense under this section or any former section that would be an offense under this section, or of an offense under the laws of another state or of the United States that would have been an offense under this section if committed in this state, then the violation is punishable by imprisonment in a county jail for not more than one year, or in the state prison.”

Penal Code Section 607 provides that:

“Every person who willfully and maliciously cuts, breaks, injures, or destroys, or who, without the authority of the owner or managing agent, operates any gate or control of, any bridge, dam, canal, flume, aqueduct, levee, embankment, reservoir, or other structure erected to create hydraulic power, or to drain or reclaim any swamp, overflow, tide, or marsh land, or to store or conduct water for mining, manufacturing, reclamation, or agricultural purposes, or for the supply of the inhabitants of any city or town, or any embankment necessary to the same, or either of them, or willfully or maliciously makes, or causes to be made, any aperture or plows up the bottom or sides in the dam, canal, flume, aqueduct, reservoir, embankment, levee, or structure, with intent to injure or destroy the same; or draws up, cuts, or injures any piles fixed in the ground for the purpose of securing any sea bank, sea wall, dock, quay, jetty, or lock; or who, between the first day of October and the fifteenth day of April of each year, plows up or loosens the soil in the bed on the side of any natural water course, reclamation ditch, or drainage ditch, with an intent to destroy the same without removing the soil within 24 hours from the water course, reclamation ditch, or drainage ditch, or who, between the fifteenth day of April and the first day of October of each year, plows up or loosens the soil in the bed or on the sides of the natural water course, reclamation ditch, or drainage ditch, with an intent to destroy the same and does not remove therefrom the soil so plowed up or loosened before the first day of October next thereafter, is guilty of vandalism under Section 594. Nothing in this section shall be construed so as to in any manner prohibit any person from digging or removing soil from any water course, reclamation ditch, or drainage ditch for the purpose of mining.”

WATER MEASUREMENTS & EQUIVALENTS

RATE

1 cubic foot per second (CFS)	
=	7.48 gallons per second
=	448.8 gallons per minute
=	26,928 gallons per hour
=	646,272 gallons per day

VOLUME

1 cubic foot per second (CFS)	
For 1 hour	= .9917 acre inch
For 12 hours	= .9917 acre feet (AF)
For 24 hours	= 1.983 acre feet
For 30 days	= 59.5 acre feet
1 acre foot	= 325,851 gallons
1 acre foot	= 43,560 cubic feet
1,000,000 gallons	= 3.07 acre feet
1 acre foot	= 1 acre to a depth of 1 foot

1 **PROOF OF SERVICE**

2 *In the Matter of the Draft Cease and Desist Order and Administrative Civil Liability Complaint*
3 *issued by the Division of Water Rights Enforcement Section against Kevin Gonzalves for alleged*
4 *unauthorized diversions of water within the Canal Creek watershed in Merced County,*
5 *Before the California State Water Resources Control Board*

6 I am a citizen of the United States, over the age of 18 years, and not a party to this action. I
7 am an employee of Duane Morris LLP and my business address is One Market, Spear Tower, Suite
8 2200, San Francisco, California 94105. I am readily familiar with this firm’s practices for collecting
9 and processing correspondence for mailing with the United States Postal Service and for transmitting
10 documents by FedEx, fax, email, messenger and other modes. On the date stated below, I served the
11 following documents:

12 **MERCED IRRIGATION DISTRICT’S PETITION FOR RECONSIDERATION OF**
13 **ORDER WR 2021-0094, AND STATEMENT OF POINTS AND AUTHORITIES IN**
14 **SUPPORT OF PETITION FOR RECONSIDERATION**

15 **BY ELECTRONIC SERVICE:** Based on a court order or an agreement of the
16 parties to accept service by e-mail or electronic transmission, I caused the documents
17 to be sent to the person(s) at the e-mail addresses listed below. I did not receive,
18 within a reasonable time after the transmission, any electronic message or other
19 indication that the transmission was unsuccessful.

Jeanine Townsend, Clerk to the Board State Water Resources Control Board 1001 I Street Sacramento, CA 95814	E-mail: Jeanine.Townsend@waterboards.ca.gov
Administrative Hearings Office State Water Resources Control Board P.O. Box 100, Mail Stop 2-C Sacramento, CA 95812-0100	E-mail: adminhrsgsoffice@waterboards.ca.gov
Kevin Gonzalves and Jennifer Gonzalves 9888 N. Buhach Road Winton, CA 95388	E-mail: kgonzalves@live.com
Kenneth Petruzzelli John Prager Division of Water Rights, Prosecution Team 801 K Street, 23 rd Floor Sacramento, CA 95814 <i>Attorneys for Division of Water Rights, Prosecution Team</i>	E-mail: Kenneth.Petruzzelli@waterboards.ca.gov John.Prager@waterboards.ca.gov

20 I declare under penalty of perjury under the laws of the State of California that the foregoing
21 is true and correct. Executed on November 4, 2021, at San Francisco, California.

22 

23 _____
24 Michelle Sangalang