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September 8, 2021

Via Electronic Mail Only

State Water Resources Control Board
1001 I Street
Sacramento, CA 95814
DWR-MillDeerDrought@waterboards.ca.gov

California Department of Fish and Wildlife
Attention: Jason Roberts
P.O. Box 944209
Sacramento, CA 94244-2090
Jason.Roberts@wildlife.ca.gov

National Marine Fishery Service
Attention: Howard Brown
650 Capitol Mall, 5-100
Sacramento, CA 95814
Howard.Brown@noaa.gov

Re: **Emergency Regulations for Mill Creek and Deer Creek**

Ladies and Gentlemen:

Los Molinos Mutual Water Company submits the following initial comments to the "Preliminary Draft Drought Emergency Regulation for Mill Creek and Deer Creek Watersheds for Public Comment". The SWRCB noticed the Draft Emergency Regulations near the close of business on Wednesday, September 1, 2021 and before Labor Day weekend, leaving affected water users 3.5 business days to submit comments. The following day, September 2, 2021, we sent letters to the State Water Board, California Department of Fish & Wildlife, and National Marine Fisheries Service requesting immediate response to pending Public Record Act and Freedom of Information Act requests dated July 8 and July 9, 2021. We have not received any public records in response to the July requests. This fact, coupled with the short turnaround time, makes it impossible for affected water users to offer comprehensive comments by the September

8, 2021 noon deadline. Los Molinos Mutual expects full compliance with its July records requests that are necessary for it to submit timely and complete comments on the Draft Emergency Regulations. Los Molinos Mutual will submit further comments in advance of the State Water Board's consideration, currently scheduled for September 22, 2021.

A. Los Molinos Mutual Has Some of the Most Senior Water Rights in the State of California and is Using Water for Beneficial Use That Has Not Been Curtailed Due to Unavailability of Water.

On June 15, 2021 the State Water Board curtailed all post-1914 water rights. On July 23, 2021 the State Water Board issued a "Notice of Unavailability of Draft Emergency Curtailment and Reporting Regulation for the Sacramento-San Joaquin Delta (Delta) Watershed for Public Review and Comment and Notice of Water Unavailability". The Notice states that "the best information available to the Board indicates that water is not available for:

- All post-1914 appropriative water rights in the Delta watershed (inclusive of the Sacramento River and San Joaquin River watersheds);
- All pre-1914 appropriative water right claims in the San Joaquin River watershed;
- All pre-1914 appropriative water right claims in the Sacramento River watershed with a priority date of 1883 or later; and
- Some pre-1914 appropriative water right claims in specific Sacramento River tributary sub-watersheds with a priority date earlier than 1883. These claims face water unavailability either due to limited local supplies or the need to bypass natural flows so that more senior rights downstream can be met."

Significantly, Los Molinos Mutual's senior rights were not curtailed. Unlike most other water right holders in the Delta watershed, water is available for diversion under Los Molinos Mutual's super-senior water rights. Under the Draft Emergency Regulations, Mill and Deer Creek water users would only be "curtailed" because the State has envisioned a preferred priority for their water – instream fishery use. To amicably address the state's preference for this instream use of water, Mill and Deer Creek water users in May 2021 offered to transfer water instream for compensation (\$2.1 million). This offer, however, was refused and the State now seeks to condemn property rights without any compensation under the guise of a "curtailment".

B. The “Unprecedented” Need for Emergency Regulations in 2014 and 2015 Are Now Becoming Routine; Since 2014 and 2015, State and Federal Agencies Have Refused to Assist Los Molinos Mutual in Solving the Root Fishery Problem on Mill and Deer Creeks – the Urgent Need for Multi-Benefit Channel Restoration.

During the last statewide drought in 2014 and 2015, at the request of CDFW and NMFS, the State Water Board adopted nearly identical emergency regulations curtailing nearly all off-stream diversions on Mill and Deer Creeks. Like 2021, the curtailments in 2014 and 2015 were not because of lack of water availability; rather, it was to implement the State and Federal Government’s policy to prefer instream fishery flows, rather than off-stream diversions for agriculture. The State Water Board determined that the 2014 and 2015 regulations were necessary “given the unprecedented nature of the current drought impacts to these fisheries.” (2014 and 2015 Emergency Regulations, § 877, subd. (c), emphasis added.) Following these “unprecedented” actions, Los Molinos Mutual repeatedly sought the assistance of state and federal agencies to address the root fishery problem on Mill and Deer Creeks – the urgent need for multi-benefit channel restoration.

For decades your agencies have dabbled, but not completed instream fishery enhancement projects on Mill and Deer Creek.¹ Having not financed or completed these measures, your agencies resorted to “emergency regulations” in 2014 and 2015 as substitutes for the unfinished public projects. Water Board Member (now-Vice Chair) Dorene D’Adamo voted for the State Water Board’s emergency regulations which curtailed diversions on Deer Creek, Mill Creek, and Antelope Creek (State Water Board Resolution No. 2014-0023). However, Board Member D’Adamo requested that staff of CDFW, NMFS, and the State Water Board work with water users to improve fishery conditions on a long-term basis through voluntary agreements. During the meeting on March 17, 2015, Board Member D’Adamo requested a “collaborative...long-term solution” involving the fishery agencies, the Mill Creek water users, the State Water Board and its staff. These discussions never occurred. For this reason, in 2015, Board Member D’Adamo cast a lone dissenting “No” vote on the 2015 version of the emergency regulations (State Water Board Resolution No. 2015-0014).

Since the 2014 and 2015 emergency regulations, Los Molinos Mutual has repeatedly sought a voluntary agreement-type of solution to try to solve the underlying problem. On March 16, 2021 Los Molinos Mutual sent a letter requesting CDFW, SWRCB, and NMFS assistance in the development and implementation of the multi-benefit channel restoration project. (Copy attached as Exhibit A.)

¹ For example, the State began, but didn’t complete, a flow project that paid for groundwater pumping to enhance Deer Creek and Mill Creek instream flows during the same periods of the regulations.

On April 2, 2021, Los Molinos Mutual sent another request for assistance of your agencies in undertaking emergency channel restoration efforts to improve fish passage conditions in 2021. (Copy Enclosed as Exhibit B.) In response, on April 7, 2021, CDFW personnel stated it is “not feasible” to undertake such an emergency project and listed numerous approvals and prerequisites to implementation of such a restoration project, including the following:

- Designs
- CEQA
- NEPA
- Lake and Streambed Alteration Agreement
- Incidental Take Permit
- ACOE 404
- SWRCB 401
- Central Valley Flood Protection Board permit
- Section 7 consultation with NOAA fisheries

A copy of this email is attached as Exhibit C.

On April 19, 2021 at the request of Los Molinos Mutual, representatives of your agencies as well as water users from Mill Creek met onsite to discuss the need for the multi-benefit channel modification project to enhance fish passage. In our view, there was consensus that this project is essential to balance the water needs of the fishery and other beneficial uses of water by Los Molinos Mutual and other water users on Deer and Mill Creeks.

On April 21, 2021 Governor Newsom issued a drought proclamation that included directives on state agencies, including CDFW and State Water Board to “Accelerate funding of water supply enhancement, water conservation, or species conservation projects.” (Emergency Proclamation, ¶ 4(a).) CDFW is specifically directed to, “Evaluate and take actions to protect terrestrial and aquatic species and, wherever possible, work with water users and other parties on voluntary measures to protect species.” (*Id.* ¶ 9(a).)

Pursuant to these directives, Los Molinos Mutual on May 5, 2021 requested funding and assistance pursuant to Governor Newsom’s Drought Proclamation for the design and implementation of the multi-benefit channel restoration project on Mill Creek, including assistance in pursuing and securing all regulatory and other approvals necessary for timely implementation of the restoration project. (Copy attached as Exhibit D.) Los Molinos Mutual has not yet received a meaningful response to this request.

On May 5, 2021, representatives of the State Water Board, CDFW and NMFS invited Los Molinos Mutual to a discussion regarding 2021 water conditions and fish passage in Mill Creek. At this meeting, Los Molinos Mutual was given an ultimatum: either (1) submit, in

writing, and within one-week terms that Los Molinos Mutual proposes to implement to ensure fish passage in 2021 or (2) the State Water Board will adopt and impose emergency regulations curtailing (yet again) Los Molinos Mutual's super-senior, adjudicated water rights. In response to this ultimatum, Los Molinos Mutual provided the term sheet attached as Exhibit E. ²

In response to Los Molinos Mutual's proposal, the State Water Board, CDFW, and NMFS pointed to the need for flows as set forth in CDFW's draft instream flow criteria for Mill Creek (CDFW 2018) and draft instream flow evaluation for Deer Creek (CDFW 2017), and that the State Water Board, CDFW and NMFS do not have authority to authorize the channel restoration measures sought by water users. Reference to CDFW's 2017 and 2018 draft instream flow evaluations is especially galling. Due to Sacramento River operations and "green tape" making it impossible to secure the necessary regulatory approvals to perform work, lower Mill Creek has filled up with sediment making adherence to the State's passage criteria an impossibility, even in a situation where no off-stream diversions occur. Even if all water right holders on Mill Creek ceased diverting and left 100% of water instream³, passage criteria would still not be satisfied. The reason is because lower Mill and Deer Creeks are filled with sediment requiring more and more flow to meet passage criteria, yet your agencies refuse to allow restoration work to occur.

This problem demands a solution, not an "emergency regulation". What may have been "unprecedented" in 2014 and 2015 is forecastable now. Adjudication of these issues through reactionary "emergency regulations" is patently unlawful and unfair to Mill Creek water users and to the fishery. Los Molinos Mutual, thus, implores your agencies to commit to assisting in solving the root problem and committing to multi-benefit channel restoration of lower Mill Creek before the spring run period in 2022. We ask that you do not adopt emergency regulations and instead commit to solving the problem.

C. The Draft Emergency Regulations are Unnecessary; The 2021 Spring Fish Counts Were Exceptionally Good and Such Success Was Accomplished without Emergency Regulations.

Water users on Mill and Deer have, in good faith, engaged in extensive and ongoing communications in 2021 with staff at the State Water Board, CDFW and NMFS. As noted, water users submitted proposals for implementing the multi-benefit channel restoration projects and fishery protection proposals that included compensation for water transferred to instream use. Both proposals were rejected. However, water users on Mill and Deer did coordinate with

² On July 12, 2021, Los Molinos Mutual again wrote the SWRCB to offer assistance in carrying out channel restoration measures and to request expedited regulatory approvals to begin implementing such measures. (Copy enclosed as Exhibit F.)

³ This is presented hypothetically. Such a draconian action would destroy thousands of acres of productive agricultural land, businesses and livelihoods in Tehama County.

CDFW and NMFS to voluntarily implement pulse flows in the Spring of 2021 for benefit to the fishery, while minimizing impacts to agricultural beneficial uses.

Given this extensive and ongoing engagement, it is inexplicable that water users were not provided copies of NMFS's July 30, 2021 and CDFW's August 9, 2021 letters requesting 2021 emergency regulations. Made worse is that the letters leave out the incredible success of the spring run in 2021, despite very critical drought conditions. NMFS' letter bases the justification for fall 2021 emergency regulations on prior year run counts, especially 2020: "The 2020 run size for both streams was the lowest on record with just 73 adults in Mill Creek and 96 adults in Deer Creek and the extinction risk for both populations has moved from moderate to high in the last five years." Similarly, CDFW incorrectly states that emergency regulations are needed "to provide emergency minimum flow protections for adult and juvenile salmonids during the current drought emergency."

The reality is that Los Molinos Mutual is being punished for its own success. Unlike many other areas of California, Mill Creek has always had a viable, native spring and fall run salmon populations. A total of 662 returning spring run have been counted in the spring of 2021. This incredible success was achieved without emergency regulations and during the current drought emergency with low flows. Fish and water users have been coexisting and thriving on Mill Creek for over 150 continuous years. CDFW and NMFS are simply not accurate in their depiction of the "need" for emergency regulations and have failed to provide the State Water Board with the full picture, including a successful spring run in 2021.

Rather than adopting emergency regulations, water users sincerely hope the State Water Board uses this as an opportunity to create a sustainable and resilient solution that works for both the fishery and water users. However, if the State Water Board is inclined to proceed with adoption of emergency regulations, we caution you to consider that this is not 2014 or 2015 or the administrative record that the Third District Court of Appeal found supported your prior actions. The record preceding 2021 emergency regulations is far different. There is a clearly documented overreliance on "emergency" that purport to be broad-reaching and legislative. In reality, these regulations are adjudicative by singling out Stanford Vina and Los Molinos Mutual Water Company and determining facts peculiar to the individual case when applying general principles of California water law to prohibit available water diversions for beneficial use. The targeted water right holders are exceptionally affected, and the regulations apply general standards to specific water right holders and their real property (adjudicated water rights). That the measures are labeled "quasi-legislative" or "regulations" is immaterial; their substance and function renders them adjudicative. (*20th Century Ins. Co. v. Garamendi* (1994) 8 Cal. 4th 216, 275 [Quasi-adjudicative classification contemplates "function performed"].)

State Water Resources Control Board
California Department of Fish and Wildlife
National Marine Fishery Service
Re: Emergency Regulations for Mill Creek and Deer Creek
September 8, 2021
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We ask that the State Water Board refuse CDFW's and NMFS' requests for emergency regulations. Water users on Mill and Deer Creeks have stepped to the plate to help solve the problem; what we need is partnership from state and federal agencies.

Very truly yours,

MINASIAN, MEITH, SOARES,
SEXTON & COOPER, LLP

By: 

JACKSON A. MINASIAN

JAM/tw
Attachments

EXHIBIT A

**MINASIAN, MEITH,
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March 16, 2021
Via Certified Mail and Email

State Water Resources Control Board:

E. Joaquin Esquivel, Chair
Doreen D'Adamo, Vice-Chair
Tam M. Doduc, Member
Sean Maguire, Member
Laurel Firestone, Member
1001 I Street
Sacramento, CA 95814

National Marine Fisheries Service
650 Capitol Mall, Suite 5-100
Sacramento, CA 95814

California Department of Fish and Wildlife
P.O. Box 944209
Sacramento, CA 94244-2090

Re: Channel Clearing – Mill Creek, Tehama County

Ladies and Gentlemen,

As of today, March 9, 2021, dry conditions are currently prevailing across California and it appears we are entering into another drought, if not already in one. Droughts are a regular occurrence in California and history commands that they be expected and planned for with proactive competence rather than reacted to with hysteria and the opportunism of “emergency” measures. Thus, it is an appropriate time to develop a *constitutional* plan for Mill Creek in Tehama County for the spring of 2021 if dry conditions continue.

To: State Water Resources Control Board, National Marine Fisheries Service, California Dept of Fish and Wildlife
Re: Channel Clearing -- Mill Creek, Tehama County
Date: March 16, 2021
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1. Low-Flow Channel.

Your agencies have expressed concerns regarding the conditions for salmon and steelhead conditions in Mill Creek during dry periods. We wish to inform you that Los Molinos Mutual Water Company is eager to work with you to clear a “low-flow” channel for fish passage. Such a clearing and removal of blockages is a physical solution to create flow and temperature conditions that enhance salmon and steelhead conditions in dry years. We are eager to hear your views of which riffles are most critical to clearing of the low-flow channel. This physical solution is simple to implement, and we urge you to execute such a clearing and excavation process for the channel for this spring. Matt Johnson of California Department of Fish and Wildlife is aware of the critical riffle problem and has attempted to modify riffles to enhance fish passage in low flow conditions in the past.

If you are inclined to respond by directing Los Molinos Mutual Water Company or other water users to file an application for a streambed alteration permit, such a response is equivalent to refusing to implement the low-flow channel. It is not possible to apply for and to receive a streambed alteration permit prior the spring fishery migration period. Such applications take many months to process and, if deemed acceptable, to finalize into a streambed alteration agreement. The conditions routinely imposed on such permits would also make it infeasible to carry out the project even if a permit were granted. Your agencies have made the process of securing a streambed alteration permit so costly and difficult that directing water users to file for a streambed alteration permit here would be the equivalent of prohibiting the proposed low-flow channel and would in and of itself be a violation of the California and Federal Endangered Species Acts by ensuring that protected fishery resources will lack enhanced passage conditions this Spring. Nor is it the burden of local water users to secure permits for the project of your agencies. While water users are willing to join your agencies in an application for such permits, this is a project of your agencies to enhance fishery passage conditions.

If you are inclined to refrain from pursuing a low-flow channel in an expedient fashion, please consider how you will explain to a court why this feasible physical solution was not pursued to implement the enhanced fishery conditions your agencies desire, and why you instead chose to confiscate the water of local interests without compensation or an evidentiary hearing.

2. Cooperation From Your Agencies.

We ask that you take a series of reasonable and feasible steps to get this done. First, we ask that you exercise your lawful authority to suspend the California Environmental Quality Act’s (“CEQA”) application to the low-flow clearing and channel reinstatement. Public Resources Code Section 21080(b) of CEQA states: “This division does not apply to any of the following activities... Specific actions necessary to prevent or mitigate an emergency.” Second, we ask that you exercise your lawful authority to declare your determination with ours under Fish and Game Code section 1610 that an emergency will exist. That provision will allow work in the streambed to occur without a permit in emergency circumstances. (Fish and Game Code § 1610.) Section 1610 states, “Except as provided in subdivision (b) this chapter does not apply to any of the following: (1) immediate emergency work necessary to protect life or property.”

These emergency exceptions can be invoked immediately to allow the low-flow channel to proceed. There is no requirement that the Governor declare an emergency. Invocation of the emergency exceptions is appropriate here. The low-flow channel is necessary to protect Mill Creek fish and the low-flow channel will not get done in a timely manner unless you invoke the emergency exceptions of CEQA and the Fish and Game Code.

3. Failure to Allow the Physical Solution Low-Flow Channel Will be an Admission.

We are asking for you to exercise your authority to get this physical solution done. If your agencies fail to facilitate the construction of the low-flow channel that would help fish with relatively little water, and instead issue regulations under the guise of “emergency” to confiscate the water of Mill Creek landowners for instream flows, it will be an admission that your true objective is to create a public instream flow project without compensating landowners for the taking of their water and for converting their irrigated farmland into unfarmed dryland.

Your apparent goal is that you do not want any fish to “drag their bellies over gravel bars” or be delayed in their upstream migration on Mill Creek – ordinary features of the natural selection process in a dry year. If this goal is accomplished by suspending water rights -- real property rights -- and prohibiting diversion that occurred uninterrupted for over 100 years, including a number of drought years, then you will be executing a public instream flow project requiring an evidentiary hearing and compensation.

Numerous courts have required physical solutions when considering competing uses of water. Some of your agencies refuse to consider any alternatives to enhancing fish passage other than “more flows” and “more water.” By refusing to consider physical solution of a low-flow channel to facilitate fish passage, your agencies will create the very “emergency conditions” invoked to take the water of Mill Creek landowners. This is indefensible.

By failing to allow the physical solution of a low-flow channel, your agencies will be demonstrating to a Court that your true objective is to utilize emergency declarations to compel a few rural landowners to pay for a public instream flow project without evidentiary hearing, compensation, or any form of due process. If the water for a few rural landowners is to be taken for what is deemed to be a public purpose of greater importance than food production and rural livelihoods, and your agencies do not wish to consider the low-flow channel a physical solution, then an evidentiary hearing must be held including the landowners’ right to cross-examine and offer evidence in opposition to the rejection of this physical solution.

4. A Low-Flow Channel is Required to Help Fish.

A low-flow channel with water flows tailored to the channel capacity is the only appropriate mechanism for improving Mill Creek fishery conditions if dry conditions persist. Confiscating the water rights of Mill Creek landowners and throwing their water down the creek will not benefit salmon and steelhead. Without a low flow channel through extensive riffle areas, instream flows spread across the streambed which results in hot and shallow water conditions, baking salmon and steelhead (CDFW 2001 Spring Run Salmon Report for Deer and Mill Creek, Collen Harvey Arrison.) Further, the shallow water conditions exacerbate predation

To: State Water Resources Control Board, National Marine Fisheries Service, California Dept of Fish and Wildlife
Re: Channel Clearing -- Mill Creek, Tehama County
Date: March 16, 2021
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problems with salmon and steelhead having little chance of avoiding predators – a problem that low-flow channels mitigate through increased depth and variability in creekbed characteristics.

If you question these statements, we can only urge you to hold the evidentiary hearing that is required under the constitution and which there is ample time and opportunity to conduct so that that truth and the facts surrounding Mill Creek hydrology, fishery conditions, and water rights can be presented through the admission of evidence and cross-examination of witnesses. Doing so will allow your agencies to make informed decisions in achieving your purported goals of helping fish while not despotically devastating the people of Mill Creek.

5. Condemnation

Creating a low-flow channel is the only means of actually helping salmon and steelhead, however members of your respective agencies have expressed the view that no proactive action of this nature is necessary, and instead the water and water rights of Mill Creek landowners (and those of other Tehama County streams) can simply be confiscated if dry conditions persist. We remind you that Constitutional protections require an evidentiary hearing and compensation if this approach is taken, and this advance notice provides you adequate time to schedule hearings and to deposit funds under eminent domain statutes. And although we disapprove of this approach and reserve all rights of protest, we are willing to work cooperatively with your agencies to facilitate the issuance of condemnation notices to water right holders and to participate in an efficient and effective evidentiary hearing proceeding and system for deposits of compensation.

It would be inexcusable to confiscate the water and water rights of landowners this spring without an evidentiary hearing and deposit with the Superior Court of the estimated compensation. You have several months to do so before the Spring and there are approximately eight (8) water right holders on Mill Creek. If you intend to take their water, then certainly you are capable of holding an evidentiary hearing before doing so and finding the monies to compensate them. It would be inappropriate to do nothing until the spring and then, with the “emergency” atmosphere and hysteria, to opportunistically confiscate the water and water rights of these eight (8) water right holders without compensation or evidentiary hearing.

Constitutional protections require that the water rights of Mill Creek landowners only be taken after an evidentiary hearing and compensation. As you know, the water rights of Mill Creek landowners are real property rights protected by the United States and California Constitutions. (*U.S. v. Gerlach Live Stock Co.* (1950) 339 U.S. 725, 727-30, 752-56; *Dugan v. Rank* (1963) 372 U.S. 609, 623-626.) “As such, they cannot be infringed by others or taken by government action without due process and just compensation.” (*United States v. SWRCB* (1986) 182 Cal.App.3d 82, 101.) The real property nature of California water rights endures regardless of fishery concerns or requirements. (*Casitas Mun. Water Dist. v. US* (2008) 543 F.3d 1276, 1279-82, 1296; *Tulare Lake Basin Water Storage District v. US* (2001) 49 Fed.Cl.313, 318-21.) Assertions of “emergency” do not excuse constitutional protections for water rights as real property rights. (*Los Osos Valley Associates v. City of San Luis Obispo* (1994) 30 Cal.App.4th 1670; *Odello Brothers v. County of Monterey* (1998) 63 Cal.App.4th 778.)

It does not require a law degree to understand that labels of “emergency”, “regulation”, “quasi-legislative”, and “unreasonable” cannot excuse the constitutional protections of an evidentiary hearing and compensation when real property rights are confiscated. If your agencies wish to decline our offer to clear a low-flow channel and instead intend to confiscate the water and water right of Mill Creek landowners, then constitutional protections must be adhered to. You have plenty of time to comply with those constitutional protections.

a. Condemnation Funds Are Available.

Condemnation funds are available if you intend to confiscate the water of Mill Creek landowner this spring. The most obvious source of condemnation monies, in addition to the budgets of your agencies, is the \$7.5 billion made available by Proposition 1 of 2014 -- most of which is available for appropriation. While the water confiscated is of tremendous importance to Mill Creek water right holders -- most of whom rely on it as their sole source of irrigation water for their crops and cows -- it is not a tremendous amount in volume or value in the context of California hydrology or your budgets and available bond monies. At approximately \$700-900 per acre foot for water taken in the spring, it would be relatively inexpensive for your agencies to compensate Mill Creek water right holders, although these figures are only estimates.

Another option is to purchase well capacity from the Mill Creek landowners that do have groundwater wells and to pay those landowners to utilize their wells and to forego their surface water diversions from Mill Creek. This will result in less surface water diversions and more Mill Creek water available for your use. Alternatively, you can pay private well owners to pump their well water into Mill Creek. This will result in more water available in Mill Creek for use by your agencies as you see fit. Such well pumping agreements have been developed in the past and can be organized again with some initiative by your agencies.

6. Mill Creek Water Rights Are Critical to Mill Creek Landowners.

The importance of Mill Creek water rights and water to the landowners cannot be overstated and we urge you to keep this in mind. The water is the primary source of irrigation water – and in many cases the only source of irrigation water - for the people of Los Molinos and Mill Creek areas. These individuals rely on the water to sustain their cattle herds, orchards, alfalfa, and other crops. Confiscating their water in the critical spring irrigation periods has devastating consequences for them: crops are stressed, herds are culled, and lands must be fallowed. Whether used for a cow or a walnut tree, a grapevine or alfalfa field, the people of Mill Creek and Los Molinos depend on their water rights and water for their livelihoods.

There is no meaningful substitute source of irrigation water for these people. Groundwater is not reliable in the area. Many landowners do not have wells or the funds to drill them, or the landowners that do have wells are pumping from an unreliable aquifer. It is imperative that your agencies take proactive action now to prevent a disaster for these people. It is unacceptable to confiscate the water and water rights of a relatively small number of rural citizens so that certain agency desires for an instream flow project on Mill Creek can be realized without compensation or an evidentiary hearing, and without actually helping fish.

To: State Water Resources Control Board, National Marine Fisheries Service, California Dept of Fish and Wildlife
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7. Mill Creek Individuals Should Not Be Forced to Fund a Government Project.

For decades your agencies have sought greater flows for a fishery project on Mill Creek. Your agencies have expended a great deal of energy and public monies studying the issue, and you have even engaged in half efforts to purchase well pumping capacity from landowners, to drill your own wells, and to purchase surface water rights from landowners. However, your agencies have failed to follow through with a long-term project that satisfies your desires for greater in-stream flows. It is inappropriate with potential dry conditions this spring to compel a few rural Tehama County landowners to fund and effectuate the same project your agencies never followed through with.

Examples of other past efforts to propose and develop the instream flow project on Mill Creek include but are not limited to: CDFW 1996 Steelhead Restoration and Management Plan for California; CDFW "Chinook Salmon Population of the Upper Sacramento River Basin 2012," Matt Johnson and Douglas Killam; CDFW "Restoring Central Valley Streams: A Plan for Action", 1993; CDFW "Juvenile Spring-Run Chinook Salmon Emergency in Deer And Mill Creeks, Tehama County," Colleen Harvey Arrison, 2001; and CDFW "Status of Actions to Restore Central Valley Spring-Run Chinook Salmon," 1996.

This is by no means an exhaustive list of studies and proposals by your agencies regarding greater in stream flow on Mill Creek. We only hope it provides insight into how long your agencies have sought greater instream flows on Mill Creek without following through with a meaningful project.

Conclusion

Your agencies must take proactive measures now. A low-flow channel is the physical solution to your fish passage desires and will serve all interests while minimizing hardships if dry conditions continue. It would be inappropriate to do nothing, and then, if dry conditions continue, to assert "emergency" to violate the constitutional protections of the landowners who rely on their Mill Creek water rights to sustain their crops, herds, and livelihoods.

Very truly yours,

MINASIAN, MEITH,
SOARES, SEXTON & COOPER, LLP

By: 

JACKSON A. MINASIAN

JAM/PRM:lmj
Enc.

EXHIBIT B

STANFORD VINA RANCH IRRIGATION COMPANY

6320 Tehama-Vina Road, P.O. Box 248, Vina, CA 96092
Telephone: (530) 520-2563

LOS MOLINOS MUTUAL WATER COMPANY

25162 Josephine Street, P.O. Box 211, Los Molinos, CA 96055
Telephone: (530) 384-2737 * Fax (530) 384-9835

April 2, 2021

Mr. Jason Roberts
California Department of Fish and Wildlife
P.O. Box 944209
Sacramento, CA 94244-2090

Mr. Howard Brown
National Marine Fisheries Service
650 Capitol Mall, 5-100
Sacramento, CA 95814

Re: Mill Creek/Deer Creek
Joint Implementation of Multipurpose Channel Restoration Measures

Messrs. Roberts and Brown:

Los Molinos Mutual Water Company on Mill Creek and Stanford Vina Ranch Irrigation Company on Deer Creek would like to coordinate site visits on both Creeks as soon as possible to discuss the implementation of multipurpose channel restoration measures that could enhance 2021 fishery conditions in the two Creeks. Please invite any others from your respective agencies that you believe would be helpful to this discussion. The measures would be implemented by our respective entities together with your agencies.

We would like to discuss ideas for channel restoration in the Creeks, the cost and funding of such measures, and how we can secure all regulatory requirements and approvals, including compliance with CEQA, and the potential need for a Streambed Alteration Agreement to implement much needed restoration measures without delay. We hope you can come prepared to discuss how we can all work together to get these measures accomplished in 2021. We are available any time on April 8th, 12th and 13th, 2021.

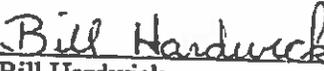
We write you jointly in response to the similar correspondence we received from you concerning fishery conditions. Scheduling the site visits on the same day will be efficient for all parties. However, we would remind you that we are distinct entities, the biological and hydrological

conditions on the two Creeks are different, and measures to enhance fishery passage conditions on the two Creeks are not likely to be uniform. We look forward to your response.

Sincerely,



Mike Wallace
Stanford Vina Ranch Irrigation Company



Bill Hardwick
Los Molinos Mutual Water Company

cc: David Guy, NCW
Todd Manley, NCW

EXHIBIT C

Jackson Minasian

From: Roberts, Jason@Wildlife <Jason.Roberts@wildlife.ca.gov>
Sent: Wednesday, April 7, 2021 11:28 AM
To: Dustin Cooper; Howard.Brown@noaa.gov
Cc: Callie Wood; keithbentz54@gmail.com; Todd Manley; Jackson Minasian; Aidan Wallace; David Guy (DGuy@norcalwater.org); Williamson, Nicole@Waterboards; Ekdahl, Erik@Waterboards; Mike Wallace; Bill Hardwick; Riddle, Diane@Waterboards; Serup, Bjarni@Wildlife; Johnson, Matt@Wildlife; Harris, Michael R.@Wildlife; Grover, Joshua@Wildlife; Bartlett, Tina@Wildlife; Roberts, Jason@Wildlife
Subject: Re: Deer Creek Watershed Meeting

Dustin,

CDFW is willing to meet onsite with the water users and NCWA to discuss channel rehabilitation. The dates proposed do not work though. I am available on the 15, 19 and 23 of April.

We also think it would be a good idea to have the meeting(s) that the SWRCB proposed too.

Regarding channel rehabilitation, I do not think our position has changed. It is not feasible to waive environmental permits and regulations and there are numerous permits and regulations issued by agencies other than CDFW.

Generally speaking, I would assume that the following would be needed for a project to move forward.

- Designs
- CEQA
- NEPA
- Lake and Streambed Alteration Agreement
- Incidental Take Permit
- ACOE 404
- SWRCB 401
- Central Valley Flood Protection Board permit
- Section 7 consultation with NOAA fisheries

Like previous letters we responded to, CDFW is willing to work with all interested stakeholders on addressing fisheries issues in lower Mill and Deer Creeks. The process will take time though and cannot be accomplished on short notice as you propose.

CDFW will formally respond to your letter in the near future.

Thanks,
Jason

Jason Roberts
Environmental Program Manager - Inland Fisheries
Northern Region (Region 1)

California Department of Fish and Wildlife
(530) 526-2168

From: Dustin Cooper <dcooper@minasianlaw.com>

Sent: Tuesday, April 6, 2021 10:01 AM

To: Williamson, Nicole@Waterboards <Nicole.Williamson@waterboards.ca.gov>; Roberts, Jason@Wildlife <Jason.Roberts@wildlife.ca.gov>; Johnson, Matt@Wildlife <Matt.Johnson@wildlife.ca.gov>; Harris, Michael R.@Wildlife <Michael.R.Harris@wildlife.ca.gov>; Grover, Joshua@Wildlife <Joshua.Grover@wildlife.ca.gov>; Serup, Bjarni@Wildlife <Bjarni.Serup@wildlife.ca.gov>; howard.brown@noaa.gov <howard.brown@noaa.gov>; brian.ellrott@noaa.gov <brian.ellrott@noaa.gov>; evan.sawyer@noaa.gov <evan.sawyer@noaa.gov>; Shin, Robin@Waterboards <Robin.Shin@Waterboards.ca.gov>; Holland, Matthew@Waterboards <Matthew.Holland@waterboards.ca.gov>; Riddle, Diane@Waterboards <Diane.Riddle@waterboards.ca.gov>; Ekdahl, Erik@Waterboards <Erik.Ekdahl@waterboards.ca.gov>; Schultz, Daniel@Waterboards <Daniel.Schultz@waterboards.ca.gov>; Maguire, Sean@Waterboards <Sean.Maguire@Waterboards.ca.gov>; Dadamo, Dorene@Waterboards <Dorene.Dadamo@waterboards.ca.gov>

Cc: Mike Wallace <mike@crainwalnut.com> (mike@crainwalnut.com) <mike@crainwalnut.com>; Bill Hardwick <Immutual@att.net>; Callie Wood <calliecowgirl@hotmail.com>; David Guy (DGuy@norcalwater.org) <dguy@norcalwater.org>; Todd Manley <tmanley@norcalwater.org>; keithbentz54@gmail.com <keithbentz54@gmail.com>; Jackson Minasian <jminasian@minasianlaw.com>; Aidan Wallace <AWallace@Minasianlaw.com>

Subject: FW: Deer Creek Watershed Meeting

WARNING: This message is from an external source. Verify the sender and exercise caution when clicking links or opening attachments.

Good morning – Stanford Vina Ranch Irrigation Company (Deer Creek) and Los Molinos Mutual Water Company (Mill Creek) coincidentally has also requested a meeting with your respective agencies to occur ASAP. Please see attached joint letter, which probably has not been routed to all of your inboxes yet.

We think a meeting onsite would be most effective and would be happy to coordinate so one trip can cover visits to both Deer and Mill Creeks. Thank you. Dustin

From: Mike Wallace <mike@crainwalnut.com>

Sent: Tuesday, April 6, 2021 9:15 AM

To: Jackson Minasian <jminasian@minasianlaw.com>; Dustin Cooper <dcooper@minasianlaw.com>; Aidan Wallace <AWallace@Minasianlaw.com>

Cc: Callie Wood <calliecowgirl@hotmail.com>

Subject: FW: Deer Creek Watershed Meeting

Michael Wallace

Chief Financial

Officer

Crain Walnut Shelling, LP

Crain Orchards, Inc.

Eco-Shell, LP

☎ (530) 529-1585 • 📠 (530) 781-3022

EXHIBIT D

STANFORD VINA RANCH IRRIGATION COMPANY

6320 Tehama-Vina Road, P.O. Box 248, Vina, CA 96092

Telephone: (530) 520-2563

LOS MOLINOS MUTUAL WATER COMPANY

25162 Josephine Street, P.O. Box 211, Los Molinos, CA 96055

Telephone: (530) 384-2737 * Fax (530) 384-9835

May 5, 2021

Jason Roberts
Environmental Program Manager – Inland Fisheries
Northern Region (Region 1)
California Department of Fish & Wildlife
P.O. Box 944209
Sacramento, CA 94244-2090
Jason.Roberts@wildlife.ca.gov

Dear Mr. Roberts:

Los Molinos Mutual Water Company (LMMWC) and Stanford Vina Ranch Irrigation Company (SVRIC) thank you and your colleagues for your willingness to discuss drought conditions on Mill and Deer Creeks, including our visit of a critical riffle site on April 19, 2021. As you know, LMMWC and SVRIC believe the best way to address CDFW's fishery concerns on the Creeks is through prompt implementation of a multi-benefit channel restoration projects. Such projects would provide multiple benefits, including enhancing fish passage and water supply reliability for the farms, businesses, terrestrial environmental, and other off-stream beneficial uses of water.

On April 2, 2021, we sent you a letter requesting CDFW's assistance in undertaking emergency channel restoration efforts to improve fish passage conditions in 2021. In response, on April 7, 2021, you stated it is "not feasible" to undertake such an emergency project and listed numerous approvals and prerequisites to implementation of such a restoration project, as follows:

- Designs
- CEQA
- NEPA
- Lake and Streambed Alteration Agreement
- Incidental Take Permit
- ACOE 404
- SWRCB 401
- Central Valley Flood Protection Board permit
- Section 7 consultation with NOAA fisheries

(See Jason Roberts, CDFW, Email Dated April 7, 2021, copy attached.)

Since your email, drought conditions across the state have continued to worsen and Governor Newsom on April 21, 2021 issued an Emergency Proclamation for drought. State agencies, including CDFW, are directed to:

Accelerate funding of water supply enhancement, water conservation, or species conservation projects.

(Emergency Proclamation, ¶ 4(a).)

CDFW is specifically directed to:

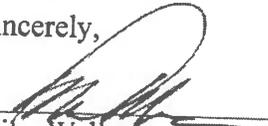
Evaluate and take actions to protect terrestrial and aquatic species and, wherever possible, work with water users and other parties on voluntary measures to protect species.

(*Id.* ¶ 9(a).)

We believe the multi-benefit channel restoration projects envisioned in our discussions are part of the suite of actions contemplated in Governor Newsom's Proclamation. Unfortunately, it appears the opportunity to do channel restoration work in the spring of 2021 has closed. However, there is opportunity for undertaking such efforts in advance of this Fall, especially if dry conditions persist into 2022. Consequently, under the Governor's Proclamation, LMMWC and SVRIC request funding and CDFW's assistance to begin implementing the multi-benefit channel rehabilitation projects on Mill and Deer Creeks. Included in this request is CDFW's assistance in pursuing and securing all regulatory and other approvals necessary for timely implementation of the rehabilitation projects and determining appropriate funding. It is essential that these efforts begin now, in the event drought conditions persist into 2022.

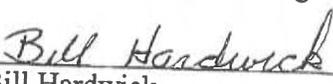
We look forward to continuing our discussion on these important matters.

Sincerely,



Mike Wallace

Stanford Vina Ranch Irrigation Company



Bill Hardwick

Los Molinos Mutual Water Company

EXHIBIT E

LOS MOLINOS MUTUAL WATER COMPANY

25162 Josephine Street, P.O. Box 211, Los Molinos, CA 96055

Telephone: (530) 384-2737 * Fax (530) 384-9835

May 13, 2021

State Water Resources Control Board
Attention: Nicole Williamson
1001 I Street
Sacramento, CA 95814

California Department of Fish and Wildlife
Attention: Jason Roberts
P.O. Box 944209
Sacramento, CA 94244-2090

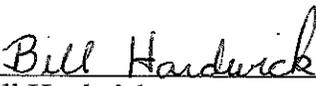
National Marine Fisheries Service
Attention: Howard Brown
650 Capitol Mall, 5-100
Sacramento, CA 95814

Re: Drought Actions on Mill Creek

Ladies and Gentlemen,

On May 5, 2021, Nicole Williamson of the State Water Resources Control Board (SWRCB) requested that Los Molinos Mutual Water Company (LMMWC) provide a summary of actions and possible measures on Mill Creek this year. This follows the meeting on April 23rd with representatives of the SWRCB, the National Marine Fisheries Service (NMFS), and the California Department of Fish and Wildlife (CDFW). Enclosed is an Outline of Key Terms for Drought Year 2021 Actions on Mill Creek, provided in response to this request. LMMWC would like to engage with you on this Outline, and has made every effort to deliver it to you within the timeframe discussed last week. Please provide the SWRCB's, CDFW's and NMFS' written response to this proposal in one week.

Sincerely,



Bill Hardwick
Los Molinos Mutual Water Company

Outline of Key Terms for Drought Year 2021 Actions on Mill Creek

1. **Purposes:**
 - a. Implement short-term actions on Mill Creek for water conservation, fishery conditions, and water supply during the 2021 drought.
 - b. Commit to pursue and implement long-term solutions improving fish passage on Mill Creek and resolving long-standing need for multi-benefit channel restoration for ecological benefits and water supply reliability; the long-term solutions are intended to address and avoid future need for emergency regulations and allegations of take associated with water diversions under Federal or State Endangered Species Acts.

2. **Parties:**
 - a. Water User Parties: Los Molinos Mutual Water Company (LMMWC);
 - b. Agencies: State Water Resources Control Board (SWRCB); California Department of Fish and Wildlife (CDFW); NOAA National Marine Fisheries Service (NMFS).

3. **Forbearance/Flow Measures, Year 2021:** Water Users will forego diversions to create base and pulse flow regimes as follows:
 - a. Base Flow of not more than 25 cfs measured at the Ward Dam from May 15 to June 15, and not more than 50 CFS from October 15 to November 30
 - b. One Pulse Flow of not more than 50 cfs for a 48-hour period during the May 15 to June 15 period.

4. **Cessation of Forbearance Due to Temperature:** A temperature monitoring program will be implemented in Mill Creek. Forbearance measures will cease when water temperatures below Ward Dam are no longer conducive for fish passage including water temperatures that exceed the EPA guideline of 68 degrees Fahrenheit.

5. **Multi-benefit Channel Restoration Project:** Agencies, in coordination with Water Users, will commit to pursue regulatory approvals and funding for design and implementation of a multi-benefit channel restoration project between Ward Dam and the confluence of the Sacramento River. Goals of restoration include but are not limited to 1) improved fish passage at lower flows; 2) improved geomorphic stream processes; 3) improved riparian habitat; and 4) improved floodplain habitat.

6. **Environmental Permits, Approvals, and Immunities**
 - a. In exchange for the foregoing, SWRCB will not pursue emergency regulations, waste and unreasonable use claims, or other enforcement proceedings (collectively “Enforcement”) against Water Users for diversions in 2021. Provided Water Users are cooperating in good faith to pursue the multi-benefit channel restoration project along with Agencies, SWRCB will not pursue Enforcement against Water Users.

- b. Safe Harbor Agreement with NMFS under federal Endangered Species Act relating to fish passage in Mill Creek.
- c. Safe Harbor Agreement with CDFW under California Endangered Species Act, relating to fish passage in Mill Creek.

7. **Funding from the State of California**

- a. See, e.g., Governor's State of Emergency Proclamation dated April 21, 2021, section 4, and SVRIC and Los Molinos Mutual Water Company's joint letter to CDFW dated May 5, 2021.
- b. Water Users will be compensated in the amount of \$2,100,000 for the purpose of implementing, in Water Users' discretion, water conservation, water efficiency, system improvement, or other water related improvements within their respective service areas.
- c. DWR/LMMWC to expand parties' existing conjunctive use agreement to intended 25 cfs (currently ± 11 cfs) to make additional flow available.

EXHIBIT F

STANFORD VINA RANCH IRRIGATION COMPANY

6320 Tehama-Vina Road, P.O. Box 248, Vina, CA 96092

Telephone: (530) 520-2563

LOS MOLINOS MUTUAL WATER COMPANY

25162 Josephine Street, P.O. Box 211, Los Molinos, CA 96055

Telephone: (530) 384-2737 * Fax (530) 384-9835

July 12, 2021

State Water Resources Control Board:

E. Joaquin Esquivel, Chair

Doreen D'Adamo, Vice -Chair

Sean Maguire, Member

Laura Firestone, Member

Nicole Morgan, Member

1001 I Street

Sacramento, CA 95814

Re: Chanel Restoration and Critical Riffle Modification on Deer and Mill Creeks

Ladies and Gentlemen:

We write you to again to offer our assistance in carrying out the fishery enhancement projects on Deer Creek and Mill Creek that your agency desires. We have previously written the State Water Board, as well as the California Department of Fish and Wildlife ("CDFW") and federal National Marine Fishery Services ("NMFS"), requesting expedited regulatory approvals, in light of drought conditions, to begin implementing a multi-benefit channel restoration project that would immediately enhance fishery passage during the current drought conditions.

We again write you to offer our assistance in implementing the riffle modification measures that are necessary to enhance fishery conditions.¹ We are willing to contribute labor to modify critical riffles by hand in a fashion that will enhance fishery passage during the prevailing drought conditions. Alternatively, we are willing to contribute an equipment operator and fuel for an excavator to mechanically modify the critical riffles.

The State Water Board, along with CDFW and the NMFS, has asserted that fish passage on Mill and Deer Creeks can be enhanced by increasing water depth at critical riffles. However, the depths and velocities desired can only be achieved through the physical solution of modifying the riffles to concentrate the flow of water over them, so as to increase the water depth. It cannot be accomplished by simply demanding through either voluntary agreement or

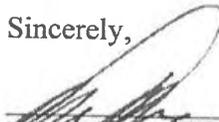
¹ Stanford Vina Ranch Irrigation Company and Los Molinos Mutual Water Company previously contacted your agency in writing to offer assistance to implement channel rehabilitation and critical riffle modification measures to enhance fishery passage conditions on Mill and Deer Creeks on February 26, 2018; February 21, 2020; March 16, 2021; March 21, 2021; April 2, 2021; and May 5, 2021.

emergency regulation “more water” or “higher flows” from water users who desperately need their water to reasonably and beneficially apply water to their crops, livestock, and permanent planting.

Under current conditions, additional flows spread out laterally across unmodified riffles, creating harmful temperature, predation conditions and other passage constraints. The physical solution of modifying critical riffles is precisely what is required by law here under *City of Lodi v. East Bay Municipal Utility Dist.* (1936) 7 Cal.2d 31, 341 which affirmed that California Constitution Article X, section 2 requires physical solutions to maximize the beneficial use of water, and without substantial cost to prior appropriators. The water users’ proposed physical solution of modifying critical riffles in Deer and Mills Creeks is necessary to maximize the beneficial use of water for both human and crop consumption and instream purposes, in accordance with Article X, section 2’s mandate that “the water resources of the State be put to beneficial use to the fullest extent of which they are capable.” We ask for the State Water Board’s assistance in cutting the green tape and immediately allowing for implementation of this physical solution.

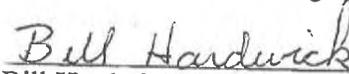
The State’s continued failure to act should not be an option. Nor should the State Water Board act as it did in 2014 and 2015 by adopting emergency regulations. It is not appropriate to refrain from taking any action to modify critical riffles, and to then claim “emergency” and take the water of users on Mill and Deer Creeks. The State Water Board and its sister state and federal agencies have had years to implement critical riffle modification measures and other channel rehabilitation measures. The regulatory burden and cost of implementing this fishery enhancement project ought to be borne by these agencies, given the public nature of the project. It should not be borne exclusively by water users on Mill and Deer Creeks as it was in 2014 and 2015. This is especially true given our repeated efforts to secure the regulatory approvals necessary to undertake this very important channel rehabilitation project. We look forward to your response.

Sincerely,



Mike Wallace

Stanford Vina Ranch Irrigation Company



Bill Hardwick

Los Molinos Mutual Water Company