

1 SOMACH, SIMMONS & DUNN
A Professional Corporation
2 STUART L. SOMACH, ESQ. (SBN 090959)
DANIEL KELLY, ESQ. (SBN 215051)
3 500 Capitol Mall, Suite 1000
Sacramento, CA 95814
4 Telephone: (916) 446-7979
Facsimile: (916) 446-8199
5
6 Attorneys for Petitioner
MORONGO BAND OF MISSION INDIANS

7
8 BEFORE THE CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
9

10 In Re Matter of License No. 659,
11 Morongo Band of Mission Indians

**SUPPLEMENTAL AND RENEWED
MOTION TO DISMISS PROPOSED
REVOCATION OF LICENSE 659
(APPLICATION 553) OF THE
MORONGO BAND OF MISSION
INDIANS, MILLARD CANYON IN
RIVERSIDE COUNTY**

12
13
14
15
16 The Morongo Band of Mission Indians (Morongo) hereby renews and supplements its
17 prior Motion to Dismiss, requesting that the State Water Resources Control Board (SWRCB)
18 dismiss the Proposed Revocation of License 659 (Application 553) of The Morongo Band of
19 Mission Indians, Millard Canyon In Riverside County (Proposed Revocation).

20 **I. INTRODUCTION**

21 This Supplemental and Renewed Motion to Dismiss is being filed for two reasons. First,
22 it has been more than two years since the evidentiary hearing in this matter and more than 18
23 months since the United States Department of the Interior, Bureau of Indian Affairs (BIA),
24 which became the holder of License 659 when the United States took the underlying real
25 property into trust for Morongo without objection from the State of California, made a Special
26 Appearance to contest the SWRCB's jurisdiction to revoke License 659 as a result of the United
27 States' sovereign immunity. Second, during the intervening period a controlling decision
28 requiring dismissal of the revocation proceeding was issued by a California Court of Appeal in

1 an action to which the SWRCB was a party. (*Millview County Water Dist. v. State Water*
2 *Resources Control Board* (2014) 229 Cal.App.4th 879 (*Millview*).

3 II. BACKGROUND

4 The SWRCB originally issued a Notice of Proposed Revocation of Water Right License
5 No. 659 to Great Spring Water of America, Inc. on April 28, 2003. On May 9, 2003, legal
6 counsel for Great Spring requested a hearing to contest the proposed revocation of License 659
7 and also notified the SWRCB that the water right for License 659 had been assigned to
8 Morongo. The most recent activity in the Proposed Revocation began with a Notice of
9 Rescheduling of Public Hearing issued February 12, 2012, which set the evidentiary hearing for
10 May 21, 2012.

11 Prior to the May 21, 2012 hearing, Morongo filed a Motion to Dismiss Or, In the
12 Alternative, to Decline to Revoke License 659 (2012 Motion to Dismiss). The 2012 Motion to
13 Dismiss raised indispensable party issues, violations of due process, concern over significant
14 delays in the proceedings, and recognition that public policy disfavors revocation. The
15 evidentiary hearing on the Proposed Revocation took place, as scheduled, on May 21, 2014.
16 The SWRCB did not address any issues raised in the 2012 Motion to Dismiss at the hearing.
17 Closing Briefs were filed in July 2012.

18 On December 7, 2012, the Hearing Officer, Charles R. Hoppin, issued a letter
19 addressing only the indispensable party issue raised in the 2012 Motion to Dismiss. The
20 December 7, 2012 letter expressed the SWRCB's intent to reopen the evidentiary hearing for
21 the sole purpose of allowing the BIA to appear and present additional evidence in the Proposed
22 Revocation. In response, on February 20, 2013, the BIA filed a Special Appearance in the
23 Proposed Revocation noting that the United States had not waived sovereign immunity, that it
24 held Morongo's water rights in trust, and that the Proposed Revocation *must be dismissed*. The
25 SWRCB never responded to the BIA's assertion of sovereign immunity and has never
26 addressed the issues raised in Morongo's 2012 Motion to Dismiss.

27 In the Spring of 2013, Charles Hoppin, the Hearing Officer, who was the only SWRCB
28 Board member present at the evidentiary hearing, retired and left the SWRCB. With the

1 Proposed Revocation still unresolved, the pending proceeding continues to cast a cloud over
2 Morongo's water rights. In January 2006, Morongo filed a Petition to Change License 659 to
3 integrate License 659 with the Morongo's other water rights to provide water supplies to the
4 Morongo Reservation. Action on that Petition was halted by the SWRCB pending resolution of
5 the Proposed Revocation. Inaction in the Proposed Revocation continues to cause injury to
6 Morongo.

7 The facts relevant to the Proposed Revocation, and arguments in opposition to the
8 Proposed Revocation are set forth in the 2012 Motion to Dismiss and Morongo's Closing Brief
9 filed in the Proposed Revocation. Instead of restating those facts and arguments, the 2012
10 Motion to Dismiss and Closing Brief are incorporated herein as though the facts and arguments
11 were set forth in their entirety.

12 In addition to the issues raised in the 2012 Motion to Dismiss and the Closing Brief, a
13 recent California Appellate case has clarified the factors that must be present prior to a water
14 right being lost by non-use. That case, *Millview*, further mandates dismissal of the Proposed
15 Revocation.

16 III. MORONGO'S LICENSE 659 HAS NOT BEEN 17 LOST THROUGH NON-USE

18 In *Millview*, the California Court of Appeal, First Appellate District, considered, among
19 other things, what factors need to be present to find that a water right has been lost through non-
20 use.

21 The *Millview* court explained that water rights are not lost "in the abstract." Instead,
22 water rights can be lost only where there is a "clash of rights", evidenced by "the presence of a
23 competing claim" for the water alleged to have been lost. (*Millview*, 229 Cal.App.4th at p. 889-
24 900.) The competing claim must be by a "rival diverter" who is prepared to use, or is using, the
25 surplus water not diverted. (*Millview* at p. 900.) In the absence of a competing claim, "a
26 California water rights holder whose water use falls below the full appropriation for five years or
27 more may nonetheless resume full use at any time if no conflicting claim has been asserted in the
28 meantime." (*Millview* at p. 903.) The *Millview* court reasoned that there was no policy reason

1 for finding forfeiture until an alternative use has been asserted. (*Millview* at pp. 900-901.) This
2 is because the policy behind forfeiture is to free up unused water for the beneficial use of others.
3 (*Ibid.*) Absent that competing claim to the water not used – there is simply no public policy
4 reason to find that the rights are lost.

5 Here, there is no competing claim for water in Millard Canyon; no clash of rights. There
6 is no competing claim because the water does not leave the Morongo Reservation. Without
7 substantial evidence of a competing claim to the water subject to License 659, the SWRCB
8 cannot revoke License 659.¹ (See *Millview*, 229 Cal.App.4th at p. 899 [SWRCB cannot find a
9 forfeiture occurred unless finding is “supported by evidence of the requisite clash of rights”], p.
10 903 [without substantial evidence in the record, SWRCB’s finding of forfeiture cannot stand].)

11 As the *Millview* Court explained, water rights are not lost in the abstract. With no
12 competing claim for water subject to License 659, and public policy disfavoring forfeiture, the
13 SWRCB *must* dismiss the Proposed Revocation and lift the cloud over the water rights and
14 supply for the Morongo Reservation.

15 IV. CONCLUSION

16 Based on the foregoing, Morongo again requests that the SWRCB dismiss the Proposed
17 Revocation.

18
19 Respectfully submitted,
SOMACH SIMMONS & DUNN

20
21 DATED: December 22, 2014

By 
Daniel Kelly

22 Attorneys for Morongo Band of Mission Indians
23
24
25
26

27
28 ¹ The lack of any competing claims is evidenced by the lack of any active protests to Morongo’s Petition for
Change of License 659.

PROOF OF SERVICE

I am employed in the County of Sacramento; my business address is 500 Capitol Mall, Suite 1000, Sacramento, California 95814; I am over the age of 18 years and not a party to the foregoing action.

On December 22, 2014 I served a true and correct copy of:

SUPPLEMENTAL AND RENEWED MOTION TO DISMISS PROPOSED REVOCATION OF LICENSE 659 (APPLICATION 553) OF THE MORONGO BAND OF MISSION INDIANS, MILLARD CANYON IN RIVERSIDE COUNTY

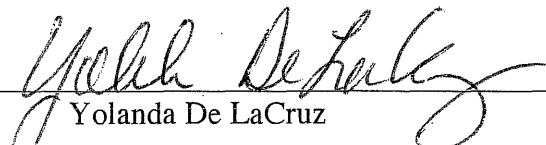
X (by mail) on all parties in said action listed on the attached service list, in accordance with Code of Civil Procedure §1013a(3), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At Somach Simmons & Dunn, mail placed in that designated area is given the correct amount of postage and is deposited that same day, in the ordinary course of business, in a United States mailbox in the City of Sacramento, California.

AND

X (by electronic service) I hereby certify that a true and correct copy of the foregoing will be e-mailed on December 22, 2014 as listed below:

Division of Water Rights Prosecution Team c/o Samantha Olson State Water Resources Control Board 1001 I Street Sacramento, CA 95814 solson@waterboards.ca.gov	Dana Heinrich State Water Resources Control Board Office of Chief Counsel 1001 I Street, 22nd Floor Sacramento, CA 95814 DHeinrich@waterboards.ca.gov
Karen Koch U.S. Department of the Interior Officer of the Solicitor 2800 Cottage Way, Suite W2928 Sacramento, CA 95825 karen.koch@sol.doi.gov	Steve Palmer Assistant Regional Solicitor U.S. Department of the Interior Officer of the Solicitor 2800 Cottage Way, Suite W2928 Sacramento, CA 95825 steve.palmer@sol.doi.gov
Mark St. Angelo Morongo Band of Mission Indians 12700 Pumarra Road Banning, CA 92220 MStAngelo@morongo-nsn.gov	

I declare under penalty of perjury that the foregoing is true and correct under the laws of the State of California. Executed on December 22, 2014, at Sacramento, California.


Yolanda De LaCruz