



EDMUND G. BROWN JR.
GOVERNOR

MATTHEW RODRIGUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

State Water Resources Control Board

December 1, 2015

VIA ELECTRONIC MAIL

TO: ATTACHED SERVICE LIST

DRAFT ORDER DECLINING TO REVOKE LICENSE 659 – THE MORONGO BAND OF MISSION INDIANS – SPRING ARISING IN MILLARD CANYON, RIVERSIDE COUNTY

Enclosed is a draft order in which the State Water Resources Control Board (State Water Board) declines to revoke License 659 (Application 553). A copy of this letter, the draft order, and written comments received regarding the draft order will be posted on the website dedicated to the Morongo Band of Mission Indians Revocation hearing:

http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/morongo_mission_indians/

The State Water Board will consider adopting the draft order at its Board meeting tentatively scheduled for **Tuesday, January 19, 2016**, at the Cal/EPA Headquarters Building at 1001 I Street in Sacramento. The State Water Board will issue a public notice of this meeting at least ten days in advance.

All interested persons and parties to the proceeding will have the opportunity to comment on the draft order at the State Water Board meeting. Comments should be limited to the general acceptability of the draft order or possible technical corrections. Parties may not introduce evidence at the State Water Board meeting.

Interested persons and parties are encouraged to submit their comments in writing. In order to be fully considered, written comments concerning the draft order must be received by the State Water Board by **Noon, Tuesday, December 29, 2015**.

Written comments are to be addressed and submitted to:

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
PO Box 100
Sacramento, CA 95812-0100

You may also submit your comments to Ms. Townsend by fax at (916) 341-5620, by email at commentletters@waterboards.ca.gov, or by hand delivery to the following location:

Jeanine Townsend, Clerk to the Board
Executive Office
State Water Resources Control Board
Cal/EPA Headquarters
1001 "I" Street, 24th Floor
Sacramento, CA

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

Couriers delivering comments must check in with lobby security and have them contact the Executive Office on the 24th floor at (916) 341-5600.

Please include the subject line, “**COMMENT LETTER – 01/19/16 BOARD MEETING: MORONGO REVOCATION HEARING.**” Any faxed or emailed items must be followed by a mailed or delivered hard copy with an original signature.

During the pendency of this proceeding, there shall be no ex parte communications regarding substantive or controversial procedural matters within the scope of the proceeding between State Water Board members or hearing team members and any of the other participants, including members of the prosecution team. (Gov. Code, §§ 11430.10-11430.80.)

If you have any non-controversial procedural questions, please contact Ernest Mona, Staff Engineer, at (916) 341-5359 or by email at Ernie.Mona@waterboards.ca.gov, or Nathan Weaver, Staff Counsel, at (916) 341-5184 or by email at Nathan.Weaver@waterboards.ca.gov.

Sincerely,



Michael Buckman, Chief
Hearings Unit
Division of Water Rights

ENCLOSURES: Service List
 Draft Order

SERVICE LIST
THE MORONGO BAND OF MISSION INDIANS
REVOCATION HEARING

(March 21, 2012; Revised 12/01/15)

<p>THE MORONGO BAND OF MISSION INDIANS Stuart L. Somach, Attorney Daniel Kelly, Attorney Somach, Simmons &Dunn 500 Capitol Mall, Suite 1000 Sacramento, CA 95814 ssomach@somachlaw.com dkelly@somachlaw.com</p>	<p>DIVISION OF WATER RIGHTS PROSECUTION TEAM Samantha Olson, Attorney State Water Resources Control Board 1001 I Street Sacramento, CA 95814 samantha.olson@waterboards.ca.gov</p>
<p>U.S. Department of the Interior Officer of the Solicitor Karen-Koch 2800 Cottage Way, Suite W2928 Sacramento, CA 95825 karen.koch@sol.doi.gov</p>	<p>Assistant Regional Solicitor U.S. Department of the Interior Officer of the Solicitor Steve Palmer 2800 Cottage Way, Suite W2928 Sacramento, CA 95825 steve.palmer@sol.doi.gov</p>
<p>Morongo Band of Mission Indians Mark St. Angelo 12700 Pumarra Road Banning, CA 92220 MStAngelo@morongo-nsn.gov</p>	

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

DIVISION OF WATER RIGHTS

ORDER WR 2016 – 00XX

In the Matter of License 659 (Application 553)

MORONGO BAND OF MISSION INDIANS

SOURCE: Springs Arising in Millard Canyon

COUNTY: Riverside

ORDER DECLINING TO REVOKE LICENSE 659

BY THE BOARD:

1.0 OVERVIEW

This matter comes before the State Water Resources Control Board (State Water Board or Board) pursuant to a 2003 Notice of Proposed Revocation for License 659 (Application 553) held by the Morongo Band of Mission Indians (Morongo Band) by the Division of Water Rights (Division). This proceeding included a protracted interlude as the California courts, and ultimately the California Supreme Court, addressed certain procedural issues. An evidentiary hearing record was developed based on evidence and testimony presented in a public hearing.¹ After consideration of the testimony and written evidence presented at the hearing and written closing statements, the State Water Board has determined that the record does not contain sufficient evidence to support a decision to revoke License 659 in light of the California Court of

¹ Citations are indicated as follows:

(1) Citations to the Reporter's Transcript are indicated by "RT" followed by the beginning page and line number and the ending page and line number. Pages and line numbers are separated by a colon. (e.g., RT 997:4-998:17.)

(2) Citations to Exhibits

a. All citations to exhibits in the evidentiary hearing record are designated by the name or abbreviation for the party that submitted the exhibit, followed by the exhibit number, followed by the page number or other location of the cited information in the exhibit, if necessary. (e.g., (MB 4, p. 1.)

b. The party abbreviations used herein are:

i. Prosecution Team: "PT"

ii. Morongo Band of Mission Indians: "MB"

Appeal's decision in *Millview County Water District v. State Water Resources Control Board* (2014) 229 Cal.App.4th 879.

2.0 FACTUAL AND PROCEDURAL BACKGROUND

The State Water Board's predecessor issued License 659 to the Southern Pacific Land Company (S.P. Land Company) in 1928. (PT 16.) As described in more detail in section 5.1, below, ownership of the license has changed several times since then. The license authorizes the diversion of 0.16 cubic feet per second (cfs) year-round for purposes of irrigation from an unnamed spring in Millard Canyon in Riverside County. (*Ibid.*) The spring is located within the Whitewater River watershed on property that used to be adjacent to the Morongo Indian Reservation. In 2002, the Morongo Band acquired the property and the license from Great Spring Waters of America, Inc. (Great Spring Waters). (MB 10, p. 4; MB 16.)

On April 28, 2003, the Assistant Deputy Director for the Division issued a Notice of Proposed Revocation (Notice) of License 659 to Great Spring Waters. (PT 40.) The Notice alleges the following:

1. Licensee has not applied the water authorized under License 659 to beneficial use as contemplated in the license and in accordance with the Water Code.
2. Licensee's water right should be deemed to have reverted to the public under section 1241 because Licensee has not applied the water to beneficial use for at least five consecutive years, and Licensee has provided no basis for determining that it should not revert.

By letter dated May 9, 2003, legal counsel for Great Spring Waters requested a hearing on the proposed revocation and also notified the State Water Board that the water right for License 659 had been assigned to the Morongo Band. (PT 41.) On August 25, 2003, the State Water Board issued a Notice of Public Hearing. Subsequently, the State Water Board granted the Morongo Band's request for a continuance, and issued a Revised Notice of Public Hearing on March 11, 2004. The key issue identified in the August 25, 2003 and March 11, 2004 notices was:

1. Should License 659 (Application 553) be revoked, in whole or in part, in accordance with Water Code section 1675?
 - a. Did Licensee or its predecessors in interest fail to use beneficially and in accordance with the Water Code, in whole or in part, the water authorized to be used under License 659 for the applicable statutory period? If so, what amount of water was unused during what period or periods of time?
 - b. Did Licensee or its predecessors in interest fail to comply with any of the terms or conditions of License 659? If so, which terms or conditions did Licensee or its predecessors in interest violate?

Before the hearing, the Morongo Band filed two petitions. The first petition sought, among other things, to disqualify the enforcement team. The second petition sought to continue the hearing, extend hearing-related deadlines, and establish a discovery schedule. In a letter ruling dated March 25, 2004, the hearing officer denied the petition for disqualification of the enforcement team and related matters. The hearing officer also denied the Morongo Band's request to establish a discovery schedule, but granted in part the request to continue the hearing and extend hearing-related deadlines. The Morongo Band filed a petition for reconsideration of the hearing officer's ruling, and the hearing officer postponed the hearing again pending action on the petition for reconsideration.

2.1 Due Process Litigation

As discussed in greater detail in Order [WRO 2004-0034](#), the State Water Board denied the Morongo Band's petition for reconsideration of the hearing officer's ruling. The petition for reconsideration challenged the hearing officer's ruling that due process did not require disqualification of the enforcement team. The gravamen of the Morongo Band's complaint was that, although the State Water Board separates advisory and enforcement staff within a given adjudicative proceeding, the same staff may serve different functions in unrelated proceedings. Accordingly, the attorney for the enforcement team in this proceeding had served as an advisor to the State Water Board in a separate and unrelated proceeding. The Morongo Band argued that the State Water Board would be biased in the enforcement team's favor as result of the enforcement attorney's role as an advisor in the other proceeding. Order WRO 2004-0034 provides relevant and extensive discussion regarding the procedures governing this proceeding

which were structured to satisfy due process requirements and afford the Morongo Band a fair hearing.

Prior to the State Water Board's adoption of WRO 2004-0034, the Morongo Band filed in superior court a petition for writ of mandate. (Wat. Code, § 1126; Code Civ. Proc., § 1094.5.)² In the petition, the Morongo Band contended that the hearing officer had abused his discretion and violated the Morongo Band's due process rights by denying the petition to disqualify the enforcement team. The trial court granted the petition for writ of mandate. The State Water Board appealed, and the Supreme Court of California ultimately reversed, upholding the State Water Board's procedures as proper. (*Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4th 731.) As the Supreme Court explained, "[i]n construing the constitutional due process right to an impartial tribunal, we take a more practical and less pessimistic view of human nature. In the absence of financial or other personal interest, and when rules mandating an agency's internal separation of functions [in a given adjudicative proceeding] and prohibiting ex parte communications are observed, the presumption of impartiality can be overcome only by specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias." (*Id.* at p. 741.)

2.2 Motion to Dismiss and Hearing

After resolving the litigation, the State Water Board issued a revised notice of the hearing on the proposed revocation. The State Water Board issued a January 26, 2012 Notice of Hearing and a February 10, 2012 Notice of Rescheduling of Public Hearing for a hearing to commence on May 21, 2012. The key issues for the January 26, 2012 notice were:

1. Should License 659 (Application 553) be revoked, in whole or in part, in accordance with Water Code section 1675?

² Water Code section 1126 authorizes judicial review of a "final action by the board." Orders on reconsideration are often a final action, subject to judicial review, but not all orders on reconsideration are a final action. Some may only address interim issues in a proceeding and may authorize further action by staff or a hearing officer following the reconsideration order. Such interim orders are not a final action subject to judicial review under Water Code section 1126. In this instance, the State Water Board did not state the order on reconsideration as interim and did not challenge the judicial petition on jurisdictional grounds. The Board's litigation decision not to challenge the judicial petition as unripe was based on unique circumstances that are unlikely to recur.

2. Did licensee or its predecessors-in-interest fail to use beneficially and in accordance with the Water Code, in whole or in part, the water authorized to be used under License 659 for the applicable statutory period? If so, what amount of water was unused during what period or periods of time?

3. Did licensee or its predecessors-in-interest fail to comply with any of the terms or conditions of License 659? If so, which terms or conditions did licensee or its predecessors-in-interest violate?

The State Water Board's Division of Water Rights Prosecution Team (Prosecution Team) and the Morongo Band submitted notices of intent to appear and hearing exhibits. On May 10, 2012, the Morongo Band filed a Motion to Dismiss or, in the alternative, to decline to revoke License 659 (Motion to Dismiss). In its motion, the Morongo Band informed the Board for the first time that, on June 29, 2005, the Morongo Band had conveyed legal title to License 659 to the Bureau of Indian Affairs, United States Department of the Interior (BIA) to be held in trust for the benefit of the Morongo Band. In the motion, the Morongo Band argued that BIA was an indispensable party to the revocation proceeding because BIA holds title to the license, and the proceeding must be dismissed because BIA cannot be joined due to its sovereign immunity.

Notwithstanding the Morongo Band's motion to dismiss, on May 21, 2012, the State Water Board held a hearing on the proposed revocation of License 659, in accordance with the Water Code and State Water Board's regulations. (See Wat. Code, §§ 1675, 1675.1; Cal. Code Regs., tit. 23, §§ 850-852.) The parties to the proceeding were the Morongo Band and Prosecution Team. Mary Ann Andreas, Tribal Vice-Chair for the Morongo Band, and Kevin Bearquiver, Deputy Regional Director – Trust Services for BIA, Pacific Regional Office submitted policy statements against the proposed revocation. Mr. Bearquiver's policy statement stated that BIA holds the land served by License 659 and "any appurtenant water rights." The policy statement asserts that there is a "serious legal issue" concerning whether the license could be revoked with allegedly inadequate notice to BIA. The Prosecution Team and Morongo Band submitted closing briefs before the July 20, 2012 deadline.

2.3 Ruling on Sovereign Immunity and Indispensable Party Issues

On December 7, 2012, the hearing officer issued a ruling denying the Morongo Band's May 10, 2012 motion to dismiss the revocation proceeding. The ruling acknowledged that legal title to License 659 probably had been transferred to the BIA along with the land served by the license. However, the hearing officer determined that the proceeding should not be dismissed for failure to join BIA because the indispensable party statutes upon which the Morongo Band had relied were not applicable to administrative hearings. The hearing officer rejected the Morongo Band's argument that sovereign immunity barred BIA's participation because the United States had waived sovereign immunity pursuant to title 43, United States Code, section 666 (hereinafter the McCarran Amendment).

Under the McCarran Amendment, the United States consents to joinder as a defendant in any suit "for the adjudication of rights to the use of water of a river system or other source" (43 U.S.C. § 666(a)(1)), and in any suit "for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights and the United States is a necessary party to such suit" (*id.*, § 666(a)(2)). The hearing officer determined that the 1917–1929 comprehensive adjudication of appropriative rights to the Whitewater River Stream System (hereinafter Whitewater Adjudication) included License 659.³ (PT 7 (abstract of claims); PT 50 (decree).) Thus, this revocation proceeding is "for the administration of such rights" within the meaning of subdivision (a)(2) of the McCarran Amendment. For this reason, the hearing officer found that the United States had waived sovereign immunity and could be joined in the revocation proceeding.

The hearing officer's December 7, 2012 ruling determined that BIA should be afforded the opportunity to participate in the revocation hearing, in order to ensure compliance with Water Code section 1675. This statute requires the State Water Board to provide the licensee with notice and an opportunity for a hearing before revoking a license. The hearing officer ordered

³ On December 9, 1938, the Riverside County Superior Court determined the rights of various claimants to use water from the Whitewater River and its tributaries by decree. Paragraph 47 of the decree identifies the Southern Pacific Land Company's right to the natural or developed flow of the spring rising in Millard Canyon for domestic, stockwatering, and irrigation use within 32.5 acres within the SW1/4 of Section 32, T2S, R2E, SBB&M. The decree recognized rates and priority from Diversion 28 for this place of use as follows: (a) 0.12 cfs with priority of January 1, 1877 and (b) 0.16 cfs with priority of January 3, 1917. (PT 50 (decree, p. 26, ¶ 47).) The 0.16 cfs rate with the 1917 priority is based on License 659. (PT 1, p. 2.)

that the hearing would be reopened to the extent necessary to allow the BIA to participate and gave the BIA until February 20, 2013, to submit a notice of intent to appear.

On February 20, 2013, BIA made a special appearance to contest the State Water Board's jurisdiction. BIA conceded that the McCarran Amendment provided a potential waiver of sovereign immunity, (Special Appearance of the United States Department of the Interior, Bureau of Indian Affairs to Contest Jurisdiction Re: Non-Waiver of Sovereign Immunity, February 20, 2013, p. 5 [hereinafter the Special Appearance]), and appears to have conceded that the Whitewater Adjudication constitutes a comprehensive general stream adjudication within the meaning of the McCarran Amendment, (*id.* at p. 7). The agency argued, however, that the United States has only consented to suit in a court under the McCarran Amendment and that the statute did not waive sovereign immunity with respect to "purely administrative" proceedings. BIA asserted that the Board's license revocation proceeding was "purely administrative," and, therefore, that the United States had not waived sovereign immunity. BIA also asserted that the Riverside County Superior Court held exclusive jurisdiction over the Whitewater Adjudication. BIA argued that the proceeding should be dismissed because BIA cannot be involuntarily joined as a party and, therefore, the Board cannot revoke the license in accordance with Water Code section 1675.

2.4 Millview Decision and Supplemental and Renewed Motion to Dismiss

On September 11, 2014, the California Court of Appeal, First Appellate District issued a decision in *Millview County Water District v. State Water Resources Control Board* (2014) 229 Cal.App.4th 879. The court held that the forfeiture of a pre-1914 water right for failure to use water under the right requires the assertion of a conflicting claim to use the water at issue during the period of non-use. On December 22, 2014, the Morongo Band filed a supplemental and renewed motion to dismiss the proposed revocation of License 659. In this motion, the Morongo Band argued that there is no competing claim for the water subject to License 659 and noted the lack of active protests to the Morongo Band's pending petition for change of License 659. The Morongo Band also renewed and incorporated by reference arguments made in its previous filings. The Prosecution Team did not submit a response.

3.0 SOVEREIGN IMMUNITY AND INDESPENSIBLE PARTY ISSUES

The State Water Board must first evaluate its jurisdiction to conduct this proceeding. BIA maintains that the United States' waiver of sovereign immunity under the McCarran Amendment does not apply to this proceeding to consider revocation of License 659, preventing the Board from joining BIA and thus depriving the Board of jurisdiction. The hearing officer's December 7, 2012 ruling substantially addressed these issues. We have reviewed the Morongo Band's arguments and the new arguments that BIA has presented in its Special Appearance and conclude that the hearing officer's ruling was correct.

Pursuant to the McCarran Amendment, the United States grants consent to be joined as a party in any comprehensive state adjudication of the rights to a stream system. (43 U.S.C. § 666(a)(1).) Once an adjudication concludes, the McCarran Amendment also grants consent to join the United States in any suit for the administration of adjudicated water rights owned by the United States, provided that the United States is a necessary party to the suit. (*Id.*, § 666(a)(2).) The purpose of the McCarran Amendment was to prevent claims of federal sovereign immunity from interfering with the ability of the states to conduct comprehensive adjudications of the interrelated rights to stream systems and to conduct subsequent proceedings to administer those rights in accordance with state law. (*Colorado River Water Conservation District v. United States* (1976) 424 U.S. 800, 810-811, 819; *United States v. Hennen* (D.Nev. 1968) 300 F.Supp. 256, 261-263.)

Here, BIA has argued that it owns the water right at issue in trust for the Morongo Band and that the United States, through BIA, is an indispensable party to the revocation proceeding. The McCarran Amendment's waiver of sovereign immunity extends to water rights held by Indian tribes, (*Arizona v. San Carlos Apache Tribe of Arizona* (1983) 463 U.S. 545, 565-570), and to water rights held in trust by the United States for an Indian tribe, (*Colorado River Water Conservation District v. United States, supra*, 424 U.S. at pp. 809-813). For the McCarran Amendment to apply, the Board must determine whether the Whitewater Adjudication was sufficiently comprehensive to satisfy the McCarran Amendment and whether this proceeding to consider revocation of License 659 is a suit for the administration of an adjudicated water right. In response to arguments raised by BIA, the Board must also determine whether it may exercise jurisdiction over rights adjudicated as part of the Whitewater Adjudication.

3.1 The Whitewater Adjudication is Sufficiently Comprehensive to Satisfy the McCarran Amendment

BIA appears to concede that the Whitewater Adjudication constitutes a comprehensive general stream adjudication within the meaning of the McCarran Amendment. (Special Appearance, p. 7.) This is correct in light of the McCarran Amendment's text, which requires an "adjudication of rights to the use of water of a river system or other source," and does not require that every right to use water from the river system be included. This conclusion is also consistent with the Ninth Circuit Court of Appeals' decision in *United States v. State of Oregon* (9th Cir. 1994) 44 F.3d 759 [hereinafter *Oregon*]. There, the court found that a stream adjudication was sufficiently comprehensive to satisfy the McCarran Amendment even though the adjudication excluded post-1909 permitted rights and groundwater rights. (See generally *Oregon*, 44 F.3d at pp. 767-770.) The court reached this conclusion because the adjudication included all undetermined claims to surface water within the stream system. (*Id.* at p. 769.) "[W]hile the adjudication must avoid excessively piecemeal litigation of water rights, it need not determine the rights of users of all hydrologically-related water sources." (*Ibid.*) Similarly, the United States Supreme Court has held that a supplemental stream adjudication under Colorado's statutory scheme was sufficiently comprehensive to trigger the McCarran Amendment even though the adjudication did not include previously adjudicated water rights. (*United States v. District Court in and for Water Div. No. 5* (1971) 401 U.S. 527, 529-530.) The Whitewater Adjudication comprehensively adjudicated all appropriate water rights to the Whitewater River stream system. (PT 50, p. 2.) Therefore, the Whitewater Adjudication is sufficiently comprehensive to satisfy the McCarran Amendment's requirements.

3.2 This Revocation Proceeding is a Suit within the McCarran Amendment's Waiver of Sovereign Immunity

BIA contends that this revocation proceeding is not a suit for the administration of adjudicated water rights within the McCarran Amendment's scope. This argument misapplies the case law and misunderstands California's statutory scheme for the administration of water rights. In *Oregon*, the United States advanced a similar argument that the McCarran Amendment did not apply to Oregon's statutory adjudication of water rights in the Klamath River system because the first stage of the adjudication occurred as an administrative proceeding before the Oregon

Water Resources Department. (*Oregon*, 44 F.3d at p. 765.) According to the United States' argument, only traditional lawsuits initiated in a court and tried exclusively before a judge fall within the McCarran Amendment's scope. (*Ibid.*) The Ninth Circuit expressly rejected this argument.

Oregon's adjudication was a "suit," per the court, because the state's administrative process was but the first stage of a single proceeding that culminated before a court. (*Oregon*, 44 F.3d at p. 765.) This was consistent, said the court, with the McCarran Amendment's legislative history and statutory purpose. When Congress enacted the McCarran Amendment, many western states, including Oregon, Colorado, Arizona, California, and Nevada, had established statutory adjudication procedures that include as a central feature the active participation of administrative agencies. (*Id.* at p. 765.) These were precisely the comprehensive state systems for adjudicating western water rights that Congress had in mind when it waived sovereign immunity. (*Id.* at pp. 767, 767 fn. 9.) The fact that adjudications under some such systems began at the administrative level was immaterial. (*Id.* at pp. 766-767.)

Oregon leaves no doubt that the original Whitewater Adjudication constituted a suit to adjudicate rights to a stream system within the McCarran Amendment's meaning. (43 U.S.C. § 666(a)(1).) When our own Legislature adopted a statutory scheme for stream adjudications, it looked to Oregon as a model. (See *Oregon*, 44 F.3d at 765; 2 Hutchins, *Water Rights Law in the Nineteen Western States* (1974) pp. 456-458.) Like Oregon, California's stream adjudications begin with an administrative review and determination of water rights claims and culminate in a judicial proceeding and a court decree. (See generally *Wat. Code*, §§ 2500-2900; see also generally *Stats. 1913*, ch. 586, §§ 24-36.) Proceedings begin with a petition (*Wat. Code*, § 2525; see also *Stats. 1913*, ch. 586, § 24), proceed through a notice process (*Wat. Code*, §§ 2526-2559; see also *Stats. 1913*, ch. 586, §§ 24-25), and an investigation by the State Water Board (*Wat. Code*, §§ 2550-2555; see also *Stats. 1913*, ch. 586, §§ 24, 30). The Board issues a preliminary report, (*Wat. Code*, §§ 2600-2604), hears objections, (*Wat. Code*, §§ 2650-2653; see also *Stats. 1913*, ch. 586, §§ 26-28), enters an order of determination, (*Wat. Code*, §§ 2700-2702; see also *Stats. 1913*, ch. 586, § 31), and submits the order, transcript of testimony, and original evidence to the appropriate superior court, (*Wat. Code*, § 2750; see also *Stats. 1913*, ch. 586, § 31).

These submissions constitute the pleadings in an action before the superior court, (Wat. Code, § 2760; see also Stats. 1913, ch. 586, § 32), for which the court sets a hearing, (Wat. Code, §§ 2751-2756; see also Stats. 1913, ch. 586, § 32), and receives and hears objections from the parties to the adjudication, (Wat. Code, §§ 2757-2759, 2761, 2763-2763.5; see also Stats. 1913, ch. 586, §§ 32, 34), in accordance with the rules governing civil actions, (Wat. Code, § 2764; see also Stats. 1913, ch. 586, § 32). The court may join the state of California as a party, (Wat. Code, § 2765; see also Stats. 1913, ch. 586, § 32), appoint its own experts, (Wat. Code, § 2766), take additional evidence, (Wat. Code, § 2767; see also Stats. 1913, ch. 586, § 32), and refer evidentiary matters back to the State Water Board for further determination, (Wat. Code § 2767; see also Stats. 1913, ch. 586, § 35 [court may order State Water Board to prepare hydrographic survey]). After the superior court completes its hearing or upon motion of the Board if no party files an exception to the order of determination, the court shall enter a decree determining the water rights of all persons involved in the proceedings. (Wat. Code, §§ 2760, 2768; see also Stats. 1913, ch. 586, §§ 32, 34, 36.) Appeals from the decree may be taken in the same manner and effect as in civil cases. (Wat. Code, § 2771; see also Stats. 1913, ch. 586, § 43.) This decree is generally conclusive as to the rights of all existing claimants upon the stream system. (See Wat. Code, §§ 2773-2783; see also Stats. 1913, ch. 586, §§ 34, 36.)

Our predecessor, the California Department of Public Works – Division of Water Rights (DPW-Water Rights), conducted the Whitewater Adjudication in accordance with this procedure as it was then set forth in the Water Commission Act.⁴ (PT 50, pp. 5-11.) Consistent with the Ninth Circuit’s reasoning in *Oregon* and the McCarran Amendment’s legislative history, the Whitewater Adjudication is clearly a suit “for the adjudication of rights to the use of water of a river system” and subject to the McCarran Amendment’s waiver of sovereign immunity. (43 U.S.C. § 666(a)(1).) In the same manner, actions to administer the rights adjudicated as part of the Whitewater Adjudication are suits for which the United States has waived sovereign immunity. (See *id.*, § 666(a)(2).) Once a decree is issued under California’s statutory scheme, the State Water Board and the appropriate superior court retain concurrent jurisdiction to address incompletely perfected appropriations from the stream system (see Wat. Code, §§ 2801-2803, 2806-2819), abandoned appropriations (see *id.*, § 2818), changes to permits and licenses (*id.*, § 2819), and the revocation of permits and licenses (see *id.*, §§ 2818, 2820). The

⁴ Stats. 1913, ch. 586, §§ 24-36.

State Water Board has continuing authority to revoke permitted or licensed water rights included in the decree, subject to approval by the appropriate superior court by supplemental decree upon completion of judicial review. (*Id.*, § 2820.)

Notwithstanding the Ninth Circuit ruling in *Oregon*, BIA cites the First Circuit Court of Appeals' decision in *United States v. Puerto Rico* (1st Cir. 2002) 287 F.3d 212 [hereinafter *Puerto Rico*] as persuasive authority in support of BIA's argument that these proceedings to revoke License 659 are not a suit within the McCarran Amendment's scope. The *Puerto Rico* decision concerned the question of whether the Navy could be compelled to participate in proceeding to impose conditions on an individual water right permit as part of a purely administrative proceeding. (*Id.* at pp. 213-214, 219.) Under the administrative process at issue in *Puerto Rico*, "no court officer is involved; the details of the process are spelled out in the [Puerto Rico Department of Natural and Environmental Resources]'s regulations; and the Secretary's decision is final unless an aggrieved party seeks review within 30 days." (*Id.* at p. 214.) The First Circuit held that "this type of administrative proceeding, wholly lacking any integrated judicial involvement" is not a suit. (*Id.* at p. 219.) *Puerto Rico*, however, did not involve a water right that had been adjudicated in a comprehensive stream adjudication, (*id.* at p. 215), nor was the administrative proceeding part of a seamless, integrated administrative and judicial process for determining and administering water rights, (*id.* at p. 219). Because of this, the First Circuit did not and could not have addressed whether suits "for administration of such rights" may begin in an administrative forum as part of a seamless system. (See 43 U.S.C. § 666(a)(2).)

Although the *Puerto Rico* court held that the McCarran Amendment did not apply to the administrative proceeding at issue, it made considerable effort to distinguish *Oregon*. Unlike the statute at issue in *Oregon*, Puerto Rico's "Law of Waters does not establish a seamless process with both administrative and judicial components. Rather, it contemplates a purely administrative proceeding—a proceeding that ordinarily will terminate with a final order of the Secretary." (*Puerto Rico*, 287 F.3d at 219.) Unlike the Puerto Rico statute, a seamless administrative-judicial scheme like Oregon's places the court in the role of independent adjudicator. (*Id.* at p. 220.) Likewise, California's seamless statutory scheme appoints the appropriate state court as the independent and final arbiter of the water rights at issue. (See Wat. Code, §§ 2760, 2768, 2820; Stats. 1913, ch. 586, § 32.) The Ninth Circuit's *Oregon* analysis provides the suitable framework for resolving McCarran Amendment issues involving

California's integrated statutory adjudication scheme. The First Circuit's *Puerto Rico* decision is inapposite.

BIA cites *Orff v. United States* (2005) 545 U.S. 596, 601-602 and other cases for the proposition that waivers of sovereign immunity must be strictly construed in the government's favor and must be unequivocally expressed in the statutory text. However, a waiver of sovereign immunity is not accomplished through a "ritualistic formula." (*Franchise Tax Board v. United States Postal Service* (1984) 467 U.S. 512, 521, quoting *Keifer & Keifer v. Reconstruction Finance Corp.* (1939) 306 U.S. 381, 389.) The plain language of the McCarran Amendment expressly waives sovereign immunity. (*Oregon*, 44 F.3d at 765; *Puerto Rico*, 287 F.3d at 216.) The question here is not whether sovereign immunity has been waived, but whether a particular proceeding falls within the scope of the waiver. "[J]ust as 'we should not take it upon ourselves to extend the waiver beyond that which Congress intended[,] ... [n]either, however, should we assume the authority to narrow the waiver that Congress intended.'" (*United States v. Idaho* (1993) 508 U.S. 1, 6 (quoting *Smith v. United States* (1993) 507 U.S. 197, 206) [alterations in original].)

The United States Supreme Court has repeatedly looked to legislative intent to construe the scope of the McCarran Amendment's unequivocal waiver of sovereign immunity. Thus, in *Arizona v. San Carlos Apache Tribe of Arizona*, *supra*, 463 U.S. at p. 564, the Court read the McCarran Amendment's scope to include water rights held by Indian tribes to effectuate Congress's purpose of "deal[ing] with a general problem arising out of the limitations that federal sovereign immunity placed on the ability of the States to adjudicate water rights." Similarly, in *Colorado River Water Conservation District v. United States*, *supra*, 424 U.S. at pp. 810-812, the Supreme Court determined that the objectives and legislative history of the McCarran Amendment support including the adjudication of federal reserved water rights held by the United States in trust for Indian tribes within the scope of the McCarran Amendment's waiver. In *United States v. District Court for Eagle County* (1971) 401 U.S. 520, 525, the Supreme Court looked to legislative history to evaluate how comprehensive an adjudication must be to fit within the McCarran Amendment's scope. Likewise, it is appropriate for the State Water Board to examine Congress's intent.

BIA's contention that revocation proceedings are not suits subject to the McCarran Amendment would require the State Water Board to conclude that Congress intended the term "suit" to have two different meanings in adjacent subdivisions of the same statute. But the meaning of the term "suit" should be interpreted consistently, and *Oregon* is clear that the McCarran Amendment's scope includes suits that begin in a proceeding before a state administrative agency and culminate before a court of law. Had Congress intended the plain meaning of "suit" in one subdivision to have a special, separate meaning in the next subdivision, it could have said so explicitly. (See, e.g., *Lamie v. United States Trustee* (2004) 540 U.S. 526, 534 [when a statute's language is plain, the function of the courts is to enforce it according to its terms]; *Hartford Underwriters Insurance Co. v. Union Planters Bank* (2000) 530 U.S. 1, 6 [same]; *United States v. Ron Pair Enterprises, Inc.* (1989) 489 U.S. 235, 241 [same]; *Carminetti v. United States* 242 U.S. 470, 485 (1917) [same].) We see no evidence to support imputing such convoluted intent to Congress. Moreover, the BIA's interpretation is inconsistent with the legislative history of the McCarran Amendment, which indicates that Congress intended to prevent claims of federal sovereign immunity from interfering with the ability of the states not just to conduct comprehensive stream adjudications, but also to administer water rights after they have been adjudicated. (*Colorado River Water Conservation District v. United States*, *supra*, 424 U.S. at pp. 810-811, 819-820; *United States v. Hennen*, *supra*, 300 F.Supp. at pp. 261-263.)

For the foregoing reasons, the State Water Board finds that the proceedings to revoke License 659 are a suit for the administration of adjudicated water rights to which the United States has waived sovereign immunity.

3.3 The State Water Board and Riverside Superior Court Exercise Concurrent Jurisdiction Over the Whitewater Adjudication

Finally, BIA asserts that, because the Riverside County Superior Court entered a decree effectuating the Whitewater Adjudication upon the completion of a proceeding by the State Water Board's predecessor agency, the Riverside County Superior Court retains sole jurisdiction over the Whitewater Adjudication. As largely explained above, this view is inconsistent with California's statutory scheme for stream adjudications. The Board and the Riverside County Superior Court exercise concurrent jurisdiction over the Whitewater Decree,

including proceedings to revoke licenses included in the decree. (See Wat. Code, § 2820.) Nevertheless, BIA insists that *State Engineer v. South Fork Band of the Te-Moak Tribe* (9th Cir. 2003) 339 F.3d 804 [hereinafter *Te-Moak Tribe*] and *United States v. Alpine Land & Reservoir Co.* (9th Cir. 1999) 174 F.3d 1007 [hereinafter *Alpine Land*] preclude the State Water Board from exercising jurisdiction over this license revocation proceeding. This argument is a non-sequitur.

In *Te-Moak Tribe*, the Ninth Circuit resolved whether Nevada's Sixth Judicial District Court or the United States District Court for the District of Nevada had the proper jurisdiction to administer a comprehensive stream adjudication decree first entered by the state court. (*Te Moak Tribe*, 339 F.3d at pp. 807-808.) In resolving the jurisdictional question, the court interpreted the McCarran Amendment's phrase "the court having jurisdiction" to incorporate the longstanding doctrine of prior exclusive jurisdiction. (*Id.* at p. 814.) Because the Nevada state court was the first to exercise jurisdiction, the Ninth Circuit found in the state court's favor. (*Ibid.*)

Similarly, in *Alpine Land*, the Ninth Circuit found that the United States District Court for the District of Nevada had exclusive jurisdiction over two other water rights adjudications because the federal court exercised jurisdiction first. (*Alpine Land*, 174 F.3d 1007, 1012-1013.) Such jurisdictional disputes between state and federal courts bear no meaningful relationship to California's seamlessly integrated procedure for stream adjudications and their subsequent administration in which the Board and an appropriate superior court share jurisdiction. The Board has concurrent jurisdiction to initiate revocation proceedings pursuant to sections 1675 and 2820 of the Water Code. Water Code section 2820 seamlessly integrates the revocation and decree administration proceedings.

3.4 Conclusion

The State Water Board finds that the hearing officer's December 7, 2012 ruling on the McCarran Amendment was correct. The McCarran Amendment waives the sovereign immunity of the United States with respect to the administration of License 659 under California's integrated statutory adjudication and administration procedures. BIA may be properly joined as a party. The State Water Board afforded the BIA notice and an opportunity for a hearing, as required by

Water Code section 1675. The Board may properly exercise jurisdiction over this license revocation proceeding.

4.0 THE LAW GOVERNING REVOCATION OF A LICENSE

Having determined that the State Water Board has properly exercised jurisdiction over this proceeding to consider revocation of License 659, we now review the matter on its merits. We begin by reciting the applicable legal standard.

4.1 Statutory Requirements

Section 1241 of the Water Code provides that:

If the person entitled to the use of water fails to use beneficially all or any part of the water claimed by him or her, for which a right of use has vested, for the purpose for which it was appropriated or adjudicated, for a period of five years, that unused water may revert to the public and shall, if reverted, be regarded as unappropriated public water. That reversion shall occur upon a finding by the board following notice to the permittee, licensee, or person holding a livestock stockpond certificate or small domestic use, small irrigation use, or livestock stockpond use registration under this part and a public hearing if requested by the permittee, licensee, certificate holder, or registration holder.

(Wat. Code, § 1241.)⁵

Section 1675, subdivision (a) of the Water Code provides that:

If, at any time after a license is issued, the board finds that the licensee has not put the water granted under the license to a useful or beneficial purpose in conformity with this division or that the licensee has ceased to put the water to that useful or beneficial purpose, or that the licensee has failed to observe any of the terms and conditions in the license, the board may revoke the license and declare the water to be subject to appropriation in accordance with [Part 2, Division 2 of the Water Code].

(Wat. Code, § 1675, subd. (a).)

⁵ There is an analogous rule for appropriative water rights developed in accordance with the common law before December 19, 1914, the effective date of the Water Commission Act, which established the water right permit and license system (See *Smith v. Hawkins* (1895) 110 Cal. 122, 127 “[A] continuous nonuser for five years will forfeit the [water] right”).

Section 2820 of the Water Code provides that:

After revocation by the board of a permit or license relating to a right included in the [comprehensive stream adjudication] decree and upon completion of court review of the board's action under Article 3 (commencing with Section 1126) of Chapter 4 of Part 1, if court review is sought, the court shall, upon motion of the board or any interested party, enter a supplemental decree denying the right involved.

(Wat. Code, § 2820.)

4.2 **Millview Decision**

In *Millview County Water District v. State Water Resources Control Board* (2014) 229 Cal.App.4th 879 [hereinafter *Millview*], the California Court of Appeal held that forfeiture of a pre-1914 appropriative water right for failure to use water under the right requires the assertion of a conflicting claim to use the water at issue during the period of nonuse. Forfeiture does not occur “in the abstract” merely because an appropriator uses less water than the maximum claimed appropriation for a five year period. (*Millview*, 229 Cal.App.4th at p. 900.) Instead, forfeiture occurs where “the original claimant’s use of less than the full appropriation lasts for at least five years and does not end before the assertion of [a] conflicting claim.” (*Id.* at p. 903.) Conversely, in the absence of a conflicting claim, a water rights holder whose use falls below the full appropriation for five years or more may nonetheless resume full use at any time. (*Ibid.*)⁶

Millview describes two examples of methods for establishing a conflicting claim by another appropriator for purposes of establishing forfeiture. First, a conflicting claim exists when “another claimant has actually appropriated the water otherwise covered by the original claim [at issue] and has perfected that appropriation by making beneficial use of the surplus water.” (*Millview*, supra, 229 Cal.App.4th at p. 903.) Second, a conflicting claim is established where another claimant “has attempted to appropriate the water by instituting proceedings to establish

⁶ Although the *Millview* court purported to interpret section 1241 of the Water Code, the case concerned a pre-1914 water right. For this reason, the holding is arguably distinguishable from one involving a permit or license. Water Code section 1241 expressly authorizes the State Water Board to revoke a permit or license after five years of non-use, and does not require the Board to find that a conflicting claim has been asserted. Under the circumstances of this case, however, we perceive no reason why a different rule should be applied to the Morongo Band's post-1914 water right license.

a right[,]” for example by seeking a permit from the Board to appropriate the surplus water or commencing a legal action for a declaration of rights. (*Ibid.*)

In addition, the *Millview* court recognized that conflicting claims are not limited to a new appropriation and beneficial use by another appropriator. Other situations can give rise to a conflicting claim and support a finding of forfeiture. One scenario involves the need for water to remain instream to protect public trust uses. (See *id.* at p. 904-905, 904 fn. 22.) Further, in certain circumstances a finding that a stream is fully appropriated can satisfy the conflicting claim requirement if the Board made the fully appropriated stream finding assuming nonuse of the subject right. (*Id.* at p. 904.) A finding that a stream is fully appropriated may not establish a conflicting claim, however, if the Board failed to consider the claim subject to forfeiture proceedings when making its finding, or if the Board assumed the full, claimed amount of the right in question when it made its finding. (*Ibid.*)

The conflicting claims analysis required by the *Millview* decision may involve difficult issues of proof. (*Millview*, *supra*, 229 Cal.App.4th at p. 904.) Nonetheless, the *Millview* court recognized that prior decisions have recognized “flexibility” in the manner of asserting and recognizing a conflicting claim. (*Id.*, at p. 901.) A conflicting claim need not be asserted via a formal notice. (*Ibid.*) Moreover, the question of whether or not the conflicting use of water was permissive is not relevant. (*Id.* at pp. 901-902).

5.0 LICENSE 659 (APPLICATION 553)

5.1 History of License 659

On October 10, 1918, the State Water Board’s predecessor, DPW-Water Rights issued Permit 486 to S.P. Land Company, pursuant to Application 553, the priority of which dates back to January 3, 1917. (PT 13.) Permit 486 authorized S.P. Land Company to appropriate 2.75 cfs of water by direct diversion from an Unnamed Spring in Millard Canyon, during the season of January 1 to December 31, for irrigation purposes on 550 acres of land owned by S.P. Land Company. (PT 2, p. 2; PT 13; PT 15.)

In 1928, DPW-Water Rights staff conducted a licensing inspection of the permitted project. (PT 16.) Based on the inspection report, which evaluated the amount of water actually applied to beneficial use under the permit, DPW-Water Rights issued License 659 to S.P. Land Company on January 31, 1928. (PT 2, p. 2; PT 16.) The license authorized the direct diversion of water from a “spring arising in Millard Canyon” at a maximum direct diversion rate of 0.16 cfs,⁷ during the diversion season of January 1 through December 31, for irrigation use on 13 acres of land. (PT 16.) The licensed description of the lands or the place where such water may be put to beneficial use is specifically defined as follows: 10 acres within the NE1/4 of SW1/4 of Section 32, and 3 acres within the SE1/4 of SW1/4 of Section 32, all within T2S, R2E, SBB&M. (*Ibid.*)

The State Water Board’s records show that ownership of License 659 changed several times. On March 17, 1930, ownership changed from S.P. Land Company to Southern Pacific Railroad Company, which later became known as Southern Pacific Transportation Company (Southern Pacific). (PT 18.) On December 5, 1989, ownership changed to Coussoulis Development Company, (PT 26), and then to Steele Foundation, Inc., on June 4, 1990 (PT 27). On May 25, 1994, the Division of Water Rights acknowledged receipt of notification that ownership had changed to Ferydoun and Doris Ahadpour, who had purchased the underlying real property in 1991. (PT 04; PT 28.) On March 30, 2000, Ferydoun and Doris Ahadpour conveyed License 659 to Great Spring Waters. (PT 4; PT 36; PT 39; MB 22.) On November 1, 2002, the Morongo Band notified the State Water Board, via Notice of Assignment dated October 31, 2002, that Great Spring Waters had sold the property to the Morongo Band. (MB 16.) Finally, BIA accepted the June 12, 2001 Grant Deed in trust for the Morongo Band on June 29, 2005. (MB 15; Closing Brief of Morongo Band of Mission Indians, Exhibit D, July 20, 2012.) The Morongo Band did not notify the State Water Board of its assignment to BIA until May 10, 2012. (Motion to Dismiss, p. 2:12.)

5.2 Related Water Rights

Four other water rights are relevant to this discussion including Licenses 660 and 174, and two pre-1914 appropriative rights. License 660 (Application 554) has a priority of January 3, 1917 and was issued to Southern Pacific on January 31, 1928. (PT 45, p. 1.) The point of diversion

⁷ Assuming year-round diversion at this rate, 0.16 cfs equals 116 acre-feet per annun (afa). (AFA = 0.16 cfs x 365 days x 1.9834 [conversion rate].)

for License 660 is the same unnamed spring identified in License 659 (also known as, S.P. Springs). (*Ibid.*) This license authorizes the direct diversion of 0.5 cfs from January 1 to December 31 of each year for domestic and industrial uses within N1/2 of Section 16, T3S, R2E, SBB&M. (*Ibid.*) Southern Pacific transferred License 660 to Cabazon Water District in the early 1960s. (See PT 46; PT 24.) A witness for the Morongo Band testified that the Morongo Band acquired License 660 in 2001. (MB 5, p. 5.) The Division reissued the license as an amended license on December 28, 2011.

The State Water Board's predecessor issued License 174 (Application 84) to Cabazon Water District on February 27, 1923. This license authorizes the direct diversion of 2.6 cfs from January 1 to December 31 of each year for domestic, and irrigation uses within the Cabazon Water District service area. (PT 48.) This license covers a separate point of diversion and a separate place of use from Licenses 659 and 660. (PT 1, p. 1.) The Division assigned License 174 to the Morongo Band on November 27, 2002, and reissued an amended license on December 28, 2011. (A000084, Correspondence File, Cat. 1, Vols. 1 & 2; A000554, Correspondence File, Cat. 1, Vols. 1 & 2).⁸

The Whitewater Decree recognized a pre-1914 appropriative water right held by S.P. Land Company. Under the decree, S.P. Land Company was entitled to draw 0.12 cfs, with a priority date of 1877, from the unnamed spring for irrigation, stock watering, and domestic purposes. (PT 50, p. 26, ¶ 47.) The authorized place of use is 32.5 acres within the SW1/4 of Section 32, T2S, R2E, SBB&M. (*Ibid.*) The record contains no evidence of a change by the Superior Court to this water right's diversion rate under the Whitewater Decree. This pre-1914 right's chain of ownership is not specifically developed in the record, but it most likely follows the chain of title for the place of use. (See, e.g., MB 15, p. 3 [transferring parcel to Morongo Band of Mission Indians with "title and interest in and to all water rights and mineral rights attached to said property."].) A witness for the Morongo Band also testified that the Morongo Band acquired the pre-1914 right in 2002. (MB 5, p. 5.)

⁸ The State Water Board may take official notice of this information pursuant to title 23, section 648.2 of the California Code of Regulations (authorizing the State Water Board to take official notice of matters that may be judicially noticed) and section 452, subdivision (h) of the Evidence Code (authorizing judicial notice of facts that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy).

The Whitewater Decree recognized a second pre-1914 appropriative water right held by S.P. Land Company, also with a priority date of 1877, that authorized the diversion of 0.23 cfs from the same unnamed spring for railroad and domestic purposes. (PT 50, pp. 25-26, ¶ 46.)

5.3 The Morongo Band's Change Petitions

On January 24, 2006, the Morongo Band filed petitions to change and consolidate the authorized places of use, purposes of use, and method of diversion of three licensed water rights: Licenses 174, 659, and 660 (Applications 84, 553, and 554). (MB 10, p. 5; see also MB 4; RT 91:14-25.) On December 28, 2011, the Division approved two of the petitions and issued Amended Licenses 174 and 660 (Applications 84 and 554). (MB 10, pp. 5-6; see also RT 94:5-9.) The amended licenses authorize direct diversion or diversion to underground storage (Cabazon Storage Unit of the San Gorgonio Pass Basin) from January 1 through December 31 of each year, for municipal, domestic, industrial, irrigation, and stockwatering uses on defined survey sections within the Morongo Band's reservation. (State Water Resources Control Board, Notice of Petitions for Change for Licenses 174, 659, and 660 (Applications 84, 553, and 554) (Feb. 3, 2011).) The Division has not yet taken action on the petition to change License 659, pending the outcome of this proceeding.

6.0 FORFEITURE OF LICENSE 659 FOR NONUSE

6.1 There Is Sufficient Evidence in the Record to Establish Failure to Beneficially Use Water under License 659 for a Period of Five Years

There is sufficient information in the record for the State Water Board to conclude that water was not put to beneficial use as authorized by License 659 during three periods of time lasting five years or more: 1952-1960, 1962-1968, and 1991-1999.

6.1.1 The Record Supports a Finding of Non-Use between 1952 and 1960

The record shows that during this period of time, Southern Pacific owned License 659. (PT 18.) Southern Pacific also owned the decreed pre-1914 right described above, which authorized the diversion of 0.12 cfs year-round from the same source, for domestic, stock watering, and irrigation use within 32.5 acres within the SW1/4 of Section 32, T2S, R2E, SBB&M. (PT 50, p.

26, ¶ 47.) As previously described above, License 659's authorized place of use for irrigation is specifically defined as follows: 10 acres within the NE1/4 of SW1/4 of Section 32, and 3 acres within the SE1/4 of SW1/4 of Section 32, T2S, R2E, SBB&M. (PT 16.)

Southern Pacific submitted Reports of Licensee for 1952-1954, 1955-1957, and 1958-1960. (PT 19, pp 10-12.) However, the reported use of water for most of the period of record indicated that water was being used for purposes other than irrigation, the only authorized purpose of use for License 659. For the period 1952-1954, Southern Pacific reported water use as follows:

Approximately 116,000 gallons is average use in 24 hours by locomotives, and domestic service to an average of 35 people is about 0.18 second feet, with a maximum, for any one month, of 0.50 second feet. Total flow of springs is used for above purposes. This report is a statement of the total quantities of water used under Licenses 659 and 660 during the three year period in question.

(PT 19, p. 10.)

Unlike License 659, License 660 authorizes the use of water for domestic and industrial purposes. (See PT 45.) For the period 1955-1957, Southern Pacific's reported water use was "[d]omestic use, Section Labor Quarters, Cabazon California. Approximate use 200 gallons of water a day per person for lawns and evaporative coolers. Approximately 30 persons." (PT 19, p. 11.) For the period 1958-1960, Southern Pacific's reported water use of "amount unknown" for irrigation of eight to ten acres and to provide domestic water use for seven persons." (PT 19, p. 12.) As noted above, under a separate water right, Southern Pacific is also entitled to draw 0.12 cfs, with a priority date of 1877, from the unnamed spring for irrigation, stock watering, and domestic purposes within 32.5 acres within the SW1/4 of Section 32, T2S, R2E, SBB&M. (PT 50, p. 26, ¶ 47.)

Prosecution Team witness Mr. John O'Hagan concluded that there "may" have been an extended period of non-use of water during the nine-year period 1952 to 1960. (PT 1.) Mr. O'Hagan testified that, "[e]ven assuming water was used for irrigation in Section 32, by using a rate of 55 gallons per day per person for domestic use, and 1 cfs per 80 acres for irrigation, the estimated rate of diversion would be less than 0.13 cfs. This estimate is reasonably covered by

the 0.12 cfs decreed pre-1914 right. Therefore, there may be nine years of non-use under License 659 prior to 1961 (1952-1960).” (*Id.* at p. 3.) To prevent the establishment of water rights in excess of available water and in excess of the reasonable needs of the user, diverted water should be credited to the senior right to the limit of that right. (See e.g., Order WR 85-4, p. 5.) Only diversions that exceed the senior right or that are made under conditions not authorized by the senior right should be credited to the junior right. (*Ibid.*; cf. *Millview*, 229 Cal.App.4th at 905 [riparian landowner cannot perfect pre-1914 appropriative right without putting water to non-riparian use].)

The State Water Board concludes that there is sufficient evidence in the record to support a finding that no water was used under License 659 between 1952 and 1960. From 1952 to 1954 and from 1955 to 1957, Southern Pacific’s reported use of water for domestic and industrial uses most likely reflected Southern Pacific’s water use under License 660 (Application 554). Unlike License 659, License 660 authorizes the direct diversion of water from the unnamed spring (S.P. Springs) for domestic and industrial uses. (PT 45.) Although Southern Pacific reported use of water for irrigation between 1958 and 1960, this use should be attributed to the higher priority decreed pre-1914 right.

6.1.2 The Record Supports a Finding of Non-Use between 1962 and 1968

The record shows that during this period of time, Southern Pacific owned License 659. (PT 18.) In 1964, our predecessor, the State Water Rights Board, conducted a site inspection after Southern Pacific failed to report use of water for the period between 1961 and 1963. (PT 3, p. 1; PT 20; PT 21.) Prosecution Team witness Mr. Walt Pettit, provided a written declaration based on his recollection and review of filed documents (PT 3.1):

I conducted the site inspection on May 4, 1964 and [I] was accompanied by Richard Zimmer, Southern Pacific engineer, and Jack White, the local Southern Pacific foreman. I also interviewed Mrs. Hazel Koger, President of Cabazon County Water District. Southern Pacific was no longer using water under the license. Much of the piping was buried and was listed as “retired in place” on a 1962 railroad map. As far as the Company was concerned, use had either ceased completely or decreased to minor stockwatering.

(PT 3, p.1, ¶ 4.)

For A000553 [License 659], there were no irrigation facilities in place. There was a line to a house that might have been intact, and a trough for stock in place. If there was any use, it would have consisted of occasional stockwatering by a lessee. There were no cattle on the property at the time of inspection, and no one knew when last cattle were on the property or their number. Mr. White stated that the house had not been occupied by a caretaker for cattle for at least two years. I noted in my remarks that there was quite likely an extended period of nonuse, but temporarily postponed action on the license. Mr. Zimmer agreed to submit additional data and would attempt to get a clarification about the Company's intentions for License 659. I noted that a re-inspection would probably be required to confirm whatever information was submitted, "particularly if revocation is indicated." [PT Exhibit 20.]

(PT 3, pp.1-2, ¶ 6.)

The record indicates that after Mr. Pettit's inspection, Southern Pacific filed a Report of Licensee for the years 1961, 1962, and 1963 by cover of letter dated June 12, 1964. (PT 21; PT 22.) In that report, and contrary to Mr. Pettit's site inspection observations, Southern Pacific reported that 2,000 gallons per day were used throughout those years for stockwatering, irrigation and domestic purposes within 49.7 acres. (PT 21; PT 22.) A follow-up letter from Southern Pacific dated July 22, 1964, further explained:

Letter on file from Mr. Geo. Bailiff, tenant and actual user of water supply covered by License No. 659, shows distribution of water use appearing on report submitted for the year 1961 as between stockwatering, domestic and irrigation. Figures for years 1962 and 1963 supplied by Mr. Bailiff were blanket estimates; however, it was assumed, in lack of evidence to the contrary, that the same proportion held good.

(PT 21, p.5.)

Division engineer, D.J. Leve, conducted a follow-up inspection on April 16, 1968. (PT 3; PT 23, p. 2.) Mr. Leve reported: "No use has been made of water under this license for about 3 to 4 years other than some for non-licensed domestic and stockwatering uses." (PT 23, p. 2.) Mr. Leve's report also indicated that "[c]hanges in the diversion system by the Cabazon County Water District prevent the use of water under the amount and conditions of the license." (*Ibid.*) Mr. Leve concluded that "[t]here is no doubt that there was a lapse in use of water under this license for about 3 years." (*Id.* at p. 4.) Nonetheless, Mr. Leve did not recommend that any action be taken at the time in order to allow the licensee and the Cabazon County Water District to resolve the problem with the diversion system. (*Ibid.*)

The Prosecution Team introduced an aerial photo illustrating U.S. Geological Survey quadrangle maps showing T2S, R2E, Sections 29 and 32 for the year 1966. (PT 12.) As noted above, License 659's specified 13-acre place of use is located within the SW1/4 of Section 32. (PT 16.) Prosecution Team witness Mr. Mark Stretars testified based on his examination of the aerial photo that he did not see any evidence of irrigated acreage occurring in 1966. (RT 71:14-71:17.) When questioned about evidence of use of water under License 659 contained in the inspection reports, Mr. Stretars concluded:

It appeared there had been no use for a rather extended period of time. From those reports, it became clear there had been no use at least for three years prior to 1964 and then following the report in 19 - the report that identified information in 1968 the use had probably not occurred 1964 through 1968. We have about seven to eight years all told that had been no use.

(RT 63:14-63:25.)

Additionally, Prosecution Team witness Mr. O'Hagan testified: "I agree with the points that Mr. Stretars made. And the 1966 photograph I think confirms the inspection findings of the inspection reports for 1964 and 1968 that there was no actual irrigation use occurring on the property." (RT 79:12-79:18.)

We conclude that there is sufficient evidence in the record to support a finding that no water was used under License 659 between 1962 and 1968. Mr. Pettit's 1964 report and onsite inspection of the licensed project concluded that Southern Pacific had ceased using water under the licensed right for at least two years (1962 to 1964). Although Southern Pacific subsequently reported water use in 1961 under License 659, the Board is not persuaded by Southern Pacific's assumption "in lack of evidence to the contrary," that its tenant's blanket estimates of water use in 1962 and 1963 were accurate. (PT 21, p.5.) This assumption is not consistent with Mr. Pettit's on-the-ground observations.

Mr. Leve's 1968 onsite inspection of the licensed project concluded that water had not been used under the license for about three or four years (1964 to 1968). This is corroborated by the 1966 aerial photo, which shows the absence of irrigation as of 1966.

6.1.3 The Record Supports a Finding of Non-Use between 1991 and 1999

The record shows that during this period of time, License 659 was owned by Ferydoun and Doris Ahadpour. On December 5, 1989, Southern Pacific conveyed the license to Coussoulis Development Company. (PT 26.) On June 4, 1990, Coussoulis Development Company conveyed the license to Steele Foundation Arizona Corporation. (PT 27.) In 1994, Steele Foundation Arizona Corporation formally assigned the license to Ferydoun and Doris Ahadpour, who had purchased the associated real property in 1991, and probably acquired ownership of the water right license along with the real property. (See PT 4; PT 28.) Ferydoun and Doris Ahadpour subsequently conveyed License 659 and the real property to Great Spring Waters on March 30, 2000. (PT 39.)

The Prosecution Team introduced exhibits and testimony regarding the condition of the licensed place of use before the 1990s and during that time period. The evidence presented included (1) a copy of a map showing the irrigated place of use prior to the 1928 issuance of License 659, (PT 10); (2) a copy of the 1988 (Photorevision) Cabazon Quadrangle map published by the United States Geological Survey (USGS) showing the general topographic locations of the licensed point of diversion (spring source) for both License 659 and License 660, located within the NE1/4 of SW1/4 of Section 32 and the licensed places of use, within the NE1/4 of SW1/4, and the SE1/4 of SW1/4 of Section 32, (PT 11); and (3) copies of aerial photographs with superimposed U.S. Geological Survey quadrangle maps showing Sections 29 and 32 for the years 1990 and 1996, (PT 12, pp. 1, 3). Prosecution Team witness Mr. Stretars testified based on examination of the 1990 and 1996 aerial photos, that: “we did come to the conclusion there appeared to be no irrigated use of the waters during the period of [the] 1990s.” (RT 71:8-71:17.) Prosecution Team witness Mr. O’Hagan also testified: “I agree with the points that Mr. Stretars made the 1990 photographs showed no sign of irrigation or cultivation on that land at those time periods.” (RT 79:12-79:18.)

Prosecution Team witness Mr. Mozafar Behzad provided sworn testimony regarding the property’s condition between 1991 and 1999. (RT 38:2.) Mr. Behzad is a semi-retired engineer who acted as an agent for the Ahadpours from 1991 until 2000 in matters concerning their property and water right License 659. (RT 39:5; 39:15-39:18.) In 1995, Mr. Behzad assisted

the Ahadpours with filing a Petition for Change related to License 659. (RT 40:12-40:18; PT 4; PT 30; PT 31.) In the environmental documentation related to the Ahadpours' change petition and under direct and cross-examination, Mr. Behzad stated that water associated with License 659 was never diverted by the Ahadpours, nor was water put to beneficial use by the Ahadpours for the authorized licensed purpose, irrigation. Mr. Behzad stated in his written declaration: "The water right License 659 was designated for agricultural use; however, since the Ahadpour's [sic] ownership in 1991 there had never been any agricultural activities on the property that the water could be used for. From 1991 through 1999, the water was being completely wasted and ran down along Millard Canyon." (PT 4.) Mr. Behzad explained that the Ahadpours were unable to use water under License 659 for the licensed purpose of use. (*Ibid.*) Mr. Behzad visited the site occasionally for the Ahadpours for the purpose of accompanying prospective buyers to the site and to work with the Department of Health Services to test the water quality of the springs. (*Ibid.*)

Under direct examination, Mr. Behzad stated: "Well, at that time, the water was being wasted in the canyon. And we talked about maybe possibly making use of that water for [a] water bottling plant. And we requested the change of use." (RT 40:15-40:18.) When asked if the proposed project was feasible, Mr. Behzad stated: "No, we could not accomplish what we had in mind because there was problem with the access to the property. The Morongo tribe did not grant the access to the property." (RT 40:21-40:24.) Mr. Behzad also testified that the licensed place of use was vacant, and that the Ahadpours did not have any lease to let any other user use the water, for any other purpose. (RT 40:25-41:8.) Under cross-examination, Mr. Behzad opined that the reason the Ahadpours sold the property was because they "could not do anything with the property, so we sold it, based on the prospective buyers being able to make some use of it." (RT 46:3-46:6.)

Contemporaneous statements by Mr. Behzad corroborate his sworn testimony. Environmental information submitted with the Ahadpours' 1995 change petition for License 659 indicates that "[t]here has never been, nor presently is there any agricultural activities that this water can be used for." (PT 31, p. 1.) Mr. Behzad signed this document on June 23, 1995. (PT 31, p. 6.) The 1995 cover letter of the Ahadpours' change petition, which Mr. Behzad signed, states that "[a]t the present time, the [License 659] water is being completely wasted and runs down along Millard Canyon." (PT 30.) An October 16, 1995 contact report, which memorializes a

conversation between Mr. Behzad and State Water Board staff, indicates that “Mozafar stated that since 1991 the water has not been used.” (PT 32; see also Gov. Code, § 11513, subd. (d) [allowing hearsay evidence, but limiting its use to supplementing or explaining other evidence].) Although counsel for the Morongo Band attempted to impeach Mr. Behzad’s credibility by citing unrelated litigation (RT 46:20-51:7), the State Water Board is not persuaded that these matters are in any way relevant to this revocation proceeding. The litigation matters discussed in cross examination bear no meaningful relationship to Mr. Behzad’s truthfulness or his knowledge of the property.

Mr. Behzad had the best opportunity among the witnesses who testified at the hearing to observe the licensed source of water and the condition of the licensed place of use. (RT 45-46; PT 04.) No Morongo Band witness testified to having visited the property between 1991 and 1999. One of the Morongo Band’s witnesses, Mr. Johnson, was retained by the tribe in early 2000 or 2001, “to look at the water rights that were associated with the land to make sure that they were valid and in good standing with the State Board.” (RT 192:14-192:17.) Mr. Johnson could not recall whether he actually visited the site between 1991 and 1999. (RT 192:20-193:5.) During cross-examination, Mr. Johnson was questioned whether he ever observed any acreage being irrigated on that property during that time period. Mr. Johnson stated “[n]ormal irrigation, I know we did visit an area a little upstream of Wild Bear Ranch. When I was there, it was not being irrigated, but it was certainly evident irrigation had occurred. It’s a section above 32.” (RT 193:7-193:18.) This is a different location from the authorized point of use for License 659. Likewise, a second Morongo Band witness, Mr. Covington, testified that he did not visit the property between 1991 and 1999. (RT 208:11-208:15.) A third Morongo Band witness, Mr. Saperstein, testified that he did not visit the property between 1988 and 1995, (RT 224:23-224:25), and that he did not become involved with the property until “[p]robably around 1999 or early 2000,” (RT 190:14-16).

In addition to witness testimony, the record contains Reports of Licensee for the 1991 through 1999 time period. The Morongo Band submitted revised Reports of Licensee for the period from 1988 to 1999 into the record as evidence. Mr. Saperstein, the Morongo Band’s witness, signed these reports on behalf of Great Spring Waters (MB 7, pp. 2, 4, 6, 8), which did not own License 659 between 1991 and 1999. By signing the reports, Mr. Saperstein declared under penalty of perjury that the information in the reports was true to the best of his knowledge and

belief. (*Ibid.*) For each submitted report, Mr. Saperstein identically reported on behalf of the licensee that the full licensed amount of water was used each year (115 acre feet) to irrigate 13 acres and water 500 stock. (MB 7, pp. 2, 4, 6, 8.) Revised reports for the years 1988 through 1996 each contained the following remarks: "License 659 is exercised in conjunction with Licensee's riparian and pre-1914 appropriative right. See Certificate of Adjudicated Water Right (Certificate 66g, dated Mar. 8, 1939) and Statement of Diversion and Use filed concurrently with this report." (MB 7, pp. 2, 4, 6.)

During cross-examination, Mr. Saperstein testified that: "My recollection was I had no direct discussion with the tribe over filing -- the filing some of the amended -- some of them, back filed reports." (RT 222:24-223:1.) When questioned whether documentation was available to support the reported use of water, Mr. Saperstein responded: "No. Was never asked to. And it's not my normal course of business to do anything other than file the reports single page, double page reports for all my clients. Never been asked to provide additional evidence." (RT 223:19-223:22.) Finally, in response to a line of questioning as to whether the reported use of water was based on his personal observation, Mr. Saperstein stated: "From 1988 to 1995, no." (See RT 224:25.) The reported statements of use were apparently based on "discussions I had with two different engineers with Nestle Waters North America who had direct knowledge of what they believed occurred on the property." (RT 225:7-225:9.) The Morongo Band did not call as witnesses the "two different engineers" to support Mr. Saperstein's testimony. (RT 225:10-225:13.) Therefore, representations as to these engineers' personal observations of the property are uncorroborated hearsay.

The record also includes Reports of Licensee filed by the Ahadpours and Mr. Behzad for the period 1991 through 1995. (PT 29.) These reports failed to quantify use of water, but reported use as follows: "Acreage irrigated 200 Stockwatering: number of stock 100." (*Id.* at pp. 4, 6.) However, irrigation outside the specific 13 acres described in License 659 would be unauthorized use. (See PT 16; see also PT 17; PT 50, p. 25.) It is not clear from the record whether the Ahadpours owned or could claim any basis of right authorizing the irrigation of 200 acres of land. The Ahadpours signed the report for the years 1991, 1992, and 1993, while Mr. Behzad signed the report for the years 1993, 1994, and 1995. (*Id.* at pp. 4, 6.) Although all three persons signed under penalty of perjury, (*id.* at pp. 3-6), the Ahadpours' reports are inconsistent with Mr. Behzad's sworn testimony.

The revised reports offered into evidence by the Morongo Band are inconsistent with the original reports submitted by the Ahadpours. The original reports indicate that the full appropriation was used to irrigate 200 acres and water 100 head of stock from 1991 to 1995. The revised reports indicate that the same full appropriation of water was used to irrigate 13 acres and water 500 head of stock over the same period, 1991 to 1995. (MB 7, pp. 3-6.) (Compare MB 7, pp. 2, 4, 6, 8, with PT 29, pp. 4, 6.) Mr. Saperstein “[w]as never asked” by his employer to provide documentation explaining the change and did not visit the property. (RT 223:19-223-25.) These subsequent, revised reports, prepared by an individual who had no first-hand knowledge of use during the relevant period, are of minimal probative value.

In contrast, evidence submitted by the Prosecution Team demonstrates that during the 1990s, no licensed farming occurred in the area of the licensed place of use. An irrigation map from 1924 indicates fields for hay and alfalfa, a vineyard, apricot groves, a garden, and other crops. (PT 10.) Yet aerial photographs taken in 2010, 1996, 1990, and 1966 all reveal a bare patch of desert at the licensed place of use. (PT 12.) But for a faint cluster of what appear to be ruins, the authorized place of use would be indistinguishable from the surrounding barren land. (See *Ibid.*) This is in stark contrast to the tidy rows of crops to the north of License 659’s authorized place of use. (See *Ibid.*)

Mr. Johnson’s testimony that irrigation occurred on a section of land above the authorized place of use corroborates this interpretation of the aerial photographs. He testified that irrigation occurred to the north, presumably in the section of the aerial photographs where crop fields are visible. Mr. Behzad, who the record establishes as the only witness to visit the property at any time between 1991 and 1999, further corroborates the aerial photographs. He testified under oath that no use of water under License 659 occurred between 1991 and 1999. Change petition-related records contain contemporaneous statements by Mr. Behzad that corroborate his sworn testimony. None of the Reports of Licensee submitted by the Ahadpours, by Mr. Behzad, or on behalf of Great Spring Waters are credible. The reports are inconsistent with the visual evidence provided by the aerial photographs. Moreover, they assert contradictory uses of the same water during the period from 1991 to 1995, and they are not consistent with Mr. Behzad’s sworn testimony or contemporaneous statements.

Based on the foregoing, the State Water Board concludes that the record supports a finding that water was not used under License 659 between 1991 and 1999.

6.2 Availability of Water for Diversion and Use

The unavailability of water due to natural conditions can constitute a defense to forfeiture of an appropriative water right for non-use. (*Huffner v. Sawday* (1908) 153 Cal. 86, 92; *Barnes v. Husa* (2006) 136 Cal.App.4th (2006) 1358, 1372; Hutchins, *The California Law of Water Rights* (1956) p. 296.) The Morongo Band argued in its closing brief that the Prosecution Team failed to establish that there was water available for use during the time of the alleged non-use. (Closing Brief of Morongo Band of Mission Indians, July 20, 2012, at p. 8.)

6.2.1 There is Not Sufficient Evidence in the Record to Conclude that Water was Available for Diversion under License 659 for Five Years During the 1952-1960 Period of Non-Use

During the 1952-1960 period, Southern Pacific submitted reports of licensee claiming to have used water under License 659, but this use can be attributed to Southern Pacific's pre-1914 appropriative rights. From 1952 to 1954, joint reports for License 659 and License 660 indicate water use for domestic purposes and locomotives. (PT 19, p. 10.) Southern Pacific reported that it used "about 0.18 second feet, with a maximum, for any one month, of 0.50 second feet" to provide water for an average of 35 people during this period. (PT 19, p. 10.) Southern Pacific also reported that it used 116,000 gallons in 24 hours for locomotives, which is equivalent to 0.18 cfs.⁹ Therefore, depending on the maximum rate of diversion at any given time, it appears that all of the water used by Southern Pacific for domestic and industrial purposes during this period could be attributed to Southern Pacific's pre-1914 rights. As described in section 5.2, above, those rights authorized Southern Pacific to divert 0.23 cfs for railroad and domestic purposes, and 0.12 cfs for domestic, stockwatering, and irrigation purposes, respectively. (PT 50, pp. 25-26, ¶¶ 46, 47.) From 1955-1957, Southern Pacific reported domestic use of approximately 200 gallons per person per day for approximately 30 people. (PT 19, p. 11.) This corresponds to a small fraction of a cubic foot per second, easily

⁹ Assuming year-round diversion at this rate, 0.18 cfs equals 130 acre-feet per annum (afa). (AFA = 0.18 cfs x 365 days x 1.9834 [conversion rate].)

satisfied by Southern Pacific's pre-1914 rights. Southern Pacific reported no other use during this period. From 1958 until 1960, the reports of licensee indicate irrigation of 8-10 acres and domestic water use for seven people. (PT 19, p. 12.) However, the State Water Board determined in section 6.1.1, above, that this use should be credited to the related pre-1914 right.

The availability of water to satisfy a senior right does not necessarily show that water was available for a junior right. On the other hand, the record does not contain any evidence that the unnamed spring that is the source of supply for License 659 ever ran dry. In the absence of any affirmative evidence that water was available during the period from 1955-1960, however, the Board finds that the record is inadequate to determine whether water was available to serve License 659 during that period.

6.2.2 There is Sufficient Evidence in the Record to Conclude that Water was Available for Diversion under License 659 During the 1962-1968 and 1991-1999 Periods of Non-Use

In 1964, Mr. Pettit reported a measured flow rate of 0.2 cfs, with an estimated minimum flow of 0.1 cfs available for use during late summer and fall. (PT 20, p. 1.) Mr. Leve's 1968 inspection report observed that "[n]o use has been made of water under this license for about 3 to 4 years other than some for non-licensed domestic and stockwatering uses," (PT 20, p. 2), which suggests that water was available between 1965, at the latest, and 1968. The report also indicates that changes to the shared diversion works after 1964 "substantially increased the amount and efficiency of the source output" for the companion License 660. (PT 20, p. 3.) This is consistent with the availability of water between 1964 and 1968. From 1991 to 1999, Mr. Behzad's sworn testimony and contemporaneous statements establish that water was available for diversion but flowed down the canyon. (RT 40:15-18; PT 31; PT 32; PT 33.) In addition to Mr. Behzad's statements, Mr. O'Hagan testified that the reports for License 660 show that water was available from the spring year-round during the 1990's. (RT 136:2-136:9.)

The record does not contain any evidence that water was unavailable from 1962-1968 or from 1991-1999. Mr. Johnson's written testimony describes the existence and rate of outflow from Millard Canyon. Specifically, he states that "[u]nder nearly ALL conditions (except during

extreme rainfall and runoff conditions) surface water associated with License 659 never leaves the Morongo Reservation and is NOT available for appropriation.” (MB 5, p. 4 [emphasis in original].) However, Mr. Johnson’s statement addresses the availability of water outside of the reservation, i.e. downstream of the point of diversion. It is silent as to the availability of water at the point of diversion. The Morongo Band seizes on evidence introduced by the Prosecution Team in an attempt to show unavailability between 1991 and 1999. Mr. Behzad testified that the Ahadpours were unable to move forward with their proposed project because “[t]he Morongo tribe did not grant the access to the property.” (RT 40:19-40:24.) The Morongo Band questions whether the Ahadpours were denied access, but also argues that “if they were, and if they were denied the ability to use water, this should act to toll the applicable forfeiture period.” (Closing Brief of Morongo Band of Mission Indians, July 20, 2012, at p. 9.) However, the record does not present sufficient evidence to establish that the Ahadpours were denied the ability to use water for irrigation, the authorized beneficial use under License 659. The record merely contains allegations that the Ahadpours were denied access to develop the property for their proposed water bottling plant per their change petition. (RT 40:12-25; see also PT 30; PT 31; PT 33; PT 34.)

Accordingly, the State Water Board finds that the failure to use water under License 659 was not due to a lack of water availability from 1962-1968 and from 1991-1999.

6.3 There is Not Sufficient Evidence in the Record to Establish a Conflicting Claim to Unused Water from License 659, per *Millview*

As set forth in section 4.2, above, the Court of Appeals held in *Millview* that a pre-1914 water right cannot be forfeited without a conflicting claim to use the water at issue. (*Millview*, 229 Cal.App.4th at p. 900.) The Court of Appeals did not publish its decision in *Millview* until after the May 21, 2012 hearing concluded. Before that case was decided, no published California decision had explicitly required a conflicting claim in order to establish forfeiture of an appropriative right for non-use. (*Ibid.*) Thus, the parties did not have the opportunity to prepare evidence or testimony responding to *Millview* and the additional proof it requires.

The record does not contain evidence that would support a finding that a conflicting claim existed during the period of non-use between 1952 and 1960. For the period of non-use from

1962 until 1968, Mr. Leve's 1968 inspection report indicates that improvements to the diversion works by Cabazon Water District after 1964 "substantially increased the amount and efficiency of the source output," (PT 23, p. 3), but had the effect of reducing the amount of water delivered for License 659 (see PT 23, pp. 3-4). However, the report also indicates that engineering solutions were readily available and that, once executed, these design changes "would result in a diversion capacity far in excess of the licensed amount." (PT 23, p. 4.) Nothing suggests that Cabazon Water District took more water than before. The district merely "redevelop[ed] the system for their own use." (PT 23, p. 3.) Based on the evidence above, water was naturally available and even the most rudimentary diligence by S.P. Land Company could have restored their connection at any time. This evidence is sufficient to establish the non-use of License 659, but not a conflicting claim to its water.

As discussed in section 6.4.1, below, the record contains evidence of resumed use under License 659 between 1968 and 1987. The record does not contain evidence that would support a finding that a conflicting claim existed before resumption of use during this period.

For the period of non-use from 1991 until 1999, there are allegations that the Morongo Band denied the Ahadpours access to develop the property served by License 659 for their proposed water bottling plant. (RT 40:12-25.) This could be explained, however, by the contemporaneous disagreement as to the existence of an easement across the Morongo Band's reservation. Apparently, the Morongo Band "determined that it was not in its best interests to continue to grant rights of way for pipelines and other conveyance facilities that have utilized the Tribe's most valuable lands to primarily serve other residents of Southern California." (MB 10, p. 2; see also PT 23, pp. 1-2 [describing easement issue].) The dispute over access can be explained by conflict over land or sovereignty, and does not by itself establish a conflicting claim to water.

The Morongo Band itself appears to have presented a conflicting claim through its January 12, 1996 protest to the Ahadpours' change petition. The Morongo Band objected, in part, that the proposed change of use for License 659 could interfere with reserved surface and groundwater rights claimed by the Morongo Band. (PT 34, pp. 2-5; see also, e.g., *Winters v. United States* (1908) 207 U.S. 564 [articulating federal reserved right doctrine].) The Morongo Band's claim to

water unused under License 659 is no longer a conflicting claim, however, because the Morongo Band has since acquired License 659. It appears that the Morongo Band now owns all the Millard Canyon water rights discussed in the record. (See MB 5, p. 5.) As further discussed below, the record does not establish the existence of any other junior water rights holders that would be injured by resumption of use under License 659. Under the unusual circumstances of this case, it would not make sense to preclude the Morongo Band from resuming use under License 659 based on the Morongo Band's own claim to water unused under the license. (See *Millview*, 229 Cal.App.4th at pp. 900-901 [noting that there is no policy reason for finding a forfeiture until an alternative use has been asserted].)

Although protests were filed against the Morongo Band's petition to change License 659, and protests have the potential to establish a conflicting claim, there is not sufficient evidence in the record to establish any extant conflicting claims after 1999. (See RT 111:22-112:4.) Coachella Valley Water District and Desert Water Agency filed protests on March 4, 2011 and March 7, 2011, respectively.¹⁰ Both agencies expressed concern, in essence, that the proposed changes could diminish the amount of water available for pumping from the Coachella Valley Groundwater Basin or exceed the water rights authorized under the Whitewater Decree. However, the correspondence files indicate that both water districts resolved their protests before the State Water Board ever had the opportunity to evaluate their allegations through the change petition process. Coachella Valley Water District agreed to dismiss its protests on March 30, 2011, while Desert Water Agency and the Morongo Band executed a dismissal on April 5, 2011. Apparently, a March 15, 2011, meeting between the water districts' general managers and Stuart Somach, the Morongo Band's attorney, resolved their concerns. In light of the protests' dismissal, and because the protest allegations were never substantiated, the Board concludes that they are not sufficient to support a finding of a conflicting claim to water unused under License 659.

Although the Whitewater River is a fully appropriated stream, (Order WR 98-08, Exhibit A, p. 39), it is unclear whether the State Water Board's determination was based on information that establishes a conflicting claim to water unused under the right subject to forfeiture, (*Millview*,

¹⁰ The State Water Board takes official notice of two protests and related correspondence concerning the Morongo Band's 2011 change petition for Licenses 174, 659, and 660. (A000084, Correspondence File, Cat. 1, Vol. 2; A000553, Correspondence File, Cat. 1, Vols. 3 & 4; A000554, Correspondence File, Cat. 1, Vol. 2; see also Cal. Code Regs., tit. 23, § 648.2; Evid. Code, § 452, subd. (h).)

229 Cal.App.4th at 904). Although the arguments of another water right holder could help to establish a conflicting claim, no third parties have come forward in support of revocation. Mr. Johnson's written testimony and an analysis conducted by Stetson Engineers, Inc. indicates that water unused under License 659 does not leave the reservation except during extreme rainfall and runoff conditions, and that the time of travel from Millard Canyon to Whitewater River is approximately 77 years. (MB 5, p. 4; MB 8; MB 9.)

Accordingly, the State Water Board concludes that the record and officially noticed materials do not support a conflicting claim to water unused under License 659, consistent with *Millview*.

6.4 Resumption of Use

Absent a conflicting claim, a water rights holder whose use falls below the full appropriation for five years or more may nonetheless resume full use at any time. (*Millview*, 229 Cal.App.4th at p. 903.) Below we examine each established period of non-use to determine whether a resumption of use occurred.

6.4.1. There is Sufficient Evidence in the Record to Establish Resumption of Use of License 659 between 1968 and 1987

The Prosecution Team submitted into evidence reports of licensee for the years 1968 to 1987. (PT 25.) These reports indicate the use of 0.16 cfs to irrigate 13 acres for forage and pasture, water between 25 and 100 head of stock, provide domestic water for between one and five people, and irrigate a garden area of up to one acre. Although the reported irrigation of 13 acres remains constant, the number livestock kept on the property and the number of people served for domestic use varies from year to year. (*Ibid.*) Horses cease to be kept on the property after 1979. (PT 25, p. 8.) Garden irrigation stops in 1980 and resumes in 1982. (PT 25, pp. 8-9.) This is all consistent with the actual occupation of the property and the actual use of License 659 for its authorized purpose, irrigation.

The water use claims made in the 1968-1987 reports of licensee are not inherently implausible, and there is not contradictory evidence on the record to warrant questioning them. Mr. Leve's April 16, 1968 inspection report did indicate that, "[n]o use has been made of water under this

license for about 3 to 4 years other than some for non-licensed domestic and stockwatering uses.” (PT 23, p. 2.) However, it is not inconceivable that the use reported for 1968 occurred after his site inspection. His report says nothing as to use or non-use of License 659 from 1969 onwards, and the record does not contain other testimony or exhibits clarifying the matter. Aerial photos provided for the prosecution show barren snapshots of the property in 1966 and 1990. (See PT 12.) This is not necessarily inconsistent, however, with a resumption of use in 1968, so long as the use ceased before the 1990 photograph.

Based on the evidence in the record, the State Water Board concludes that resumption of use occurred sometime after April 16, 1968. Because there is not sufficient evidence on the record to support a finding of a conflicting claim, this resumption of use cures the possibility of forfeiture for 1952-1960 and for 1962-1968.

6.4.2. There is Not Sufficient Evidence in the Record to Establish a Resumption of Use of License 659 after 1999

The Morongo Band has presented evidence that it is able to beneficially use water authorized under License 659. According to testimony presented by the Morongo Band’s witness, John Covington, the Morongo Band currently has over 35 miles of potable water distribution system, consisting of pipelines, reservoirs, wells, and related appurtenances, and in addition has approximately 15 miles of non-potable water system with its reservation. (MB 4.) The system has the capacity to deliver over 10,000 gallons per minute and has wells extracting water from 150 feet to 600 feet below ground in different locations throughout its reservation service area. (*Ibid.*)

Groundwater recharge allows the Morongo Band to store surface water (in wet years) in the Cabazon Storage Unit which underlines the Potrero and Millard Canyon watersheds, including the Cabazon basin, for future extraction. The tribe extracts water from the Cabazon Storage Unit, of which 65 percent underlies the Morongo Band tribal lands. (MB 4.) The Morongo Band owns wells overlying the Cabazon Storage Unit that are used for the extraction of groundwater, and some of these wells were specifically designed to divert flow associated with License 659. (MB 4, p. 3.) However, the Morongo Band has refrained from investing the capital needed to improve these facilities for these purposes until such time as the petition for change regarding

License 659 is granted, and the risk of being unable to benefit from such an investment due to cancellation of the license is alleviated. (*Ibid.*)

Although the Morongo Band is prepared to resume use if its change petition is approved, we find nothing in the record to indicate a resumption of the uses permitted under the present terms of the license. Accordingly, the State Water Board finds that there is not sufficient evidence in the record to support a finding of the resumption of use after 1999.

7.0 DOCTRINE OF LACHES

In its Motion to Dismiss, the Morongo Band argues that the doctrine of laches bars revocation of License 659. Because the State Water Board has determined that there is not sufficient evidence on the record to support revoking License 659, it is not necessary to address this argument.

8.0 CONCLUSION

The State Water Board finds that revocation of water right License 659 for nonuse of five or more years is not supported by the record because, although there is sufficient evidence in the record to establish five years or more of non-use, there is not sufficient evidence to establish a conflicting claim consistent with the recently decided *Millview* decision. Likewise, nothing in the record is sufficient to establish the resumption of use by the Morongo Band after 1999. In the absence of a conflicting claim, however, the Morongo Band could resume use, if its change petition were approved.

ORDER

IT IS HEREBY ORDERED THAT License 659 (Application 000553) not be revoked.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on _____ 201X.

AYE:

NO:

ABSENT:

ABSTAIN:

Jeanine Townsend
Clerk to the Board