

1 **OLIVAREZ MADRUGA LEMIEUX O'NEILL, LLP**

2 Wayne Lemieux – SBN 43501

3 wlemieux@omlowlaw.com

4 Edward B. Kang – SBN 237751

5 ekang@omlowlaw.com

6 500 South Grand Avenue – 12th Floor

7 Los Angeles, CA 90071

8 Tel: (213) 744-0099

9 Fax: (213) 744-0093

10 Attorneys for Intervenor

11 NACIMIENTO REGIONAL WATER

12 MANAGEMENT ADVISORY COMMITTEE,

13 DALE FIEBER AND WILLIAM H. INGALLS

14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

15 **COUNTY OF MONTEREY**

16 SALINAS VALLEY WATER COALITION, )

17 Petitioner and Plaintiff, )

18 vs. )

19 MONTEREY COUNTY WATER )

20 RESOURCES AGENCY; BOARD OF )

21 SUPERVISORS OF MONTEREY COUNTY )

22 WATER RESOURCES AGENCY; BOARD )

23 OF DIRECTORS OF MONTEREY COUNTY )

24 WATER RESOURCES AGENCY; COUNTY )

25 OF MONTEREY; BOARD OF )

26 SUPERVISORS OF THE COUNTY OF )

27 MONTEREY; and DOES 1 through 100, )

28 inclusive, )

Defendants. )

29 NACIMIENTO REGIONAL WATER )

30 MANAGEMENT ADVISORY )

31 COMMITTEE, a California non-profit )

32 corporation; DALE FIEBER, an individual; )

33 and WILLIAM H. INGALLS, an individual, )

Intervenors. )

Case No. 17 CV 000157

Hon. Lydia M. Villareal

Dept. 1A

**REQUEST FOR JUDICIAL NOTICE IN  
SUPPORT OF MOTION TO INTERVENE**

Date: September 19, 2018

Time: 1:30 p.m.

Dept. 1

Action Filed: January 13, 2017

1       **PLEASE TAKE NOTICE** that Intervenor Nacimiento Regional Water Management  
2       Advisory Committee, Dale Fieber and William H. Ingalls will and hereby do request the Court to take  
3       judicial notice of the following document, which is filed concurrently herewith as Exhibit 1, in support  
4       of Intervenor's Motion for Leave to Intervene:

5       Exhibit 1 – A true and correct copy of the Respondents' Opening Brief in the proceedings  
6       before the State Water Resources Control Board.

7       The request is made pursuant to Evidence Code sections 451(a) and (f), 452 (c) & (d), and 453.  
8       Evidence Code section 452 provides documents of which this Court may take judicial notice include  
9       “(c) Official acts of the legislative, executive, and judicial departments of the United States and of any  
10      state of the United States; (d) Records of (1) any court of this state or (2) any court of record of the  
11      United States or of any state of the United States.”

12  
13      Dated: August 13, 2018

**OLIVAREZ MADRUGA LEMIEUX O'NEILL, LLP**

14  
15      By: 

Edward B. Kang

16      Attorneys for Intervenor, NACIMIENTO REGIONAL  
17      WATER MANAGEMENT ADVISORY COMMITTEE,  
18      DALE FIEBER and WILLIAM H. INGALLS  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

# **EXHIBIT 1**

DOWNEY BRAND LLP  
 KEVIN M. O'BRIEN (Bar No. 122713)  
 MEREDITH E. NIKKEL (Bar No. 254818)  
 621 Capitol Mall, 18th Floor  
 Sacramento, CA 95814-4731  
 Telephone: (916) 444-1000  
 Facsimile: (916) 444-2100  
 kobrien@downeybrand.com  
 mnikkel@downeybrand.com

COUNTY OF MONTEREY  
 CHARLES McKEE (Bar No. 152458)  
 LESLIE J. GIRARD (Bar No. 98986)  
 JESSE J. AVILA (Bar No. 79436)  
 168 West Alisal Street  
 Salinas, CA 93901  
 Telephone: (831) 755-5045  
 Facsimile: (831) 755-5283

Attorneys for Respondents and Defendants  
 MONTEREY COUNTY WATER RESOURCES  
 AGENCY; BOARD OF SUPERVISORS OF  
 MONTEREY COUNTY WATER RESOURCES  
 AGENCY; BOARD OF DIRECTORS OF  
 MONTEREY COUNTY WATER RESOURCES  
 AGENCY; COUNTY OF MONTEREY; and  
 BOARD OF SUPERVISORS OF THE COUNTY  
 OF MONTEREY

ON COURT ORDERED REFERENCE TO THE

STATE WATER RESOURCES CONTROL BOARD

SALINAS VALLEY WATER COALITION,  
 Petitioner/Plaintiff,

v.

MONTEREY COUNTY WATER  
 RESOURCES AGENCY, BOARD OF  
 SUPERVISORS OF MONTEREY COUNTY  
 WATER RESOURCES AGENCY; BOARD  
 OF DIRECTORS OF MONTEREY COUNTY  
 WATER RESOURCES AGENCY; COUNTY  
 OF MONTEREY; and BOARD OF  
 SUPERVISORS OF THE COUNTY OF  
 MONTEREY and DOES 1 through 10,  
 inclusive,

Respondents/Defendants.

Monterey County Superior Court Case No.  
 17CV000157

**OPENING BRIEF OF RESPONDENTS  
 AND DEFENDANTS MONTEREY  
 COUNTY WATER RESOURCES  
 AGENCY *ET AL.* IN RESPONSE TO  
 REFERENCE ORDER (CAL. WATER  
 CODE SECTION 2000 *ET SEQ.*)**

**Action Filed: January 13, 2017**

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1     **I. INTRODUCTION**

2             In 2013-2015 the Salinas River watershed experienced the most severe drought in its  
3     modern history. Reservoir levels were at historic lows. Groundwater levels were dropping.  
4     Endangered steelhead were at risk. Cities were concerned about the availability of water for  
5     health and safety needs. There was no indication of when the drought would end.

6             In this context the entity charged with managing the water resources of the watershed—  
7     the Monterey County Water Resource Agency (“Agency”)—undertook an extensive public  
8     process in the spring of 2014 to determine how to operate its two reservoirs, Nacimiento and San  
9     Antonio. The objective of this process was to determine how much water to release versus how  
10    much to retain in storage. The Agency received input from farmers, cities, districts,  
11    environmental organizations and regulatory agencies. Ultimately the Agency’s board of directors  
12    decided to reduce reservoir releases to conserve stored water. Beginning on June 4, 2014 the  
13    Agency gradually reduced releases from Nacimiento Reservoir from 60 cubic feet per second  
14    (cfs) to 25 cfs. At the time of this decision, water storage in Nacimiento was approximately 20%  
15    of capacity and San Antonio storage was near minimum pool. On May 28, 2015 the Agency  
16    reinstated the 60 cfs release regime.

17            The Salinas Valley Water Coalition (“Coalition”) commenced this lawsuit in the  
18    Monterey County Superior Court alleging in relevant part that the Agency’s decision to reduce  
19    reservoir releases violated the terms and conditions of the Agency’s water rights, causing injury  
20    to Coalition members. The Coalition never raised any concerns about the Agency’s compliance  
21    with its water rights with the entity charged with administering those rights—the State Water  
22    Resources Control Board (“State Board”). Moreover, the Coalition opposed the Agency’s motion  
23    to refer its water right claims to the State Board. The Court rejected the Coalition’s arguments,  
24    referring multiple factual and legal issues to the State Board pursuant to Water Code section 2000  
25    *et seq.* This reference proceeding is the result of that ruling.

26            The respondents and defendants in this proceeding—the Agency, the County of Monterey  
27    and the Monterey County Board of Supervisors (collectively “County”)—have no interest  
28    whatsoever in adjudicating the water rights of the Salinas Valley Groundwater Basin or the

1 Salinas River. Such a proceeding would take decades to complete, would cost tens of millions of  
 2 dollars, and would divert attention and resources from the development of physical solutions to  
 3 address the Salinas Valley's water supply and water quality issues. The Coalition chose to  
 4 commence this lawsuit and assert water right claims which, under California water law, implicate  
 5 the water rights of others. And the Monterey County Superior Court expressly identified the  
 6 issue of whether other water users in the Salinas Valley must be considered in the disposition of  
 7 the Coalition's water right claims. In pointing out the defects in the Coalition's legal arguments  
 8 the County is not, in any way, suggesting that an adjudication should be undertaken.

9 The following points summarize the Agency's responses to the issues identified by the  
 10 Court for this phase of the reference proceeding:

- 11 • The Agency's decision to reduce reservoir releases was made in full compliance  
 12 with the Agency's water rights. The "Flow Prescription" contained in those rights  
 13 incorporates a Drought Provision, which authorizes the reduction of reservoir  
 14 releases under drought conditions, following consultation between the Agency and  
 15 the National Marine Fisheries Service ("NMFS"). During the spring of 2014 the  
 16 Agency, in consultation with NMFS, developed a reservoir operations and  
 17 monitoring program that balanced the competing demands for water in the Salinas  
 18 Valley and monitored the effects of reduced releases on steelhead.
- 19 • The Flow Prescription was never intended to ensure a water supply for Coalition  
 20 members. Rather, it was developed jointly by the Agency and NMFS, and  
 21 ultimately approved by the State Board, for the purpose of protecting endangered  
 22 steelhead. While the Coalition members certainly enjoyed the benefits of a 60 cfs  
 23 release regime they never acquired a right to insist on the continuation of that  
 24 regime. Overlying and riparian right holders have no rights to previously stored  
 25 water. Nor do they have rights to water allocated by the State Board to instream  
 26 uses.
- 27 • The Coalition cannot demonstrate that its members suffered any legally cognizable  
 28 injury to their water rights. Assuming that Coalition members hold riparian and



1           overlying water rights, those rights are equal in priority to or “correlative” with the  
2           water rights of other overlying landowners within the Salinas Valley Groundwater  
3           Basin and other riparian right holders on the Salinas River. It is simply impossible  
4           to determine whether Coalition members received less than their legally  
5           appropriate share of the limited water supply available during the extreme drought  
6           of 2013-15 without simultaneously determining (i) the nature, priority and extent  
7           of other water rights in the Salinas River watershed; (ii) the quantity of water used  
8           by Coalition members in relation to the quantity of water used by other right  
9           holders throughout the watershed; and (iii) the reasonableness of Coalition  
10          members’ use and methods of diversion of water—in particular the reasonableness  
11          of the Coalition’s demand that groundwater levels beneath Coalition members’  
12          lands be maintained at specific depths during a severe drought. Because other  
13          right holders are not before the State Board in this proceeding, the Coalition’s  
14          water right claims are procedurally defective and must be rejected.

- 15          • The Coalition argues that its members suffered injury during the drought—in the  
16          form of reduced groundwater levels and diminished groundwater quality—and that  
17          this alleged injury was caused by the Agency’s reduction in reservoir releases.  
18          Even assuming that reductions in groundwater levels or water quality rose to the  
19          level of a legally cognizable injury (the Agency denies this), the Coalition cannot  
20          demonstrate that the Agency’s revised reservoir releases caused such effects. As  
21          the expert declarations submitted with this Opening Brief demonstrate, the  
22          extraordinary nature of the drought was the overriding causal factor affecting  
23          groundwater and surface water conditions in the Salinas Valley in 2013-15. The  
24          Agency’s prudent decision to retain additional water in storage as a hedge against  
25          extended drought conditions had no significant impact on those conditions.
- 26          • The Coalition’s water right claims are defective because no competent evidence  
27          has been presented to the State Board regarding who the Coalition members are,  
28          where they are located or the nature or extent of their water rights. The Coalition’s

approach to these foundational issues can be summed up in two words: “trust us.” It is nonsensical to assert a claim of injury to water rights without first proving up the nature and extent of those rights. The Coalition should be required to demonstrate whether and to what extent its members hold any water rights.

## II. PROCEDURAL HISTORY

The underlying action was commenced in the Monterey County Superior Court on January 13, 2017, after the end of the drought. On June 8, 2017, the Agency filed a motion pursuant to Water Code section 2000 *et seq.* to refer the Fifth, Sixth, Ninth and Twelfth Causes of Action of the Coalition’s Second Amended Complaint to the State Board. The Coalition opposed the motion for reference on the ground, among others, that “[t]he free-wheeling, if not chaotic, nature of State Board water right proceedings is infamous.” (Opp. to Motion for Reference at p. 9, lines 3-4).

On August 1, 2017, the Court issued an Order of Reference to the State Board. On September 8, 2017, the Court issued an Order Specifying Issues for Reference to the State Water Resources Control Board (“Order Specifying Issues”). The Court directed the State Board to investigate and report back to the court on the following four issues, which are a subset of the eight issues identified in paragraph 3 of the Order of August 1, 2018:

(3)(a) Whether the Defendant Monterey County Water Resources Agency (“Agency”) has violated the Flow Prescription for Spawning and Rearing Habitat in the Nacimiento River in License 7543 (Application 16124) and Permit 21089 (Application 30532) by releasing less than 60 cubic feet per second (“cfs”) of water Nacimiento Reservoir during the period from June 4, 2014, through May 27, 2015 [“Issue 3a”];

(3)(b) If the State Water Board concludes the Agency did not comply with the 60 cfs water release requirement of the Flow Prescription for Spawning and Rearing Habitat in the Nacimiento River, whether such failure reduced recharge that otherwise would have been provided to the Salinas River Groundwater Basin’s (“Basin”) Upper Valley and Forebay subareas and, if so, whether that recharge reduction reduced water availability (i.e., groundwater elevations and groundwater quality for any riparian and overlying rights in the Upper Valley and Forebay subareas [“Issue 3b”]);

(3)(c) Whether the Agency’s appropriative water rights for Nacimiento and San Antonio reservoirs – License 7543 (Application 16124), License 12624 (Application 16761) and

1 Permit 21089 (Application 30532) – are junior in priority to any  
 2 downstream riparian and overlying water rights in the Salinas River  
 and Basin [(“Issue 3c”)];

3 (3)(d) To what extent, if any, must water use in other subareas of  
 4 the Salinas Valley Groundwater Basin be considered in concluding  
 whether riparian and overlying rights in the Upper Valley and  
 5 Forebay subareas were injured by the Agency’s reservoir operations  
 in 2014 and 2015 [(“Issue 3d”)] . . . .

6 (Order Specifying Issues, p. 3:1–23.)

7 To facilitate the reference process, the Agency has produced, on a voluntary basis, the  
 8 following documents and electronic files identified in the Coalition’s “Record Request Table”  
 9 dated September 21, 2017:

- 10 • On October 13, 2017, the Agency produced audio and video recordings of Agency  
 11 Board of Director and Agency Reservoir Operations Committee meetings in its  
 12 possession and the electronic modeling files within the Agency’s possession that  
 13 are responsive to Row No. 6 of the Record Request Table.
- 14 • On October 26, 2017, the Agency produced files in its possession, custody and  
 15 control that are responsive to Row Nos. 1, 2, 3, 4, 10, 11, and 12 of the Record  
 16 Request Table.
- 17 • On October 31, 2017, the Agency produced additional electronic modeling files in  
 18 its possession that are potentially responsive to Row No. 6 of the Record Request  
 19 Table.
- 20 • On November 6, 2017, the Agency received electronic files from its former  
 21 consultant RMC that are responsive to Row No. 6 of the Record Request Table,  
 22 and produced all such files to Plaintiff.
- 23 • On November 10, 2017, the Agency produced records in its possession, custody or  
 24 control that are responsive to Row Nos. 15 and 16 of the Record Request Table, a  
 25 privilege log of those records withheld on the basis of attorney-client privilege or  
 26 attorney work product, and electronic files in a folder called “IGSM Source Code-  
 27 NOAA” from RMC that are responsive to Row No. 6 of the Record Request  
 28 Table.

- On December 11, 2017, the Agency produced files in its possession, custody and control that are responsive to Row Nos. 13 and 14 of the Record Request Table that are not readily available on the Agency's website and that are subject to disclosure under section 1.01.13 of the Agency Ordinance No. 3717 and the Public Records Act, Government Code section 6250 et seq.
- On December 15, 2017, the Agency produced corrected shape files in replacement of two of the files produced on December 11, 2017.
- On December 22, 2017, the Agency produced all files previously produced to the Coalition to the State Water Board per its request.
- On January 12, 2018, the Agency produced additional files for Agency-owned wells responsive to Row Nos. 13 and 14 of the Record Request Table.
- On January 19, 2018, the Agency produced the modeling reports requested by the State Water Board on January 5, 2018.
- On February 5, 2018, the Agency provided an FTP link for the State Water Board and the Coalition for all documents exchanged during the Modelers' Conference held on January 25, 2018.
- On February 20, 2018, the Agency produced "Confidential – Expert's Eyes Only" files responsive to Row Nos. 13 and 14 of the Record Request Table directly to the Coalition's expert Mr. Tim Durbin pursuant to the Protective Order issued by the Court on February 7, 2018.

By letter dated December 14, 2017, the State Board requested that the parties and their respective modeling experts, and other experts involved in past modeling efforts, attend a Modelers' Conference. (MCWRA-001, State Board December 14, 2017 Letter.) The Modelers' Conference was held on January 25, 2018. The Coalition thereafter requested a follow-up meeting with Mr. Ali Taghavi (formerly an engineering consultant to the Agency) which was held on April 23, 2018. (MCWRA-002, MCWRA April 4, 2018 Letter.) By letter dated April 26, 2018, State Board staff directed the parties to submit legal briefs, technical analyses and supporting evidence to the Board for evaluation of issues 3(a) through 3(d) by June 7, 2018, with

1 responses due by July 9, 2018.

### 2 **III. FACTUAL BACKGROUND**

#### 3 **A. The Salinas Valley Groundwater Basin**

4 The Salinas Valley is situated between the San Joaquin Valley and the Pacific Ocean, and  
5 is drained by the Salinas River. (MCWRA-003, State of the Salinas River Groundwater Basin  
6 Report, p. 2-2.) The Salinas Valley Groundwater Basin ("Basin") is the largest coastal  
7 groundwater basin in Central California, extending approximately 150 miles from the headwaters  
8 of the Salinas River to its mouth at Monterey Bay. (*Id.*)

9 In the early 1930s, concerned Salinas Valley residents requested that the State of  
10 California investigate declining groundwater levels in the Basin. The resulting report, issued in  
11 1933, warned that continued pumping could induce seawater intrusion into the Basin. (MCWRA-  
12 004, DWR Bulletin No. 52-B at pp. 7-8<sup>1</sup>; MCWRA-005, Benefits of Joint Operation of the  
13 Nacimiento and San Antonio Projects at p. 1.) Based on the 1933 report, the California  
14 Department of Water Resources undertook a comprehensive investigation of the Basin and in  
15 1946 issued a study entitled "Bulletin 52." (See MCWRA-006, DWR Bulletin No. 52; MCWRA-  
16 007, DWR Bulletin No. 52-A; MCWRA-004, DWR Bulletin No. 52-B.) Bulletin 52 confirmed  
17 that seawater intrusion had occurred in the Basin and was worsening. (MCWRA-006, DWR  
18 Bulletin No. 52, at pp. 18, 24, 113, 138.)

19 Bulletin 52 divided the Basin into five interconnected subareas: the Pressure, East Side,  
20 Forebay, Arroyo Seco Cone, and Upper Valley subareas. (*Id.* at pp. 14-15, 46-48; see also  
21 MCWRA-008, 1995 White Paper on Hydrogeology and Water Supply of Salinas Valley, at p. 8;  
22 see also Declaration of Anthony Daus ("Daus Decl."), ¶ 6.) Bulletin 52 and subsequent studies  
23 determined that, despite important differences, the subareas function as a connected whole to  
24 form a single groundwater basin with two defining characteristics. (MCWRA-008, 1995 White  
25 Paper on Hydrogeology and Water Supply of Salinas Valley, at p. 8; MCWRA-009, East Side

26 <sup>1</sup> The Agency requests that the State Board take official notice of DWR Bulletin No. 52, No. 52-A and No. 52-B.  
27 (See Cal. Code Regs., tit. 23, § 648.2; *Planning and Conservation League v. Department of Water Resources* (2000)  
28 83 Cal.App.4th 892, 898 fn. 2 [courts can take judicial notice of bulletins published by the Department of Water  
Resources].)

Canal Project Report, at p. 10.) First, groundwater tends to move steadily within and between the subareas in a horizontal manner. (MCWRA-010, 1997 IGSM Update Final Report, at p. 3-39; MCWRA-011, Water Resources Investigations Report 87-4066, at p. 23; MCWRA-009, 1995 White Paper on Hydrogeology and Water Supply of Salinas Valley, at p. 8; MCWRA-012, 1985 Salinas Valley Seawater Intrusion Study, at pp. 1, 3-3; MCWRA-013, Excerpts from Water Resources Investigations Report 78-113, at p. 11.) There are no significant barriers to horizontal flow between any of the subareas. (MCWRA-009, 1995 White Paper on Hydrogeology and Water Supply of Salinas Valley, at p. 8.) Second, groundwater generally flows through the Basin from higher-elevation mountainous regions in the southeast to lower elevation areas in the northwest, gaining recharge from rainfall, the Salinas River, and smaller streams along the way. (*Id.*) Accordingly, groundwater generally moves from the mountainous Upper Valley subarea into the Forebay subarea and then into the coastal Pressure and East Side subareas in the north. (MCWRA-014, Excerpts from Arroyo Seco Dam Feasibility Study Final Report, at p. IX-4; MCWRA-007, DWR Bulletin No. 52, at pp. 34-35, 71; see also Daus Decl., ¶ 11.) This interconnectedness allows “local overdrafts [to] adversely affect adjacent areas.” (MCWRA-009, East Side Canal Project Report, at p. 10; MCWRA-007, DWR Bulletin No. 52, at p. 146.) Extraction of groundwater in excess of recharge in the Upper Valley can affect the subsurface recharge in the Pressure Area, the Salinas River and the Forebay Area. (MCWRA-009, 1995 White Paper on Hydrogeology and Water Supply of Salinas Valley, at pp. 9-10.)

**B. Formation of the Monterey County Water Resources Agency and the Construction of Nacimiento and San Antonio Reservoirs.**

To address the issues identified in Bulletin 52, the California Legislature formed the Agency’s predecessor in 1947. (See MCWRA-005, Benefits of Joint Operation of the Nacimiento and San Antonio Projects, at pp. 1-2, 4.) In 1990 the enabling legislation was amended to establish the Agency in its current form. (Monterey County Water Resources Agency Act, Stats. 1990, ch. 1159, Amended Stats. 1993, ch. 234 (“Agency Act”).) The Agency Act authorizes and obligates the Agency to conserve the Salinas Valley’s water supply for beneficial use by replenishing groundwater, preventing contamination, delivering conserved water to

1 residents in exchange for their reduced pumping, and preventing harmful extractions. (Agency  
2 Act §§ 8, 9.)

3 In an effort to combat the seawater intrusion problem identified in Bulletin 52, the  
4 Agency's predecessor financed and constructed the Nacimiento and San Antonio Reservoirs in  
5 the 1950s and 1960s, respectively. The two reservoirs are owned and operated by the Agency.  
6 License 7543 authorizes the Agency to divert to storage up to 350,000 acre-feet per year from the  
7 Nacimiento River at Nacimiento Dam, to be collected from October 1 of each year to July 1 of  
8 the succeeding year. Permit 21089 authorizes the agency to divert to storage an additional 27,900  
9 acre-feet per year from the Nacimiento River at Nacimiento Dam, to be collected from October 1  
10 of each year to July 1 of the succeeding year. License 12624 authorizes the Agency to divert to  
11 storage up to 220,000 acre-feet per year from the San Antonio River at San Antonio Dam, to be  
12 collected from October 1 of each year to July 1 of the succeeding year. The two reservoirs are  
13 operated for multiple purposes including water supply (irrigation and municipal/industrial),  
14 groundwater recharge, flood protection, fish protection, power generation and recreation. In  
15 making decisions regarding the release of water from the two reservoirs, the Agency considers  
16 (and must balance) all of these purposes. (Declaration of Brent Buche ("Buche Decl."), ¶ 3; see  
17 MCWRA-015, San Antonio and Nacimiento Rivers Watershed Management Plan ("Management  
18 Plan"), at p. 79; see also Daus Decl., ¶ 16.)

19 The operational minimum pool of Nacimiento Reservoir is at elevation 687.8 feet msl.  
20 (Buche Decl., ¶ 5.) This elevation corresponds to a storage volume of approximately 22,300  
21 acre-feet of in the reservoir. (MCWRA-016, Flow Prescription, at p. 31.) When water levels  
22 reach 687.8 feet msl, the Agency only releases water from Nacimiento Reservoir to meet  
23 contractual entitlements held by San Luis Obispo County. The physical minimum pool or dead  
24 pool, which is when the reservoir level falls below the outlet pipes, is at an elevation of 670 feet  
25 msl. (Buche Decl., ¶ 5.)

26 **C. State Board Proposes Adjudication of the Basin.**

27 Despite the beneficial effects of the Nacimiento and San Antonio Reservoirs, seawater  
28 intrusion in the Pressure subarea continued moving inland. (MCWRA-005, Benefits of Joint

1 Operation of the Nacimiento and San Antonio Projects, at p. 2; MCWRA-006, Salinas Valley  
 2 Seawater Intrusion Program, at p. 2; see also MCWRA-017, Alternative Basin Management  
 3 Project, at p. 3.) Seawater eventually moved from the Pressure subarea into the East Side  
 4 subarea, and groundwater overdraft in the East Side worsened. (MCWRA-018, Proposition 218  
 5 Engineer's Report Draft Assessment Workbooks, at p. 70; MCWRA-017, Alternative Basin  
 6 Management Project, at p. 3.) In response, in 1993 the Agency initiated the Monterey County  
 7 Water Recycling Projects (MCWRP) including the Castroville Seawater Intrusion Project (CSIP),  
 8 which replaced agricultural water supply and reduced pumping in coastal areas. (MCWRA-019,  
 9 Excerpts from 2001 SVWP DEIR/EIS, at p. 1-7.) As with the reservoirs, these projects helped  
 10 slow, but did not fully control, the advance of seawater. (MCWRA-020, Excerpts from 1998  
 11 SVWP DEIR, at p. 4.3-2.)

12 Beginning in 1977 the State Board determined that the Basin's seawater intrusion problem  
 13 was severe enough to warrant adjudication of groundwater pumping rights unless the Agency  
 14 implemented a local solution. (MCWRA-019, Excerpts from 2001 SVWP DEIR/EIS, at p. 4-13;  
 15 MCWRA-020, Excerpts from 1998 SVWP DEIR, at p. 1-3; MCWRA-021, CEPA News Release,  
 16 at p. 1.<sup>2</sup>) The State Board stated, among other things, that an adjudication would require  
 17 determining the volume of overdraft in the Basin and the volume of groundwater available  
 18 without causing undue harm. The State Board also stated that an adjudication would result in  
 19 severe pumping curtailments based on water rights and "determining the reasonable historical use  
 20 by each user." (MCWRA-022, State Board Salinas Valley Groundwater Basin Adjudication  
 21 Process, at pp. 1-38; MCWRA-023, Draft Salinas Valley Groundwater Situation, at pp. 1-7;  
 22 MCWRA-024, Salinas Valley Seawater Intrusion Program, at p. 7.) "The result would be a loss  
 23 of local control over the management of local water resource issues [and] the State of California  
 24 would assume responsibility for allocation and oversight of local water resources." (MCWRA-  
 25 025, Excerpts from SVWP Draft Project Plan Report, at p. ES-2.) Recognizing the harsh  
 26

27 <sup>2</sup> The Agency requests that the State Board take official notice of the CEPA News Release. (See Cal. Code Regs., tit.  
 28 23, § 648.2; *Javor v. State Board of Equalization* (1974) 12 Cal.3d 790, 800-801 [Courts can take judicial notice of a  
 news release from a state agency].)



1 consequences and enormous cost of an adjudication, the State Board emphasized a preference for  
 2 a local solution to seawater intrusion. (MCWRA-026, 2002 SVWP Final EIR/EIS, at p. 2-656;  
 3 MCWRA-021, CEPA News Release, at p. 1; see also MCWRA-027, Letters Submitted to House  
 4 Energy and Water Development Appropriations Committee in Support of the SVWP.)

5 **D. Implementation of the Salinas Valley Water Project**

6 In the wake of the State Board's proposal to adjudicate the Basin, the Agency undertook  
 7 extensive hydrologic modeling efforts and other technical review. Modeling indicated that  
 8 Nacimiento and San Antonio Reservoirs could be re-operated to conserve additional surface  
 9 water, which could be delivered to users in coastal areas. The supplemental surface water would  
 10 be used by irrigators in lieu of groundwater pumping, thereby keeping groundwater levels high  
 11 and reducing seawater intrusion. (MCWRA-025, SVWP Draft Project Plan Report, at pp. 1-12,  
 12 3-1; MCWRA-028, Findings and Statement of Overriding Considerations Related to Approval of  
 13 the SVWP FEIR, at p. 2.) From these initial technical discussions the conceptual framework of  
 14 the Salinas Valley Water Project ("SVWP") emerged.

15 The Agency designed the SVWP with three primary components: (1) modification of the  
 16 Nacimiento Dam spillway to allow flood water passage and operational flexibility; (2) re-  
 17 operation of the Nacimiento and San Antonio reservoirs to conserve and release additional water;  
 18 and (3) construction and operation of a diversion facility on the Salinas River that would provide  
 19 a surface water supply to facilitate pumping reductions in seawater-intruded areas. (MCWRA-  
 20 029, 2003 SVWP Engineer's Report, at p. ES-1.)

21 **E. Development of the Flow Prescription.**

22 Construction of the SVWP required a dredge and fill permit from the U.S. Army Corps of  
 23 Engineers ("USACE") pursuant to Section 404 of the Clean Water Act. As a result, a  
 24 consultation under Section 7 of the federal Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*  
 25 ("ESA"), between USACE and the National Marine Fisheries Service ("NMFS") was required.  
 26 NMFS initiated the Section 7 consultation for SVWP on December 9, 2004. (MCWRA-030,  
 27 2007 SVWP Final BiOp, at p. 5.) The principal focus of the consultation and the resulting flow  
 28 prescription (discussed below) was protection of steelhead, which had been listed as endangered

1 under the ESA. (*Id.* at pp. 10, 23; 50 C.F.R. § 223.203 (2014).)

2 The Agency was actively involved in the Section 7 consultation process. Beginning in  
3 2002, Agency staff and consultants worked closely with NMFS to develop flow criteria for  
4 steelhead migration. (See MCWRA-030, 2007 SVWP Final BiOp, at 4.) From April through  
5 August 2005, a technical working group made up of representatives of NMFS and the Agency  
6 met regularly to develop the final flow prescription. (*Id.*) On October 11, 2005, the Agency  
7 provided to NMFS the *Salinas Valley Water Project Flow Prescription for Steelhead Trout in the*  
8 *Salinas River*. (MCWRA-016, Flow Prescription.) On November 8, 2005, the Agency provided  
9 an *Errata to the Salinas Valley Water Project Flow Prescription for Steelhead Trout in the*  
10 *Salinas River* that included corrections and clarifications based on NMFS' review of the *Salinas*  
11 *Valley Water Project Flow Prescription for Steelhead Trout in the Salinas River* (both are  
12 referenced together here as the "Flow Prescription"). (See MCWRA-016, Flow Prescription.)  
13 The Flow Prescription was thereafter made part of the Project Description for the SVWP. (See  
14 MCWRA-030, 2007 SVWP Final BiOp, at pp. 8, 10.)

15 On July 31, 2007, the Monterey County Board of Supervisors, in its role as Board of  
16 Supervisors of the Agency, publicly adopted an Addendum to the Final Environmental Impact  
17 Report for the SVWP. (MCWRA-031, BOS Order and Resolution Adopting SVWP Final EIR  
18 Addendum; MCWRA-032 SVWP Final EIR Addendum.) The Addendum described the Flow  
19 Prescription and its anticipated impacts in detail, including water supply impacts. (Buche Decl., ¶  
20 7.) The Addendum was never challenged by the Coalition or any other party. (*Id.*)

21 F. **The Flow Prescription, including the Drought Provision, Was Incorporated**  
22 **into the Agency's Water Rights.**

23 In 2004, the Agency filed a change petition with the State Board requesting authorization  
24 for changes to its Nacimiento River water rights for the SVWP. (See MCWRA-033, 2004 Notice  
25 of Petition to Change the Place of Use and Add Points of Rediversion.) NMFS filed a protest to  
26 the Agency's change petition. (See MCWRA-034, License 7543, at p. 1; MCWRA-035, Permit  
27 21089, at p. 1; MCWRA-036, License 12624, at p. 1.) As part of an agreement between NMFS  
28 and the Agency for withdrawal of the NMFS protest, License 12624, License 7543 and Permit

21089 incorporated the Flow Prescription as set forth in the June 20, 2007 NMFS biological opinion on the SVWP. (See MCWRA-034 (License 7543), Order WR 2008-0037-DWR, at p. 2; MCWRA-035 (Permit 21089), Order WR 2008-0037-DWR, at p. 2; MCWRA-036 (License 12624), Order WR 2008-0037-DWR, at p. 1; see also MCWRA-037, NMFS August 28, 2008 Letter to State Board, at p. 1; see also MCWRA-038, NMFS June 23, 2006 Letter to State Board, at p. 2 [NMFS is willing to drop its protest “[g]iven that MCWRA has agreed to operate the SVWP using the Flow Prescription.”].) Therefore, the Flow Prescription *in full* was incorporated into the Agency’s Nacimiento water rights pursuant to Water Right Order 2008-0037 ¶ 4(c).

Specific to the Nacimiento River, License 7543 and Permit 21089 contain a summary of the Flow Prescription specific to the Nacimiento River under the heading “Flow Prescription for Spawning and Rearing Habitat in the Nacimiento River.” (MCWRA-034, License 7543, at p. 7; MCWRA-035, Permit 21089, at p. 8.) The summary of the Flow Prescription under this heading states:

Licensee shall augment flow in the Nacimiento River by releasing 60 cfs MDF [minimum daily flow] from Nacimiento Reservoir beginning the 8th day after the first adult steelhead passage day occurs on the Salinas River after January 1 of each year. The first passage day is the first day in a period of 5 consecutive days with an MDF of 260 cfs or higher at the USGS gage No. 11152300 (Salinas River near Chualar). The release of 60 cfs MDF will continue at least through May 31. After May 31, licensee will continue to release 60 cfs of MDF the remainder of the calendar year as long as the water surface elevation of Nacimiento Reservoir is above 687.8 feet mean sea level.

(*Id.*)

NMFS stated in its June 23, 2006 letter that it was willing to withdraw its protest on the basis that Licenses 7543 and 12624 and Permit 21089 would adopt this term and others consistent with the Flow Prescription that the Agency and NMFS had developed together. (MCWRA-038, NMFS June 23, 2006 Letter to State Water Board, at p. 2.) NMFS made clear that its conditional protest dismissal was premised on the Agency’s agreement to operate the SVWP pursuant to the Flow Prescription. (*Id.*) Significantly to the issues raised here, the Flow Prescription includes a contingency in case of drought conditions (“Drought Provision”):

Under drought conditions, the [Agency] will evaluate reservoir

storage with regard to the continuation of minimum releases. When the water surface of Nacimiento Reservoir is at or below elevation 748 msl recommendations may be presented to NMFS for a reduction of the minimum flow criterion.

(MCWRA-016, Flow Prescription, at p. 31.) The Flow Prescription, including the Drought Provision, was incorporated into the Agency's water rights as it was the basis for NMFS's agreement to dismiss its protest to the Agency's change petition. As discussed below, NMFS and the Agency implemented the Drought Provision during the severe drought of 2013-2015.

**G. The Extreme Drought of 2013-15.**

In 2014 and 2015, Monterey County, as well as most of California, was in the midst of a historically significant drought. (Daus Decl., ¶¶ 20, 21, 40.) On August 8, 2013, the water level at Nacimiento Reservoir fell below the 748 feet msl elevation set forth in the Flow Prescription as the point at which point a recommendation can be presented to NMFS for a reduction of the minimum flow criterion. (MCWRA-039, Daily Water Surface Elevation for Nacimiento Reservoir; see Buche Decl., ¶ 8.) Conditions remained extremely dry in the Salinas River watershed throughout the fall of 2013 and the early winter of 2014. (Daus. Decl., ¶¶ 23, 26.) On January 9, 2014, the Agency Board of Directors ("BOD") reviewed water supply conditions at Nacimiento and San Antonio with the Reservoir Operations Committee ("Committee"), and noted that San Antonio was at 5% of its storage capacity and close to its physical dead pool level of 645 feet. (MCWRA-040, BOD Committee January 2014 Meeting Minutes, at p. 3.) The Committee reported that the water level at Nacimiento was 727.25 feet msl (23% of reservoir capacity) and 57 feet above physical dead pool. (*Id.* at p. 2) By the Committee's February 2014 meeting, Nacimiento's water level had dropped to 725.65 feet msl, 22% of capacity, and San Antonio's to 655.90 feet msl, 5% of capacity. (MCWRA-041, BOD Committee February 2014 Meeting Minutes, at p. 2.) On January 17, 2014, Governor Brown issued a Proclamation of a State of Emergency regarding drought conditions throughout California.<sup>3</sup> (MCWRA-042, Proclamation

<sup>3</sup> The Agency requests that the State Board take official notice of the Proclamation of a State of Emergency. (See Cal. Code Regs., tit. 23, § 648.2; Evid. Code, § 452, subd. (c); see also *Stanislaus Lumber Co. v. Pike* (1942) 51 Cal.App.2d 54, 56 [the court can take judicial notice of a proclamation of the Governor, the chief executive of the state].)

1 of a State of Emergency.)

2 Water levels at Nacimiento continued to decline through 2014. (See MCWRA-043,  
3 Historical Reservoir Releases Elevation Storage; MCWRA-044 Stream and Reservoir Data.) As  
4 discussed above, the operational minimum pool for the Nacimiento Reservoir is 687.8 feet msl.  
5 Prior to 2014, Nacimiento had only reached operational minimum pool (below 687.8 feet msl) six  
6 times since its construction: in August of 1960, July of 1961, in November of 1969, in October of  
7 1972, in October of 1977, and in June of 1989. (Buche Decl., ¶ 9.) Since beginning operation of  
8 the Salinas Valley Water Project pursuant to the Flow Prescription in 2010, other than in the  
9 period from 2013 through 2017 Nacimiento fell below 748 feet msl only in October of 2010 and  
10 September of 2012. (*Id.*) As for San Antonio, as of March 31, 2014, it was setting a new  
11 milestone for lowest reservoir elevation every day until spring 2016. (MCWRA-043, Historical  
12 Reservoir Releases Elevation Storage; MCWRA-044 Stream and Reservoir Data; see Buche  
13 Decl., ¶ 10.)

14 **H. Diminishing Natural Flow and Increased Extractions During the Drought.**

15 Extractions from the Basin in the Upper Valley and Forebay Subareas increased during  
16 the drought. (Daus Decl., ¶ 29, 30.) Groundwater extractions in 2013 through 2015 were all  
17 above the average since 2010, including the highest amount of 303,675 acre-feet in June 2014 to  
18 May 2015 when reservoir releases were reduced below 60 cfs. (Daus Decl., ¶ 29, Table 2.)  
19 Reports of surface water diversions made to the State Water Resources Control Board during the  
20 period of reduced reservoir releases amounted to approximately 86,000 acre-feet in the Upper  
21 Valley and Forebay Subareas (Declaration of Anne Williams ("Williams Dec."), ¶ 12). Because  
22 these reports, in some instances, do not distinguish between surface water diversions and  
23 extractions of percolating groundwater, it is difficult to determine the extent to which the reported  
24 diversions are additive to groundwater pumping in the two Subareas, as reported to the Agency.

25 As would be expected during a severe drought, the flow the Salinas River plummeted in  
26 2014-2015. (Daus Decl., ¶ 21). Even if reservoir releases remained at 60 cfs in 2014-2015, flow  
27 at the Bradley gage would still have been over 140,000 acre-feet less than in 2013-2014. (*Id.*) In  
28 addition, the last time there was a period of 5 consecutive days with a minimum daily flow

(MDF) of 260 cfs or higher at USGS gage No. 11152300 (the Salinas River at Chualar gage specified in the Flow Prescription) was from December 24, 2012 to December 30, 2012. (MCWRA-045, USGS 11152300 Salinas River NR Chualar CA; see also Daus Decl., Exh. C.5 Salinas River Gages Map.) Less than a year later, from October 23, 2013 through 2015, there was zero flow at USGS gage No. 11152300, even as the Agency continued to make 60 cfs releases in early 2014, late 2015, and 2016. (MCWRA-044, Stream and Reservoir Data; MCWRA-045, USGS 11152300 Salinas River NR Chualar CA.) In fact, throughout 2016 when the Agency was releasing 60 cfs from Nacimiento, there remained zero flow at USGS gage No. 11152300. (MCWRA-044, Stream and Reservoir Data.) It wasn't until January 2017 that USGS gage No. 11152300 saw a minimum daily flow above 260 cfs. (*Id.*) More specifically, the only natural flow that was present during the period when reservoir releases were reduced below 60 cfs occurred during two storm events that occurred in December 2014 and March 2015. (Daus Decl., ¶ 27, Exh. C.10.) As such, all of the water that was released from June 4, 2014 through at least early December 2014 was water stored by the Agency pursuant to its water rights.

#### **I. The Agency and NMFS Implement the Drought Provision.**

Following public meetings of the Agency Board of Directors ("BOD") and the Reservoir Operations Committee, Agency staff met with NMFS on February 20, 2014 to discuss reducing releases from Nacimiento and San Antonio Reservoirs. (MCWRA-041, BOD Committee February 2014 Meeting Minutes, at p. 2.) At the time, the Salinas River watershed was projected to have very little to no additional rainfall for the 2014 rainy season. (*Id.*; see also MCWRA-046, MCWRA March 18, 2014 Letter to NMFS.) Monterey County overall was either in an extreme or exceptional drought. (MCWRA-047, BOD March 2014 Meeting Agenda, at p. P98.) The BOD approved the Committee's recommendation that the Agency request concurrence from NMFS for a reduction in reservoir releases, in accordance with the Flow Prescription's Drought Provision. (*Id.*; see also MCWRA-046, MCWRA March 18, 2014 Letter to NMFS.) On March 18, 2014, the Agency formally requested that NMFS concur with a reduction in releases from Nacimiento from 60 cfs to 25 cfs. (MCWRA-046, MCWRA March 18, 2014 Letter to NMFS, at p. 1.) The Agency stated to NMFS that if the Agency continued to provide 60 cfs releases from

1 Nacimiento, the reservoir would reach its minimum pool elevation of 687.8 feet msl by early  
 2 February 2015, at which time all releases from Nacimiento Reservoir would cease. (*Id.* at p. 2)  
 3 The Agency further stated that if releases from Nacimiento were reduced to 25 cfs, the time  
 4 period to reach minimum pool would be delayed by approximately 180 days. (*Id.*) The requested  
 5 reduction in Nacimiento releases would allow the Agency to provide instream flow for a  
 6 significantly longer time period, thereby maintaining the steelhead habitat for as long as possible.  
 7 (*Id.*)

8 The forecast for Nacimiento showed that if the reservoir continued with 60 cfs releases,  
 9 the water level at the reservoir would reach operational minimum pool by mid-February 2015 and  
 10 physical dead pool in May. (MCWRA-048, BOD March 2014 Meeting Slides, at p. 29.) A 25  
 11 cfs release would push the operational minimum pool scenario back to approximately early-  
 12 September 2015. (*Id.*) Thus, to “offset[ ] the uncertainties of continuing drought conditions,” the  
 13 BOD unanimously approved a motion to reduce the minimum flow criteria from Nacimiento  
 14 Reservoir from 60 cfs to 25 cfs on March 31, 2014, but the actual flow release would not be  
 15 reduced until the Agency worked with NMFS to develop a monitoring plan in spring of 2014.  
 16 (MCWRA-049, BOD March 2014 Meeting Minutes, at p. 13.) At this meeting, Coalition  
 17 representative Nancy Isakson commented on the importance of developing a drought contingency  
 18 plan with NMFS and recommended that the Agency proceed with such an approach. (MCWRA-  
 19 049, BOD March 2014 Meeting Minutes, at 12.)

20 Throughout the spring of 2014, the Agency was in regular communication with NMFS  
 21 regarding the proposed reduction in reservoir releases. (See MCWRA-050, BOD April 2014  
 22 Meeting Minutes [conference call between Agency staff and NMFS regarding minimum flow  
 23 release reduction].) By letter dated April 25, 2014, NMFS responded to the Agency’s request to  
 24 decrease releases from Nacimiento. (MCWRA-051, NMFS April 25, 2014 Letter to MCWRA.)  
 25 In its letter, NMFS determined that a reduction in releases could result in adverse impacts to  
 26 steelhead habitat, but offered various measures to address those concerns if the Agency were to  
 27 implement the proposed reduction in reservoir releases. (*Id.* at p. 2.) The measures offered by  
 28 NMFS included the following:

(1) Ramp down flows such that changes in stage will be approximately two inches per hour.

(2) Conduct continuous stream temperature monitoring for as long as flows are at a reduced level and provide stream temperature data to NMFS on a monthly basis.

(3) Conduct summer fish monitoring.

(*Id.* at p. 3.) In addition to the monitoring plan, NMFS also recommended supplemental flows in the future to offset the reduction. (*Id.*)

The Agency developed a monitoring plan (“Agency Monitoring Plan”) that expanded upon the NMFS recommendations. The Agency also developed a ramping rate and temperature and fish monitoring measures. (MCWRA-052, Drought Conditions Fisheries Monitoring on the Nacimiento River.) In addition to ramping down flows, as suggested by NMFS, the Agency would also evaluate the flows “for instances of stranding, isolation, or extreme loss of habitat.”

(*Id.* at p.1.) If the reduction resulted in any take of steelhead, the Agency would reinstate the higher level flow. (*Id.*) The Agency would also submit field survey reports to NMFS after flow reduction. (*Id.*) In terms of temperature monitoring, not only did the Agency adopt NMFS’ suggested plan, but the Agency also agreed to supplement two temperature monitoring loggers with two additional loggers. (*Id.*) Finally, NMFS requested summer fish monitoring.

(MCWRA-051, NMFS April 25, 2014 Letter to MCWRA, at p. 3.) The Agency Monitoring Plan included collecting data of the ambient conditions as well as water quality in addition to the summer fish monitoring, and providing the data to NMFS. (MCWRA-052, Drought Conditions Fisheries Monitoring on the Nacimiento River, at pp. 2–3.)

#### **J. Agency Board of Directors Approves Flow Reduction and Monitoring Plan**

By the time the Agency BOD met on April 28, 2014, the watershed was experiencing an “exceptional drought,”<sup>4</sup> with the water levels of Nacimiento and San Antonio plunging steeply.

<sup>4</sup> Under the U.S. Drought Monitor classification, “exceptional drought” is defined as exceptional and widespread crop/pasture losses, and shortages of water in reservoirs, streams, and wells creating water emergencies. In terms of USGS Weekly Streamflow data, this means the area affected is in the 0 to 2 percentiles. (See U.S. Drought Monitor, Drought Classification (2018) <<http://droughtmonitor.unl.edu/AboutUSDMDroughtClassification.aspx>> (as of May 18, 2018).)



(See MCWRA-053, BOD April 2014 Meeting Slides, at p. 47.) By May 2014, the BOD noted that if Nacimiento continued to release 60 cfs with no significant reservoir inflow the following winter, Nacimiento would be at minimum operational pool (a water elevation of 687.8 feet msl) by early March 2015, and would reach physical dead pool (670 feet msl) by June 2015. (MCWRA-054, BOD Committee May 2014 Meeting Minutes, at p. 3.) The dire state of Nacimiento also caused water users to raise concerns regarding public health and safety if water levels reached minimum operational pool or lower. (*Id.*)

On June 2, 2014, the Agency BOD, based on the lengthy consultation process with NMFS, unanimously approved (i) a reduction of releases from Nacimiento Reservoir from 60 cfs to 25 cfs, and (ii) implementation of the Agency Monitoring Plan that included and expanded on the measures recommended by NMFS. (MCWRA-055, BOD June 2014 Meeting Minutes, at p. 6; see also MCWRA-056, BOD Committee June 2014 Meeting Minutes, at p. 2.) Beginning on June 4, 2014, the Agency gradually reduced releases from Nacimiento Reservoir to the target rate of 25 cfs. (MCWRA-056, BOD Committee June 2014 Meeting Minutes, at p. 2.) At that time the water level at Nacimiento Reservoir was 723.1 feet msl, 20% of capacity. (MCWRA-056, BOD Committee June 2014 Meeting Minutes, at p. 2.)

As the Agency reduced Nacimiento Reservoir releases to 25 cfs, the Agency implemented the Agency Monitoring Plan and closely monitored water temperature, the existence and health of steelhead and steelhead habitat. (See generally, MCWRA-057, March 2015 Letter to NMFS.) The Agency adjusted Nacimiento releases depending on the results of that monitoring. (See generally, *id.* at pp. 10, 16; MCWRA-056, BOD Committee June 2014 Meeting Minutes, at p. 2.) The Agency also maintained contact with NMFS and provided temperature data for the Nacimiento River below the Nacimiento Dam to NMFS as part of its monitoring observations. (MCWRA-057, March 2015 Letter to NMFS, at p. 1.) In addition to the water temperature data, the Agency provided to NMFS habitat description, air temperature data and the streamflow data of the monitoring locations. (See, e.g., *id.* at pp. 2, 3, 4.)

**K. Resumption of 60 cfs Release Regime on May 28, 2015.**

Water levels at Nacimiento Reservoir continued to decline until a low of 714.9 ft. msl was

reached on December 1, 2014. (MCWRA-039, Daily Water Surface Elevation for Nacimiento Reservoir.) Depending on the result of the Agency's monitoring observations, the releases from Nacimiento during this period varied from 25 to 30 cfs until May 28, 2015 when releases were increased to 60 cfs. (MCWRA-056, BOD Committee June 2014 Meeting Minutes at p. 2; MCWRA-058, Daily Releases for Nacimiento Reservoir; MCWRA-059, BOD May 2015 Meeting Minutes [BOD directed staff to increase minimum flow releases from Nacimiento Reservoir from 25 to 60 cfs].) However, the water elevation in Nacimiento Reservoir did not recover to above 748 feet msl until January 9, 2017. (MCWRA-039, Nacimiento Water Surface Elevation; Buche Decl., ¶ 8.)

#### IV. LEGAL ARGUMENT

##### A. The Agency Did Not Violate the Flow Prescription (Issue 3a).

Issue 3a of the Order Specifying Issues poses the following question: "Whether the Defendant Monterey County Water Resources Agency ("Agency") has violated the Flow Prescription for Spawning and Rearing Habitat in the Nacimiento River in License 7543 (Application 16124) and Permit 21089 (Application 30532) by releasing less than 60 cubic feet per second ("cfs") of water Nacimiento Reservoir during the period from June 4, 2014, through May 27, 2015." The answer to this question is no.

As discussed above, the "Flow Prescription for Spawning and Rearing Habitat in the Nacimiento River" is a summary of the terms of the Flow Prescription itself and does not expressly include the Drought Provision; however, the Drought Provision is included in the Flow Prescription itself. The record makes clear that the Flow Prescription, which includes the Drought Provision, is incorporated into the Agency's water rights as it was the basis for NMFS's agreement to dismiss its protest to the Agency's change petition. (*See supra* at Section III.F.) The Drought Provision provides as follows:

Under drought conditions, the MCWRA will evaluate reservoir storage with regard to the continuation of minimum releases. When the water surface of Nacimiento Reservoir is at or below elevation 748 feet msl recommendations may be presented to NMFS for a reduction of the minimum flow criteria.

(MCWRA-016, Flow Prescription, at p. 31.) As incorporated into License 7543 and Permit

21089 (see MCWRA-034 (License 7543), Order WR 2008-0037-DWR, at p. 2; MCWRA-035 (Permit 21089), Order WR 2008-0037-DWR, at p. 2), the Flow Prescription at issue includes this Drought Provision.

“Drought conditions,” within the meaning of the Drought Provision, began in the summer of 2013. (Buche Decl. ¶ 8.) Specifically, water levels at Nacimiento fell below 748 feet msl on August 8, 2013. (See *id.*; see also MCWRA-039, Daily Water Surface Elevation for Nacimiento Reservoir.) As discussed in detail above, the Agency initiated consultation with NMFS and, on March 18, 2014, it made a formal recommendation to NMFS pursuant to the Drought Provision to reduce the minimum flow criterion at the Nacimiento Reservoir from 60 cfs to 25 cfs.

(MCWRA-046, MCWRA March 18, 2014 Letter to NMFS, at p. 1.) After sending its formal recommendation to NMFS, the Agency worked closely with NMFS to develop a monitoring plan that would address concerns about adverse impacts to steelhead resulting from the reduced releases. (See MCWRA-055, BOD June 2014 Meeting Minutes, at p. 5; MCWRA-053, BOD April 2014 Meeting Slides, at p. 46.) Not only did the Agency incorporate all of NMFS’s recommended monitoring measures; it adopted additional monitoring measures such as evaluation of flow during ramp downs, submission of reports to NMFS, addition of temperature monitoring loggers, and collection of water quality as part of the monitoring. (MCWRA-052, Drought Conditions Fisheries Monitoring on the Nacimiento River, at pp. 1–3.)

At the time, the Agency faced the pressure of the ongoing drought and the steep decline of reservoir levels, with the prospect of Nacimiento Reservoir reaching operational minimum pool in a few months. (See MCWRA-053, BOD April 2014 Meeting Slides, at pp. 47, 52, 53.) The Agency continued working with NMFS to develop mitigation measures before it reduced the minimum releases from Nacimiento Reservoir. (See *id.* at p. 54; MCWRA-055, BOD June 2014 Meeting Minutes, at p. 6.) In the face of uncertainty about how long the drought would last, the Agency acted reasonably to protect beneficial uses to the maximum extent possible with very limited water supplies. The Agency complied fully with the Flow Prescription including the Drought Provision and the other terms and conditions of its water rights.

**B. The Reduction in Releases from Nacimiento Reservoir Did Not Have a Significant Effect on Water Availability in the Upper Valley or Forebay Subareas (Issue 3b).**

Issue 3b of the Order Specifying Issues poses the following question: “If the State Water Board concludes the Agency did not comply with the 60 cfs water release requirement of the Flow Prescription for Spawning and Rearing Habitat in the Nacimiento River, whether such failure reduced recharge that otherwise would have been provided to the Salinas River Groundwater Basin’s (“Basin”) Upper Valley and Forebay subareas and, if so, whether that recharge reduction reduced water availability (i.e., groundwater elevations and groundwater quality for any riparian and overlying rights in the Upper Valley and Forebay subareas).”

For the reasons discussed below, the Agency’s reduction in Nacimiento releases in accordance with the Drought Provision did not have a significant effect on water availability in the Upper Valley or Forebay Subareas; the overriding factor affecting groundwater and surface water conditions in the two Subareas was the extreme severity of the drought itself.

From June 4, 2014 through May 27, 2015 (hereinafter “Period of Interest”), the difference between the reduced releases of water from Nacimiento Reservoir and a hypothetical 60 cfs continued release totaled to approximately 21,102 acre-feet. (Daus Decl., ¶ 24.) Nacimiento Reservoir did not experience any increase in storage (as the result of natural in-flow) after releases were reduced below 60 cfs on June 4, 2014 until December 2014. (Daus Decl., ¶¶ 27-28, Exh. C.10.) Assuming hypothetically that the Agency had resumed 60 cfs releases from Nacimiento when natural flow became available, only approximately 8,707 acre-feet of additional water would have been released from December 30, 2014 to May 27, 2015. (Daus Decl., ¶ 28.) 8,707 acre-feet represents (i) approximately 3% of the groundwater extractions in the Upper Valley and Forebay Subareas reported during the Period of Interest. (Daus Decl., ¶ 29.); and (ii) less than half a foot of groundwater elevation decline in the Upper Valley and Forebay Subareas, assuming that none of the water released from Nacimiento Reservoir would have been intercepted by surface water diversions or other groundwater pumping. (Daus Decl., ¶¶ 32-34.) Even if reservoir releases had remained at 60 cfs for the Period of Interest, groundwater levels in the Upper Valley and Forebay Subareas would have declined about one foot less than they did with

1 the reduction in releases. (*Id.*) As discussed below, a foot of groundwater elevation decline is  
 2 extremely small when compared to the impacts of the drought. (Daus Decl., ¶¶ 39, 41.) In any  
 3 event, water diversions near the Salinas River would intercept a potentially significant amount of  
 4 the water if it had been released from Nacimiento and would deplete the available recharge to the  
 5 Upper Valley and Forebay Subareas. (Daus Decl., ¶¶ 31, 32.)

6 Moreover, analysis of water quality at monitoring wells in the Upper Valley and Forebay  
 7 Subareas indicates that groundwater quality was not reduced by the reduction in reservoir releases  
 8 below 60 cfs; reduced water quality at only two of the wells was likely due to other factors and  
 9 water quality data overall did not show a consistent relationship to Nacimiento Reservoir releases.  
 10 (Daus Decl., ¶¶ 36, 37, 38.) Indeed, the elevated concentrations of analytes identified during the  
 11 Period of Interest were slight, temporary and overall not significant. (Daus Decl., ¶¶ 36, 37.) In  
 12 sum, the water quality data suggest that the reductions in Nacimiento Reservoir releases below 60  
 13 cfs did not reduce groundwater availability during the Period of Interest in the Upper Valley  
 14 Subarea and Forebay Subarea. (Daus Decl., ¶ 38.)

15 Even if changes in groundwater elevations had occurred as a result of the Agency's  
 16 reduction in reservoir releases, these changes in groundwater elevations did not constitute a  
 17 significant portion of the overall reduction in average depth to groundwater in the Upper Valley  
 18 and Forebay Subareas during the drought. (Daus Decl., ¶ 41.) Rather, the addition of 8,707 to  
 19 21,102 acre-feet would not have raised the depth to groundwater above the record low for both  
 20 the Upper Valley and Forebay Subareas. (Daus Decl., ¶ 41.) The severity of the drought was the  
 21 overriding factor in the decline of groundwater elevations; the effect of additional releases on  
 22 groundwater elevations and groundwater quality in the Upper Valley and Forebay Subareas was  
 23 extremely small. (Daus Decl., ¶¶ 39-41.) Even if reservoir releases had been maintained at 60  
 24 cfs, Nacimiento releases would have been about 160,000 acre-feet less than in the previous year  
 25 due to the unavailability of natural flow. (*See* Daus Decl., ¶ 39.)

26 In the end, the reduction in releases from Nacimiento Reservoir during the Period of  
 27 Interest did not have a significant impact on water availability in the Upper Valley or Forebay  
 28 Subareas. (Daus Decl., ¶ 42.)

1           **C.     The Agency, as a Salvager of Water, Holds a Prior and Paramount Right to**  
2           **Water Stored in Nacimiento and San Antonio Reservoirs in Accordance with**  
3           **its Appropriative Water Rights (Issue 3c).**

4           Issue 3c of the Order Specifying Issues poses the following question: “Whether the  
5           Agency’s appropriative water rights for Nacimiento and San Antonio reservoirs – License 7543  
6           (Application 16124), License 12624 (Application 16761) and Permit 21089 (Application 30532)  
7           – are junior in priority to any downstream riparian and overlying water rights in the Salinas River  
8           and Basin.” For the reasons discussed below, the Agency, as a salvager of water, holds a prior  
9           and paramount right to the water stored in Nacimiento and San Antonio reservoirs.

10                   **1.     Coalition members have no rights to previously-stored water.**

11           A recent decision of the Sixth Appellate District (the District with jurisdiction over  
12           Monterey County), *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266 (“*Santa Maria*”),  
13           describes the relative rights of a reservoir operator in relation to downstream overlying right  
14           holders. *Santa Maria* arose from an adjudication of groundwater rights in the Santa Maria  
15           Groundwater Basin, a coastal basin similar in many respects to the Basin. A reservoir project  
16           (Twitchell) was constructed in the headwaters of the watershed pursuant to a license issued by the  
17           State Board. (*Id.* at 281). The reservoir project added roughly 32,000 acre-feet per year to the  
18           basin that would not be there otherwise; this increment of water was referred to as the “Twitchell  
19           Yield.” The appellants in *Santa Maria* held overlying rights to pump native groundwater from  
20           the basin. They argued that the Twitchell Yield should be treated as native groundwater for water  
21           right purposes. The Court of Appeal rejected this argument. “Simply stated, salvaged water is  
22           water that is saved from waste as when winter floodwaters are dammed and held in a reservoir.  
23           As is the case with return flows, a priority right to salvaged water belongs to the one who made it  
24           available. This is not a new rule.” (*Id.* at 304, citing *Pomona etc. Co. v. San Antonio etc. Co.*  
25           (1908) 152 Cal. 618, 620.) The court concluded: “The Twitchell Yield is salvaged water to  
26           which overlying rights do not attach.” (*Id.* at 307; *see also Peabody v. Vallejo* (1935) 2 Cal.2d  
27           351, 372).

28           The same rules apply to riparian rights. A riparian right holder only has a right to the  
amount of water existing in natural conditions before a dam was erected. (*Lindblom v. Round*

1 *Valley Water Co.* (1918) 178 Cal. 450, 457; *see also State Water Resources Control Board Cases*  
 2 (2006) 136 Cal.App.4th 674, 738 [finding that the State Board properly concluded that  
 3 downstream riparian rights holders would not be injured or unreasonably affected by adding fish  
 4 and wildlife enhancements as a purpose to previously issued licenses for upstream projects].) A  
 5 riparian has no right to the release of stored water by an upstream appropriator where there would  
 6 have been no natural flow if the dam had not existed. (*Id.*)

7 In Decision 1642 issued February 15, 2001, the State Board considered an argument  
 8 strikingly similar to that now asserted by the Coalition. Decision 1642 involved the Agency's  
 9 Application 30532 for additional storage rights at Nacimiento Reservoir. (MCWRA-060, State  
 10 Board Decision No. 1642.<sup>5</sup>) The protestants, downstream overlying and riparian right holders,  
 11 argued that the approval of Application 30532 would cause injury to their senior rights. The State  
 12 Board determined that the protestants had failed to demonstrate any injury. (*Id.* at 14.) The State  
 13 Board concluded that no "special terms or conditions" were necessary to protect senior water  
 14 right holders downstream of Nacimiento Reservoir. The Agency was allowed to store water up to  
 15 the permitted amount without injury to senior water right holders. (See, e.g., MCWRA-035,  
 16 Permit 21089, at p. 4.) It is noteworthy that the Coalition did not protest Application 30532. (See  
 17 MCWRA-062, Salinas Valley Water Coalition News Release, at pp. 1-2).<sup>6</sup>

18 As was the case in *Santa Maria*, Nacimiento and San Antonio Reservoirs add water to the  
 19 Basin that would not be there otherwise. The fact that the Agency released 60 cfs of previously  
 20 stored water during the early stages of the drought (when no natural flow was available) was a  
 21 benefit to downstream riparian and overlying right holders, but not a right. (MCWRA-060, State  
 22 Board Decision No. 1642, at p. 14 [Protestants' "lands in the Upper Valley benefit from increased  
 23 groundwater levels in drought years due to MCWRA diverting to storage all or part of the 27,900  
 24

25 <sup>5</sup> The Agency requests that the State Board receive in evidence or take official notice of State Board Decision No.  
 26 1642. (See Cal. Code Regs., tit. 23, §§ 648.2, 648.3; *State Water Resources Control Bd. Cases* (2006) 136  
 Cal.App.4th 674, 698 fn.12 [Courts can take judicial notice of a State Board decision].)

27 <sup>6</sup> The Agency requests that the State Board receive in evidence or take official notice of Salinas Valley Water  
 28 Coalition News Release. (The Agency requests that the State Board take official notice of the CEPA News Release.  
 (See Cal. Code Regs., tit. 23, § 648.2; see generally, *Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 325, 326  
 [documents prepared by the opposing party are admission].)

af increment during prior years of above normal rainfall.”]; emphasis added.) To require the release of previously stored water from Nacimiento or San Antonio in 2014-2015 to satisfy the Coalition’s desire for additional groundwater recharge would violate the Agency’s rights under License 7543, License 12624 and Permit 21089. There is simply no legal basis for such a release requirement.

## 2. Coalition members have no rights to flow prescription water.

As discussed above, the Flow Prescription was developed jointly by the Agency and NMFS, and ultimately approved by the State Board, for the purpose of steelhead protection. It was not developed for the purpose of protecting groundwater recharge (or stream flow) for riparian or overlying right holders. If the Coalition members had wanted the State Board to include conditions in the Agency’s water rights requiring specific reservoir releases for the protection of downstream water right holders they could have participated in the water right proceeding relating to the Agency’s change petition for the Salinas Valley Water Project, or in the proceeding relating to Application 30532, and advocated for such a release requirement. They chose not to do so.

By asserting that the Agency had a duty to continue releasing water at the rate of 60 cfs during the Period of Interest the Coalition is, in essence, attempting to gain rights to previously-stored water which the State Board has allocated to instream beneficial uses. The Coalition members have no rights to the water allocated by the State Board to instream uses through the Flow Prescription. The Coalition members likewise have no legal basis for contesting the Agency’s decision to reduce releases from Nacimiento pursuant to the Drought Provision because the Coalition members do not have the right to insist on the maintenance of any particular reservoir release regime.

### D. Water Use and Water Rights of Other Water Users in the Basin Must Be Considered in Determining Whether Coalition Members Have Suffered Legally Cognizable Injury (Issue 3d).

Issue 3d of the Order Specifying Issues poses the following question: “To what extent, if any, must water use in other subareas of the Salinas Valley Groundwater Basin be considered in concluding whether riparian and overlying rights in the Upper Valley and Forebay subareas were



1 injured by the Agency's reservoir operations in 2014 and 2015."

2 For the reasons discussed below, the Coalition's water right claims cannot be determined  
3 without considering the water rights and water uses of other parties within the Salinas Valley  
4 Groundwater Basin and on the Salinas River. Because those parties are not before the State  
5 Board, the Coalition's water right claims are procedurally defective and must be rejected.

6 **1. Riparian and overlying rights are correlative in nature.**

7 As a threshold matter, there is no evidence in the record of this reference proceeding that  
8 Coalition members hold any rights to surface water or groundwater let alone the nature or extent  
9 of those rights. Indeed, we do not know who the Coalition members are, where they are located  
10 or the nature or extent of their claimed water rights. Proof of the existence of a riparian right  
11 requires an examination of the chain of title of the claimed riparian land and an expert opinion  
12 from a qualified attorney that a riparian right exists and has not been severed. (See *Phelps v.*  
13 *State Water Resources Control Bd.* (2007) 157 Cal.App.4th 89, 116-117 (court reviewed property  
14 deeds to determine the existence of riparian rights.) Proof of the existence of an overlying right  
15 requires similar evidence. To date the Coalition has failed to submit any evidence substantiating  
16 the water rights allegedly held by its members.

17 Even assuming that Coalition members hold valid riparian or overlying rights in the Upper  
18 Valley and Forebay subareas, it is impossible to determine whether Coalition members suffered  
19 legally cognizable injury to those rights without considering the rights and water uses of other  
20 right holders in the watershed. It is well-established that riparian right holders are entitled to a  
21 correlative share of the natural flow in common ownership with the other riparian right holders on  
22 the watercourse. (*United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d  
23 82, 104.) Riparian right holders have no rights to a specific quantity of water. During times of  
24 shortage in natural flow, all riparian right holders on a watercourse must decrease their usage of  
25 the water proportionately. (*Id.* at pp. 101, 104.) If only some of the riparian right holders on a  
26 watercourse are included in an action to determine their correlative share of the natural flow,  
27 there can be no binding determination of the absent riparian right holders' rights. (See *Strong v.*  
28 *Baldwin* (1908) 154 Cal. 150, 163 (hereinafter "*Strong*"); see also *Santa Barbara Channelkeeper*

1 v. *City of Buenaventura*, *supra*, 2018 WL 618674 at p. \*8 [the City of San Buenaventura must be  
 2 allowed to bring in other water users diverting the same water that Santa Barbara Channelkeeper  
 3 alleged the City of San Buenaventura must leave in the river for the fish.] The California  
 4 Supreme Court's decision in *Strong* makes the latter point forcefully. In that case plaintiffs filed  
 5 suit against defendant over water diverted from a river. Among the parties, only the defendant  
 6 was a riparian right holder. (*Id.* at p. 163.) There were nine other riparian right holders for the  
 7 relevant portion of the river who were not part of the litigation. (*Id.*) The Court refused to  
 8 determine the extent of the riparian rights in the case without taking into account the rights of the  
 9 other riparian right holders who were not parties to the case. (*Id.*)

10 The same principles apply to overlying rights. (*City of Barstow v. Mojave Water Agency*  
 11 (2000) 23 Cal.4th 1224, 1253 ["The overlying right is correlative and is therefore defined in  
 12 relation to other overlying water right holders in the basin."]; see also *City of Santa Maria v.*  
 13 *Adam* (2016) 248 Cal.App.4th 504, 514 [overlying right holders are required to determine their  
 14 proportionate, correlative share of groundwater with other overlying right holders].) An  
 15 overlying right holder has no right to any specific amount of water. During times of drought all  
 16 overlying right holders in a basin must decrease their usage of water proportionately in  
 17 accordance with the correlative rights doctrine. (*Katz v. Walkinshaw* (1903) 141 Cal. 116, 136).

18 **2. Due to the interconnected nature of groundwater and surface water in**  
 19 **the Salinas Valley, it is impossible to determine whether one group of**  
 20 **right holders has been injured without simultaneously determining the**  
 21 **nature, priority and extent of other water rights.**

22 As discussed above, surface water and groundwater in the Salinas Valley is  
 23 interconnected. (*Supra* at III.A; see also Daus Decl., ¶ 6-11, 16.). The Department of Water  
 24 Resources considers the Basin to be one basin for groundwater management purposes.  
 25 (California Department of Water Resources, Groundwater Information Center Interactive Map  
 26 Application (July 2017) <<https://gis.water.ca.gov/app/gicima/>> [as of May 18, 2018].)  
 27 Groundwater in the Basin generally flows down the valley from the southern end of the Upper  
 28 Valley Subarea toward Monterey Bay up to Chualar. (MCWRA-003, State of the Salinas River  
 Groundwater Basin Report at p. 2-2.) North of Chualar, groundwater flows in two directions, one

1 towards Monterey Bay and another in a northeast direction toward a trough of depressed  
 2 groundwater head on the northeastern side of Salinas. (*Id.* at p. 3-1.) This interconnectedness  
 3 allows “local overdrafts [to] adversely affect adjacent areas.” (MCWRA-009, East Side Canal  
 4 Project Report, at p. 10; MCWRA-007, DWR Bulletin No. 52, at p. 146.) In particular, extraction  
 5 of groundwater in excess of recharge in the Upper Valley can affect the subsurface recharge in  
 6 the Pressure Area, the Salinas River and the Forebay Area. (MCWRA-009, 1995 White Paper on  
 7 Hydrogeology and Water Supply of Salinas Valley, at pp. 9-10.)

8 In circumstances where surface water and groundwater supplies are interconnected,  
 9 California courts have treated the two supplies as one common supply for water right purposes.  
 10 *Hudson v. Dailey* (1909) 156 Cal. 617, 622. Without determining the nature, priority and extent  
 11 of other water rights in the watershed (groundwater and surface water), it is impossible to  
 12 determine whether Coalition members received their legally appropriate share of the limited  
 13 water supply available during the “extraordinary” drought of 2013-15. In the end, the riparian  
 14 and overlying rights of Coalition members (if any) attach to the same water supply to which  
 15 numerous other riparian and overlying rights also attach. To determine whether Coalition  
 16 members have suffered legally cognizable injury to their water rights, without considering the  
 17 nature, priority and extent of other water rights in the watershed, would be “artificial and unfair,  
 18 and likely inconsistent with the rule of priority.” (*Santa Barbara Channelkeeper, supra*, 2018  
 19 WL 618674 at p. \*7.)

20 Another complicating factor here is the impact of surface water and underflow extractions  
 21 in the Upper Valley and Forebay Subareas on groundwater and surface water conditions  
 22 throughout the Basin. Based on reports submitted under penalty of perjury to the State Board,  
 23 surface water diversions in the Upper Valley and Forebay between June 2014 and May 2015  
 24 totaled approximately 86,000 acre-feet, including 82,000 acre-feet above the confluence of the  
 25 Arroyo Seco River near Soledad. (Williams Decl., at ¶ 12, 13.) There are over 320 reported  
 26 water diversions on the Salinas River downstream of the San Antonio River. (*Id.* at Exh. A.) A  
 27 number of the reported surface water diversions indicate that pumping from wells in the vicinity  
 28 of the Salinas River may be intercepting Salinas River underflow or percolating groundwater (*Id.*

at Exh. B.). The Coalition's water right claims cannot be determined without a comprehensive consideration of the impact of extractions of surface water, underflow or groundwater occurring in the vicinity of the Salinas River and the effect of those extractions on Basin recharge.

Finally, the Coalition argues that the "Upper Valley Subarea wells are more directly and immediately affected by the Agency's reservoir release operations than wells located farther downstream in the Valley." (SAP ¶ 46). The Upper Valley Subarea is the closest in proximity to Nacimiento and San Antonio Reservoirs so it is not surprising that wells in the Upper Valley subarea would be "more directly and immediately affected" by reservoir releases. However, whether one Subarea is "more directly and immediately affected" by reservoir releases than other Subareas is completely irrelevant to the analysis of water rights. The critical fact here is that Coalition members' riparian and overlying water rights (if any) are correlative with the rights of other riparian and overlying right holders throughout the Basin and Salinas River. (See *Pabst v. Finmand* (1922) 190 Cal. 124, 129 [rights of upstream riparian proprietors are correlative to downstream riparian proprietors].) There is simply no legal basis for segregating the Upper Valley Subarea from other Subareas for purposes of determining the nature and extent of water rights held by Coalition members. All overlying rights within the Basin are equal in priority and correlative as are all riparian rights on the Salinas River.

3. **A determination of whether coalition members have suffered legally cognizable injury requires consideration of the reasonableness of coalition members' use and methods of diversion of water during the drought.**

Article X, section 2 of the California Constitution and Water Code section 100 prohibit the waste or unreasonable use of water and the unreasonable method of diversion of water. (Cal. Const. art. 10, § 2; Water Code, § 100.) All water rights in California, including rights to groundwater, are subject to the requirement of reasonable use. (*Peabody v. City of Vallejo, supra*, 2 Cal.2d at p. 383.) The reasonable use requirement has been referred to as the "cardinal principle" of California water law. (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 105.)

"What may be a reasonable use, where water is present in excess of all needs, would not

1 be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use  
 2 at one time may, because of changed conditions, become a waste of water at a later time.” (*Tulare*  
 3 *Dist. v. Lindsay-Strathmore Dist.* (1935) 3 Cal.2d 489, 567; *see also*, MCWRA-061, State Board  
 4 Water Right Order No. 2015-0043 citing *Light v. State Water Resources Control Board* (2014)  
 5 226 Cal.App.4th 1463, 1479–1480.<sup>7</sup>) As the State Board pointed out in a recent order issued  
 6 during the 2014 drought, in drought conditions the State Board does not consider the consumptive  
 7 use of water alone; rather, it balances multiple factors such as consumptive uses, the needs of fish  
 8 and wildlife, and the public interest in maintaining critical supplies throughout the year.  
 9 (MCWRA-061, State Board Water Right Order No. 2015-0043 at pp. 28–29.)

10 A determination by the State Board as to whether members of the Coalition suffered a  
 11 legally cognizable injury as a result of the Agency’s reservoir operations during the Period of  
 12 Interest will require consideration of the reasonableness of the Coalition members’ use and  
 13 methods of diversion of water during the drought. The latter analysis, in turn, will require  
 14 consideration of the Coalition members’ water use and methods of diversion in relation to the  
 15 water use and methods of diversion of other water users within the Basin and on the Salinas  
 16 River. The Coalition apparently asserts that the Agency has a legal obligation to maintain  
 17 specific groundwater levels beneath Coalition members’ lands in the Upper Valley and Forebay  
 18 Subareas during droughts so that Coalition members may continue to pump groundwater without  
 19 incurring additional pumping costs or costs associated with the deepening of wells. (*E.g.*, Second  
 20 Amended Complaint ¶¶ 43, 156.) Similarly, it appears that the Coalition is asserting that the  
 21 Agency has a legal obligation to maintain specific groundwater quality beneath Coalition  
 22 members’ lands during droughts. (*Id.* ¶ 156).

23 Accordingly, there is a significant issue in this proceeding as to whether the maintenance  
 24 of specific groundwater levels or specific groundwater quality, in the context of an  
 25 “extraordinary” drought, is consistent with the constitutional requirement of reasonable use and  
 26

27 <sup>7</sup> The Agency requests that the State Board receive in evidence or take official notice of State Board Water Right  
 28 Order 2015-0043. (See Cal. Code Regs., tit. 23, §§ 648.2, 648.3; *County of Amador v. El Dorado County Water*  
*Agency* (1999) 76 Cal.App.4th 931, 949 fn. 7 [Courts can take judicial notice of a State Board water right order].)

1 reasonable method of diversion. Is it "reasonable" to require water users in other subareas of the  
2 Basin to limit or forego their water extractions so that Coalition members can maintain their  
3 groundwater levels at desired depths during droughts? Is it "reasonable" to require water users in  
4 other subareas of the Basin to forego water extractions so that Coalition members can maintain  
5 their groundwater quality at desired levels during droughts? Resolution of these issues will  
6 require a comprehensive review and analysis of water rights, water use and methods of diversion  
7 throughout the Basin and the Salinas River system. In the current procedural posture of this case  
8 (where other water users are not parties) such an analysis is impossible. The Coalition's water  
9 right claims are procedurally defective and must be rejected.

10 **V. CONCLUSION**

11 The Coalition's positions on Issues 3a, 3b, 3c and 3d are not supported by the law or the  
12 facts of this case. In its Report of Referee, the State Board should recommend summary  
13 dismissal of the Coalition's water right claims.

14 DATED: June 7, 2018

DOWNEY BRAND LLP

15  
16 By: 

17 KEVIN M. O'BRIEN

Attorney for Defendants

18 MONTEREY COUNTY WATER RESOURCES  
19 AGENCY; COUNTY OF MONTEREY and BOARD  
20 OF SUPERVISORS OF THE COUNTY OF  
21 MONTEREY  
22  
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28

**PROOF OF SERVICE**

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and am not a party to the within action. My business address is 500 South Grand Avenue, 12th Floor, Los Angeles, CA 90071.

On August 13, 2018, I served a true and correct copy of the foregoing document entitled:

**REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION TO INTERVENE**

on the interested parties in this action by placing the document in a sealed envelope and addressed as follows:

Eric N. Robinson Hanspeter Walter Elizabeth Leeper Kronick Moskovitz, Tiedemann & Girard 400 Capitol Mall, 27th Floor Sacramento, CA 95814	Attorneys for Plaintiff Tel: (916) 321-4500 Fax: (916) 321-4555
Meredith E. Nikkel Downey Brand 621 Capitol Mall - 18th Floor Sacramento, CA 95814	Attorneys for Board Of Directors / Board of Supervisors of Monterey County Water Resources Agency; Board of Supervisors of the County of Monterey Tel: (916) 444-1000 Fax: (916) 444-2100
Leslie J. Girard, Chief Assistant County Counsel County of Monterey 168 West Alisal Street, 3rd Floor Salinas, CA 93901	Attorneys for the County of Monterey Tel: (831) 755-5045 Fax: (831) 755-5283
Eric N. Robinson Kronick Moskovitz, Tiedemann & Girard 400 Capitol Mall, 27th Floor Sacramento, CA 95814	Attorneys for Salinas Valley Water Coalition Tel: (916) 321-4576 Fax: (916) 321-4555
Pamela H. Silkwood 6385 Carmel Rancho Boulevard Suite 200 Carmel, CA 93923	Attorneys for Salinas Valley Water Coalition Tel: (831) 373.4131 Fax: (831) 373.8302

☒ **BY MAIL:** I am readily familiar with the firm's business practice for collection and processing of correspondence for mailing with the United States Postal Service. I know that the correspondence is deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelope was sealed and, with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices, in the United States mail at Los Angeles, CA.

☒ (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 13, 2018, at Los Angeles, CA.

Marti Hale

Printed Name



Signature