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## PETITION FOR RECONSIDERATION

To Charles R. Hoppin, Frances Spivy-Weber, Arthur G. Baggett, Jr., Tam M. Doduc, and Walter G. Pettit, individually and as members of the California State Water Resources Control Board:

### PETITION FOR RECONSIDERATION OF STAFF "ORDER GRANTING RECONSIDERATION" BY THE EXECUTIVE DIRECTOR of 07/01/2010

#### I. INTRODUCTION

1. I am Michael J. Barkley. I make this Petition with a Verification: I intend this to be as testimony, a truthful statement of what I know, believe, have seen, have heard, and have read. Please note my new mailing address, above.
2. This Petition is for reconsideration of Order WR 2010-021-EXEC , Order Granting Reconsideration by the Executive Director Dorothy Rice dated 07-01-10. As discussed below, this is the first Petition for reconsideration provided for by statute, the previous one of 01/12/2010 (the 01/14/2010 date shown on p. 3 of this Order is in error) was authorized by some apparently underground regulation as reaffirmed by comments and correspondence by the State Water Resources Control Board's (the Board's) legal staff.
3. This Petition will be far skimpier than I wish. A suddenly emerging personal problem<sup>1</sup> has interfered with my research and preparation of it. USA has had 50 years to get itself together on Ap. 18115 or more than a century on diversions on Stony Creek in general - any protestant is limited by your staff's behavior to segments of less than 30 days in preparation (note that this

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<sup>1</sup>In 2003 then-State Senator Alarcon authored SB 228, which added “utilization review” for all recipients of workers’ compensation medical benefits regardless of when awarded. In a feeding frenzy, the insurance companies are challenging all awards of lifetime medical regardless of when granted, and halting all medical care for tens of thousands, if not hundreds of thousands of Californians. My wife is one of those victims. The way the workers’ compensation laws work, once an award is final there is no more money in it for the workers’ compensation bar and the codes prohibit simply hiring an attorney and paying a retainer. A protracted *pro. per.* battle is the only recourse, which we have started this month and are now in the middle of it. Why not ask for an extension of time to file this Petition? Extensions of time for good cause are apparently NEVER granted protestants and ALWAYS granted applicants. Then there has been the problem of the Division’s Record Unit being closed for all of July severing access to files for research.

Order of 07/01/2010 was sent to me in an envelope with a postage meter mark of 07/06/2010, cutting 30 days to 24 or 23 or 22....). October: 50 years vs. 30 days; January: 50 years vs. 7 days; now: 50 years vs 24 days? In digging through the various case files in your Records Unit I see case after case where applicants are given as much time as they need or wish (in this case, 50 years), while protestants are slapped with shotgun deadlines. The preferential treatment accorded applicants over protestants is outrageous.

4. Still, this Petition is important because on 07/26/2010 (see Doc #322 on the Court's CM-ECF web site or reproduced on my own website at <http://www.mjbarkl.com/322.pdf>) Judge Karlton of the United States District Court, Eastern District, California, to whom the Angle Decree is assigned, case 80-583, has ordered me to bring before him in a cross-complaint all issues I wish to litigate in and related to the Angle Decree. With the State of California being a party to the Decree, regardless of staff assertions otherwise, that would include a request for an order to show cause against the State and against this Board in particular, as well as a state-code (Gov't Code §§12650 et seq ) *qui tam* action for the value of the water stolen. This would appear to supplant the requirement of California Water Code Section 1126. subdivision (a) which states in part "It is the intent of the Legislature that all issues relating to state water law decided by the board be reviewed in state courts, if a party seeks judicial review." It is appropriate to allow every opportunity for this Board to reconsider its position before going to Federal Court. Note that in his 04/28/2010 Order (doc #316, or 316.pdf on my web site) at approximately p. 8, Judge Karlton notes that he is waiting for this Board's position on at least some of the issues before it, including issues that staff has ignored with the Order p. 1 comment "To the extent Barkley raises issues that are not addressed in this Order, the Executive Director determines that those issues do not merit further review." Is staff being lazy? As it was with the 12/14/2009 letter? Staff is shoving off onto the judge work that staff should be doing.

5. I incorporate by reference my Protest Forms, Supplement, and Exhibits submitted 10/01/2009 along with the Table of Contents I added later, (see <http://www.mjbarkl.com/index10.htm>); follow-up letters of 12/16/2009 and 12/20/2009; California Public Records Act Petition of 01/05/2010 and response by your Mr. Andrew Sawyer of 01/14/2010; Petition for Reconsideration of 01/12/2010 and all attachments including Statement of Points and Authorities ; Supplement to Petition of 02/11/2010 and all attachments; Second Supplement to Petition of 03/14/2010 ; Third Supplement to Petition of 04/06/2010 ; Petition for Writ of Mandate of 04/12/2010; Andrew H. Sawyer letter of 06/10/210 ( copy at <http://www.mjbarkl.com/sawy0610.pdf> ); follow up email to that Mr. Sawyer letter with the Deputy Attorney General (at <http://www.mjbarkl.com/fuch0610.txt> ); Fourth Supplement to Petition of 07/29/2010 attached hereto as Exhibit A (and at <http://www.mjbarkl.com/072910.pdf> ); related recent Angle Case filings by me and by USA, Docs #307, #307-2 307-3, 307-4, 307-5, 307-6, 309, 310, 310-2 , 310-3, 310-4, 310-5, 310-6, 310-7, 310-8, 311, 312, 316, 317, 318, 319, and 322 (see USDC ED Calif. CM-ECF website, or links on my Angle Case Index <http://www.mjbarkl.com/Aindex.htm> - these would be the ones at the bottom as the most recent filings); case indexes for USA applications 2210 and 18115, at <http://www.mjbarkl.com/2210.htm> (in progress) and at <http://www.mjbarkl.com/18115.htm> .

6. Major issues on the Stony Creek Watershed are:

- a. Loss of jurisdiction by the State of California over Stony Creek watershed surface flows under the Angle Decree of 01/13/1930.
- b. Fraud on the Court by plaintiffs used to strip Stony Creek riparians of riparian rights without compensation
- c. Theft (or as Water Code Section 1052 subdivision (a) puts it, taking by "trespass") of upwards of 2,500,000 acre-feet of water from Stony Creek by USA and its agents
- d. Environmental Issues

7. Factual errors in the Order include, for example:

- a. Order asserts that my Petition time-stamped by SWRCB on 01/12/2010 was filed 01/14/2010
- b. Order asserts I filed a "writ of mandate" instead of the "petition for writ of mandate" that I filed; there is a difference.
- c. pp. 3 and 8 of the Order repeat the ignorant assertion that waste by USA of water from Stony Creek ended in 1946 and was based on Water Master reports; actually the waste and theft continues to this day based on reports from Reclamation and its agents in SWRCB files for Ap. 2212 and 18115, see Exhibits B, C and D attached which were also part of my Third Supplement noted above; evidence supplied, sourced from the Board's own records from reports by USA or its agents, was ignored by staff.

## II. AUTHORITY FOR PETITION

8. This is the first Petition for reconsideration authorized by statute; from the Water Code:

§1120 in part: This chapter applies to any decision or order issued under this part...or the public trust doctrine.

§1121. The board shall serve a copy of a decision or order on the parties by personal delivery or registered mail.

§1122. The board may order a reconsideration of all or part of a decision or order on the board's own motion or on the filing of a petition of any interested person or entity. The petition shall be filed not later than 30 days from the date the board adopts a decision or order. The authority of the board to order a reconsideration on its own motion shall expire 30 days after it has adopted a decision or order. The board shall order or deny reconsideration on a petition therefor not later than 90 days from the date the board adopts the decision or order.

§1126 subdivision (b) ... Except in cases where the decision or order is delegated to an officer or employee of the board, reconsideration before the board is not an administrative remedy that is required to be exhausted before filing a petition for

writ of mandate....

9. This Order has not been served on me by personal delivery or registered mail. In the very least, this is yet another instance where someone on staff has apparently decided that portions of statutes are surplusage. Hardly a year goes by that some court with power over this Board does not issue an opinion that statutes ordinarily do not contain surplusage, that where it is possible to reconcile all parts of a statute, all parts are given meaning, see for instance *Imperial Merchant Services, Inc. v Hunt*, 47 Cal.4th 381, 390 (2009) "Statutes must be interpreted, if possible, to give each word some operative effect." [cite omitted]; *Metcalf v. County of San Joaquin*, 42 Cal.4th 1121, 1135 (2008) "...rule of statutory construction that courts should avoid a construction that makes any word surplusage." [cite omitted], and so on. These pronouncements occur so frequently that they are axiomatic, so what is it about §1121 that allows staff to ignore the clear intent of the word "shall"? Why is service not being properly handled? Can it be argued that this Order is not final until that service is accomplished in accordance with §1121, or that NO Board Order is final where §1121 has not been followed? Ever?

10. One might consider this Petition for reconsideration to be a waste of time where staff is so diligent in ignoring facts before it, including in staff's own files. Unfortunately §1126 subdivision (b) requires that this Petition be submitted, and, as I pointed out in paragraph I.4 above, this is going to wind up in Federal Court and the Board really ought to take its own look before it gets there.

11. The Order recites 23 CCR §768 of the Board's regulations on authority.

"No later than thirty (30) days after adoption by the board of a decision or order, any person interested in any application, permit or license affected by the decision or order may petition the board for reconsideration of the matter upon any of the following causes:

- (a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) The decision or order is not supported by substantial evidence;
- (c) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- (d) Error in law."

12. Responding: I was prevented from having a fair hearing because I was prevented from having any hearing. The order states on p. 4:

"The Water Code does not contain specific provisions that address protests to time extension petitions. The only reference to protests of time extensions is found in California Code of Regulations, title 23, Section 843, subdivision (c)(1). That section requires that a protestant state the reason for the objection to the time extension petition and any condition on which the objection could be satisfied.

Section 843 subdivision (c)(1) also provides that the Board may make a determination on the protest with or without a hearing."

This is inconsistent. Having authorized protests, the Board is required to respect the Water Code protest requirements. §843(c)(1) contradicts Water Code Sections 1340 & 1341, which, when contrasted with Section 1342 shows that petitioners and protestants have an equivalent right to a formal hearing,. If protests are allowed at all, they have a right to a formal hearing and the regulation and the Order's argument that a hearing is not required contradict state law.

P. 4 of the Order cites Water Code §1335 ; note that the code section requires first a request for information, and following that a "failure to provide information requested" for denial; throughout this process since 10/01/2009 , not only has staff not requested the information, when staff has had it, staff ignored it. Staff is using the statute backwards: 1) don't request it, 2) reject the protest, 3) reject the information [bindly] proffered after rejection. I have been through many files in the Records Unit. I am amazed a the lengths to which staff goes to elicit information from applicants but ignore it from protestants. This behavior is arbitrary, capricious, contrary to law, irregular, and an abuse of discretion, and it treats the requirements of §1335 as surplusage as to protests of initial applications as well as to protests of extensions.

13. The "proceedings" have been irregular from the beginning. Sworn filings have been ignored. Records already on file behind various applications in the watershed have been ignored. Issues have been ignored. Arbitrary and capricious behavior by staff has been ignored. Discriminatory treatment as between applicants and protestants has been rampant. Abuse of discretion has been total in that unfairness pervades the process.

14. Relevant evidence, as set forth in Exhibit A, attached could not have been produced at the time the original protest was submitted because the total Stony Creek record is so massive, not even staff knows what is in it. I have been diligent in seeking this information, in a manner so thorough that I doubt anyone else has ever compared to it. On my web page (<http://www.mjbarkl.com/wars.htm> ), under the portion regarding Ap. 18115 about half way down the page, are links to indexes I've created to some 40 of the application file sets that I have already gone through. There are also application files that are missing; I have a list of 21 of them so far but unfortunately didn't start keeping the list until I was well into this process so there are some I did not include which I may never recapture. There are other files that I have requested from archives which have never arrived. I do not know what is in these missing or undelivered files. I do know that nearly every one of these file sets contains something, from the first real environmental/cultural resources review observed in Ap. 28994 to the early watershed environmental reviews in the Santa Clara Applications 26378 and 26379 which in turn referred earlier reviews I have not yet found but all of which suggest that while Black Butte Dam itself is an engineering marvel, the abutments are little more than piles of rubble. I am aware that USACE sued its Black Butte engineer at one point but I have not yet found that case or know why the suit was brought. The integrity of the Black Butte abutments would be one of those issues that "the Executive Director determines...do not merit further review." (Order, p. 1) How

quickly we forget Teton Dam and St. Francis Dam. If the Board does not require environmental comment on these issue, who will? Note that USA has had a century to prepare, but I get less than 30 days at each stage. Considering our relative resources, I should get a century to prepare and they should get about 10 minutes.

15. Error in law pervades staff's consideration, from its consideration of the Angle Decree to its convenient and self-serving interpretations of various Water Code provisions. Discussions of these errors are throughout this Petition and the related Statement of Points and Authorities. These errors in law should be corrected.

16. Also relevant is

§ 769. Petition for Reconsideration.

(a) Any petition for reconsideration of a decision or order shall be submitted in writing and shall contain the following:

- (1) Name and address of the petitioner.
- (2) The specific board action of which petitioner requests reconsideration.
- (3) The date on which the order or decision was made by the board.
- (4) The reason the action was inappropriate or improper.
- (5) The specific action which petitioner requests.
- (6) A statement that copies of the petition and any accompanying materials have been sent to all interested parties.

(b) If reconsideration is requested based in whole or in part on Section 768, subdivision (c), the petition shall include an affidavit or declaration under penalty of perjury stating that additional evidence is available that was not presented to the board and the reason it was not presented. A general statement of the nature of the evidence and of the facts to be proved shall also be included.

(c) The petition shall be accompanied by a statement of points and authorities in support of legal issues raised in the petition.

17. My name and address are at the top of this Petition; the Specific Board Action and date of it is the Order of the Executive Director on Ap. 18115 of 07/01/2010; the reason the action was inappropriate or improper appears throughout this Petition and the referenced filings and web pages cited herein; the specific action I request is to set aside the Order, require USA to answer the protest, to hold the hearing, to intervene in U.S. District Court and move to set aside the Angle Decree and dismiss the case for fraud on the court, to require restoration of the extirpated species to the watershed and mitigate all the other cumulative effects, to administer the watershed in a fair and equitable manner, to formalize its underground regulations related to protests in a way that the public informs the public. The statement of furnishing this Petition and

accompanying materials to all interested parties appears at the end of this Petition; the verification thereafter plus the content of the rest of this Petition is intended to satisfy §769 subdivision (b) ; Statement of Points and Authorities is attached.

### III. JURISDICTION

18. At pp. 6 & 7 the Order recites how the Board has power to issue permits and licenses for diversions in the Stony Creek watershed without regard to the requirements of the Angle Decree. I do not know how the decrees are constructed in other jurisdictions but I do know how the Angle Decree reads. The Board has several copies of the 01/13/1930 Decree. On my website I have a retranscribed version of the 04/15/1930 "Corrected Decree" at <http://www.mjbarkl.com/decree.htm> , or, if preferred, at <http://www.mjbarkl.com/278-CD1> is a true copy of the 01/13/1930 Decree filed by USA on CD-ROM with the court on 09/05/2008. The Decree is *in rem* and *in personam*. It recites parcels throughout the watershed to which it pertains, and while there may be parcel omissions only USA (presumably) has the map from the 1920s that shows the omissions. It lists parties. It binds parties, heirs, successors, and assigns:

"each and all of the parties to whom rights to water are decreed herein (and the persons, estates interests and ownerships represented by such thereof as are sued in a representative capacity herein), their assigns and successors in interest, servants, agents, attorneys and all persons claiming by, through or under them and their successors,"

Decree, para. XVII; paragraph XVII also states "the provisions of this decree shall bind, and inure to the benefit of, the grantees, assigns and successors in interest of the owners of rights and parties hereto, whether substituted as parties or appearing in this case or named herein or not;". Typical of a number of provisions throughout the Decree binding persons not receiving an award of rights is in Paragraph II:

"...they and their assigns and successors in interest are debarred and estopped from claiming or asserting any right, title or interest in or to any of the waters or use of any of the waters of Stony Creek or its tributaries as against any of the parties plaintiff or defendant herein, their assigns or successors in interest, or their rights as same are decreed herein..."

19. At lines 7 - 9 of p. 10 of Judge Karlton's 04/28/2010 Order (see copy of Doc 316 referenced above) he affirms that USA is subject to the Decree, which presumably covers Reclamation, USACE, FERC, BLM, Interior, USDA, United States Forest Service, Mendocino National Forest, and any other agency of USA. As a party, all of USA is subject to the Decree, not just Reclamation.

20. The State of California (and through it the Board) is a successor or assign and subject to the Decree:

- 1) Participation in the development of Black Butte Dam and Reservoir on Stony Creek, as successor and assign of USA, as well as of a number of holders of Angle Decree appropriative and riparian rights to lands taken for that project, and lands of other defendants divested of rights by the Angle Decree, although subsequently assigning it back to USA, see for instance the assignment at <http://www.mjbarlk.com/111560as.pdf> from Ap. 18115, and the 24 to 28 other documents listed in my 18115 index at <http://www.mjbarlk.com/18115.htm> concerning the CWC or California Water Commission;
- 2) taking of Orland Project, USA-owned, and defendant owned lands for the construction of Interstate 5 through Glenn & Tehama Counties and for widening and realignment of State Route 32 between Orland and Hamilton City, Glenn County ;
- 3) assignment by USA to California Division of Forestry and California Department of Corrections of the Salt Creek Conservation Camp west of Paskenta in Tehama County, Ap. 30010 index at <http://www.mjbarlk.com/30010.htm>
- 4) various other assignments still to be determined.

21. The restrictions by the Decree on the parties, heirs, successors and assigns (from my 10/01/2009 protest) are as follows:

D. Remember the rule of law that a legal document such as the Angle Decree is interpreted most strictly against its draftsman and thus against the State of California as successor and assign (see discussion of who wrote the Decree under Fraud on the Court in my 10/01/2009 Protest, paragraph II.N.). Specific relevant language from the Decree includes, all under the heading "General Provisions" therein:

1. Para XV. p. 173: "...except as herein specifically provided no diversion of water from the natural flow of the stream into any ditch or canal for direct conveyance to the lands shall be permitted as against any of the parties herein except in such amount as shall be actually and reasonably necessary for the beneficial use for which the right of diversion is determined and established by this decree, to wit: shall be made only at such times as the water is needed upon their lands and only in such amounts as may be required under the provisions hereof for the number of acres then being irrigated;"

A portion of that is quoted in the Order p. 6. The Order forgets to mention the rest of it:

2. Para XV. p. 173: "...in such instance diversions may be made outside of the irrigation sea- [p. 174] son, provided that the amount diverted as against any of the parties hereto from the natural flow for direct application to such lands during the calendar year shall not exceed the quantity in acre-feet per acre allowed to be thus diverted herein during an irrigation season under any particular right;"

3. Para XV. p. 174: "...that where amounts or rates of diversions or flows of water are limited in this decree to stated figures for each irrigation season, such

limitations apply as well to the entire calendar year containing said irrigation season;"

4. Para XV. p. 175: "...when permitted by said Water Master, divert a larger head or flow into his ditch for short periods of time in lieu of the smaller flow allowed to him under his said right, providing always that such use shall not exceed for the irrigation season the amount in acre-feet herein specified and allowed to be diverted from the stream for his lands;"

5. Para XV. p. 175: "...any of the parties to whom rights to water have been decreed herein shall be entitled, in accord with applicable laws and legal principles to change point of diversion and the places, means, manner or purpose of the use of the waters to which they are so entitled or of any part thereof, so far as they may do so without injury to the rights of other parties as the same are defined herein."

6. Para XVII p. 177: "...each and all of the parties to whom rights to water are decreed herein (and the persons, estates interests and ownerships represented by such thereof as are sued in a representative capacity herein), their assigns and successors in interest, servants, agents, attorneys and all persons claiming by, through or under them and their successors, are hereby forever enjoined and restrained from asserting or claiming-- [p. 178] as against any of the parties herein, their assigns or successors, or their rights as decreed herein--any right, title or interest in or to the waters of the Stony Creek or its tributaries, or any thereof, except the rights specified, determined and allowed by this decree."

7. Para. XVII, p. 178: "...and each and all thereof are hereby perpetually restrained and enjoined from diverting, taking or interfering in any way with the waters of the Stony Creek or its tributaries or any part thereof, so as in any manner to prevent or interfere with the diversion, use or enjoyment of said waters by the owners of prior or superior rights therein as defined and established by this decree;"

E. Reading the entire Decree and then focusing on these seven phrases from it, it is obvious that the Decree is both *in rem* and *in personam*, and its jurisdiction is in the general nature of a virus: once infected, fully infected - 1) parcels named in the Decree are covered by the Decree; 2) persons named in the Decree binds all property that named person owns in the watershed; 3) Becoming a successor or assign to a party named in the Decree binds all property in the watershed owned or possessed or controlled by that successor or assign. Thus the Decree grows in scope until it covers the entire watershed.

22. With these intersecting provisions, no one subject to the Decree may apply for or accept Stony Creek watershed surface flow water rights from the SWRCB. Period. Water Code Section

138 recognizes that in general rights, etc., are not to be granted to persons not allowed to receive them. And of course, with the State of California also being bound by the Decree it cannot grant permits or licenses to these waters to anyone or to itself, such as it did in Aps. 25513 & 25514, including to USA as it did in Ap. 18115 and maybe Ap. 2212.

23. It is remotely possible that what the Order was getting at in its discussion of jurisdiction is that it is not bound by the Angle Decree because it is a state agency administering state law. Moore's Federal Practice, Volume 18, Chapter 133 discusses "Intersystem Preclusion", "B. Preclusive Effect of Federal Decisions in State Court," "§133.10 Preclusive Effect of federal judgments on Subsequent State Litigation is Well Accepted." I am aware of the requirement in §8 of the Reclamation Act of 1902 requiring that USA respect state law in water matters, but that did not happen in the Angle Decree. There is some discussion in Moore's Chapter 133 regarding possible other arguments that the State might be using, but nothing similar to what the Order says. Can it be that the Order is saying, "We have the right until you get a Federal Court order saying we don't?" Well, the Angle Decree already "preempts", so if there is further argument I would like to hear it before bringing this to the U.S. District Court.

#### IV. FRAUD ON THE COURT

24. In my 10/01/2009 protest I outlined the Fraud on the Court committed by plaintiff in the Angle Case used to strip riparians of their riparian rights without compensation in the Stony Creek Watershed. In his Order of 05/05/2009 Doc. 302 Judge Karlton stated at p.3 line 18:

"Instead, defendant argues that fraud was committed relating in the proceedings adopting the original decree. While the court may have the power to reconsider, it is clear that the moving party is guilty of laches, and the court will not consider the motion."

While laches does not apply to fraud on the court, still, he is the judge, so that left me an uphill battle although I still have the opportunity to bring it by petition for writ before the Court of Appeals since they heard the case when it came up, see *Wackerman Dairy v. Wilson*, 7 F.3d 891 (9th Cir. 1993) and thus under Hazel-Atlas they have original jurisdiction to consider a petition for writ. In addition to Moore's Federal Practice §60.21[4][g] second paragraph ( discussing *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944) ), a quote from Wright, Federal Practice and Procedure, Civil 2d, v. II, 2005, §2870 is relevant, footnotes omitted:

"[p. 409] The power to vacate a judgment that has been obtained by fraud upon the court is inherent in courts. Indeed even the Tax Court, which has a strong statutory policy of finality of judgments recognizes this inherent power, on the theory that 'a decision produced by fraud on the court is not in essence a decision at all and never becomes final.'...[p. 411] Although a party may bring the matter to the attention of the court, this is not essential, and the court may proceed on its own motion....[p. 412] There is no time limit on setting aside a judgment on this

ground, nor can laches bar consideration of the matter....[p. 413] If it is found that there was a fraud on the court, the judgment should be vacated and the guilty party denied all relief."

25. While it is obvious I have not yet convinced anyone of the wisdom of it, the duty of the Board under the California Constitution and the Water Code is to walk the 5 blocks down the street to the United States District Court, move to intervene (easy since California is already a party), and then move to set aside the Angle Decree and dismiss it for Fraud on the Court. Everyone, except the Orland Unit Water Users Association (OUWUA) would benefit, and since they've been taking water they aren't entitled to, I'm not certain they deserve much sympathy. Until the Angle Decree goes away, every permit and license issued by the Board in the Stony Creek watershed is unlawful.

#### V. THEFT AND WASTE

26. The Board does not accept protests from people without clean hands, that is to say, those who do not have everything in order on their water rights. However, the Board seems to accept petitions from USA while it has reported to the Board for decades that it has diverted water in excess of the adjudicated reasonable and beneficial amounts to its Orland Project. As Exhibits B, C, and D attached show, that's somewhere between 2,500,000 and 5,000,000 million acre-feet that have been stolen (or, as the Water Code puts it, taken by "trespass") from Stony Creek and from the people of the State of California. At Los Angeles DWP wholesale rates , that's between \$1,000,000,000 and \$2,000,000,000 worth of water (yes, billions). P. 8 of the Order says my recourse is to file a complaint. How can that be? Before that the Order states "The California Constitution requires the Board to act to prevent waste or unreasonable use of water." I don't see anything in the Constitution that says "only if a perfect person complains" (SWRCB Regs § 820). I don't see anything in the Constitution that requires a complaint at all. The Board is obviously shirking its duty and the limits on complainants in §820 are outrageous, stupid, and probably in effect violate the California Constitution and the Water Code, not as to the rights of the people, but as to the duties quoted in the Order. An examination of the Division's Stony Creek "Dewey Decimal" Complaint File (see index at <http://www.mjbarkl.com/swrcompl.htm> ) shows how useless the complaint process is - most, if not all those complaints were mishandled. The Division sends people out to survey 1 and 2 acre ponds. The Board regularly notices hearings for relatively small amounts of water. CDOs proliferate for minor diversions. What is it that USA is doing that deserves ignoring 2,500,000 acre-feet wrongfully diverted. What's it going to take? Billboards? I understand there's an \$11,140,000,000 water bond measure coming up on the November Ballot, Proposition 18? Why would I vote for that if the Board ignores a \$1,000,000,000 or \$2,000,000,000 wrongful diversion? Why would anyone vote for that? Should I ask the Governor? This wrongful diversion needs to be Terminated, and you have sufficient notice without further action by me. Do your duty. Require the excess diversions be halted as a condition of the extension. Require appropriate reimbursement for all the water taken improperly as a condition of the extension, and I don't mean the piddling penalties in §1052 in the Water Code. In prosecution you may be limited to that amount, but there are no limits on

the restitution you may require as mitigation or condition of approval.

## VI. ENVIRONMENTAL GROUNDS

27. Exhibit A attached describes the sort of cultural mitigation that should be imposed on USA for its reservoir, based on the same degree of such mitigation you were going to impose on Mr. Whitney for Ap. 28994, assuming of course that what was an appropriate mitigation for Mr. Whitney is just as appropriate for USA. It was not until May, 2010 that I came across those requirements in the 28994 file although your staff obviously was aware of them before since your staff imposed them. Because of the sheer mass of Stony Creek files, it was simply not possible for me to discover those before I did. It is information new to me, but not to you, except that you have forgotten it.

28. While I am grateful that the Order accepts my environmental protest, it speaks as if the only environmental issues I have raised concern fish. That is absolutely and outrageously false. I have raised the full spectrum of cumulative adverse effects, including on human beings for which feasible mitigations exist. All adverse environmental effects must be considered.

29. The Order speaks of USA's proposed BDCP EIR/EIS proposal as a possible forthcoming environmental document. Such regional documents as I have seen (Cal Fed and so on) take such a "macro" view of the impacts that the needs of this poor little neglected 700-square mile upstream Stony Creek watershed disappear into them. That is absolutely not acceptable. There should be full environmental review under CEQA and NEPA of the cumulative environmental effects on this upstream watershed from USA's cumulative, piece-mealed project, not a footnote buried in some massive CVP document.

## VII. WATER RIGHTS

30. In 1961 you rejected 50 or so protests to Ap. 18115 (including by my grandparents), on the basis that the protestors did not have permits and/or they were upstream from the project. Actually, a number of them did have permits (Jamieson, Wright, and so on). But it didn't matter, your interpretation of your own regulation §749 or whatever it was back then was cited as reason enough for rejection. The Order says I urge that 23 CCR §749 should not apply in this case. That is wrong. It should apply, but ALL OF IT should apply: the word 'normally' in that code section is ignored by staff in EVERY case by its own admission, see Mr. Sawyer's response of 01/14/2010 to CPRA petition of 01/05/2010. I assume it is the prerogative of the Board to ignore parts of its own regulations, but that would require notice of rulemaking and a hearing, etc., and I don't recall that happening in the case of the word "normally". I cannot imagine the Board holding a hearing on a regulation for the purpose of telling the public you are going to put a surplus word like "normally" in it. In the case of Stony Creek, there is no upstream or downstream because of the Angle Decree. Because of the Angle Decree, it is in legal effect one big lake, with decreed limits on who can take what. Unfortunately the Board has allowed USA to take more than the decree allowed it and send it to Los Vaqueros Reservoir in Contra Costa for

instance, well outside county and area of origin, while at the same time the Board has declared the watershed fully appropriated and imposed a \$10,000 23 CCR §1062 subdivision (a)(3) penalty on applications - not successful applications, ALL applications, by all the rest of us. The sequence is clear: protests not allowed, all water taken by USA, much wasted or exported, watershed declared fully appropriated, upstream users pinched out. How can this not be interference with upstream needs? It is an outrageous gift to USA at the expense of all the rest of us and to do it, the Board has to twist its own regulations and ignore the Decree.

31. Water Code §1335 subdivision (c)(3) describes information to the Board:

"(3) Information concerning the protestant's historical, current, or proposed future diversion and use of water that is reasonably necessary to determine if the proposed appropriation will result in injury to the protestant's exercise of its water right."

If, for instance, I went to all the trouble to file the full cross-complaint in the Angle Court that the Judge has ordered me to - that is, order to show cause against the State of California and this Board, *qui tam* action against USA, injunction against the Water Master, class action against all other diverters in excess of the Decree, and through some lucky circumstance managed to persuade everyone except O UWUA that they would all be better off without the Decree and then it went away, where would I be? Right where I am now. I cannot appropriate, because while the Decree was in force and USA was filing protests like crazy against everyone upstream there was no real opportunity to do anything about water and now it's fully appropriated. It's all gone. You allowed them to take it and waste it or export it to the injury of everyone upstream of Black Butte. I wish to start expanding the production of elderberries in the various draws and riparian margins on the ranch. I cannot do it because you have given the water to USA for export. When I tell people about your regulation §749, they just sigh and shake their heads. Either fix it or stop deceiving the public.

#### VIII. UNFAIR AND DISCRIMINATORY TREATMENT

32. I have spoken about the differences in time allowed applicants in general and USA in particular versus the time allowed protestants. It is very unfair of you and should be made more fair. Times for responses should be equivalent to times for applications.

33. Staff has a problem with the concept of diligence. Water Code §1202 subdivision (c) speaks of diligence in applying pre-1914 water to the reasonable and beneficial uses for which it was appropriated. With the development of Stony Gorge and later Black Butte, East Park has been improperly converted to a boating facility, and the Rainbow Dam and diversion canal has fallen into disuse. You should declare East Park waters to be subject to appropriation. This is part of the cumulative impacts of which the 18115 extension is only the latest part. USA successively takes more and more from the watershed, far more than it needs, and then wastes it or exports it.

34. Water Code §1228.6. imposes on you requirements to establish or revise reasonable general conditions including requiring "(3) ...water applied to beneficial use with due diligence." Similarly, Water Code §1396. requires "the utilization of water for beneficial purposes shall be prosecuted with due diligence...." And §1410: (a) There shall be cause for revocation of a permit if the work is not commenced, prosecuted with due diligence, and completed or the water applied to beneficial use as contemplated in the permit..." with other subsections providing for revocation and declaration of availability for appropriation. You are considering an extension out to 70 years of a permit that has been around for 50 years. How can this possibly be "diligence" without completely making these statutory terms surplusage? A complete new application from scratch should be required of USA.

35. At 4 places in the Order you refer to precedential orders, resolutions, or decisions, as you do on your web site. I find no subject matter index anywhere of those precedential rulings. I am very concerned about that. How is a normal person supposed to file an intelligent protest when you have this vast storehouse of "gotchas" hidden in your back pocket? Certainly USA and the bigger water-law firms can afford to build their own indexes of your "gotchas", but what about the rest of us? Simply putting an unindexed mass of rulings on your web site cannot be enough to balance the power among the haves and the have-nots who need your services. If you are going to use these precedential rulings, at least post some sort of index. The Google search feature on your pages is useless, it either returns too much information or none at all.

36. Staff has adopted a posture of chief advocate for the applicant rather than impartial referee. Where an applicant is a little guy just looking to build a pond it's understandable, but in this case, USA can do its own arguing and staff should accept the protest, get out of the way, and require USA to spend its unlimited funds arguing.

### VIII. PLEA

37. I request relief as described herein and as described in my Petition of 01/12/2010, including a full and fair public hearing and that USA be required to respond in detail to my Protest and my subsequent filings, including to furnish their own reconciliation of waters they have actually diverted from Stony Creek with what they were allowed in the Angle Decree.

### IX. SERVICE ON ALL PARTIES

38. Before delivering this protest to you, I sent a copy by mail to Bob Colella, U.S. Bureau of Reclamation, 2800 Cottage Way, Sacramento, CA 95825 by mailing it this day first class with proper postage affixed at the Post Office in Manteca, California, 95336.

### VII. VERIFICATION

39. I am the protestant in this proceeding and I researched, compiled and wrote this Petition. I declare under penalty of perjury that the allegations and factual contentions in this Protest are

true and correct, except for those submitted on information and belief and as for those I believe them to be true and correct. Respectfully submitted,

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Michael J. Barkley

Dated: July 30, 2010

cc: Bob Colella, Reclamation